

Entry	Date	Proceedings and Orders
	Jul 26 1996	Motion of Washington Apple Commission, et al. for leave to file a brief as amici curiae filed.
	Jul 29 1996	Brief of petitioner Daniel R. Glickman, Secretary of Agriculture filed.
	Jul 29 1996	Brief amici curiae of Arizona, et al. filed.
	Jul 29 1996	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
	Aug 12 1996	Order extending time to file brief of respondent on the merits until September 27, 1996.
	Aug 14 1996	Brief amicus curiae of Pacific Legal Foundation filed.
	Aug 22 1996	Joint appendix filed.
	Aug 30 1996	Record filed.
	Sep 6 1996	Record filed.
	Sep 20 1996	Motion of National Association of State Departments of Agriculture, et al. for leave to file a brief as amici curiae GRANTED.
	Sep 20 1996	Motion of Washington Apple Commission, et al. for leave to file a brief as amici curiae GRANTED.
	Sep 20 1996	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae GRANTED.
	Sep 27 1996	Brief of respondents Gerawan Farming, Nilmeier Farms, and George Huebert Farm filed.
	Sep 27 1996	Brief amici curiae of American Advertising Federation, et al. filed.
	Sep 27 1996	Brief amicus curiae of Sun-Maid Growers of California filed.
	Sep 27 1996	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Sep 27 1996	Brief amicus curiae of Treehouse Farms, Inc. filed.
	Sep 27 1996	Brief amici curiae of United Sheep Producers, et al. filed.
	Sep 27 1996	Brief of respondents Wileman Brothers & Elliott, Inc., et al. filed.
	Sep 27 1996	Brief amicus curiae of National Right to Work Legal Defense Foundation, Inc. filed.
	Oct 29 1996	CIRCULATED.
	Oct 31 1996	Reply brief of petitioner Daniel Glickman, Secretary of Agriculture filed.
	Dec 2 1996	ARGUED.

951184 JAN 24 1996

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities.

PARTIES TO THE PROCEEDINGS

The petitioner is the Secretary of the United States Department of Agriculture. The respondents are Wileman Bros. & Elliott, Inc.; Kash, Inc.; Gera-
wan Farming, Inc.; Asakawa Farms, Inc.; Chiamori
Farms, Inc.; Phillips, Inc.; Kobashi Farms, Inc.;
Tange Bros., Inc.; Nagao Farms; Wilmer Huebert
Farms; Kobashi Farms; Nakayama Farms, Inc.; and
Mihara Farms.

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*ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of Agriculture, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 58 F.3d 1367. The opinion of the district court (App. D) is unreported. The opinions of the Judicial Officer of the Department of Agriculture

are reported at 49 Agric. Dec. 705 and 50 Agric. Dec. 1165.¹

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1995. A petition for rehearing was initially denied on September 18, 1995. App. 2a.² On December 15, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including January 16, 1996. On January 11, 1996, Justice O'Connor further extended the time within which to file a petition to and including January 24, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹ The Judicial Officer (JO) issued two decisions, one dismissing each of the administrative petitions that respondents, among others, filed in the agency proceedings that led to the present case. Because of the length of the JO's decisions and the fact that they are reported, we have reproduced in the appendix to this petition (App. G) only the JO's decision that addresses the question presented in this certiorari petition, and have omitted from that decision the concluding portions that have no bearing on the First Amendment question. We have lodged copies of both JO decisions with the Clerk of this Court.

² The Ninth Circuit issued two subsequent orders, on October 3 and 17, 1995 (Apps. B, C), that may have been intended to vacate the September 18, 1995, order denying rehearing and to make the denial of rehearing finally effective as of October 17, 1995. Because the orders are unclear, however, we have treated the date of the first order denying rehearing—September 18, 1995—as the one that triggered the 90-day period for filing a petition for a writ of certiorari prescribed in 28 U.S.C. 2101(c) and this Court's Rule 13.1, and on that basis we requested extensions of the time within which to file a petition for a writ of certiorari.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 (Act) are 7 U.S.C. 608a(6), 608c(1)-(4), (6), (7) and (15), and 610(b)(2) and (c). They are reproduced at App. H.

The relevant regulations implementing the Act are 7 C.F.R. 916.20, 916.31, 916.40, 916.41, 916.45, 916.62, 917.16, 917.20, 917.30, 917.34-917.37, and 917.39. They are reproduced at App. I.

STATEMENT

This case presents a First Amendment challenge to provisions in the marketing orders for California peaches, nectarines, and plums issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U.S.C. 601 *et seq.* The challenged provisions impose mandatory assessments on the handlers (*i.e.*, packers and distributors) of California peaches, nectarines, and plums; those assessments are used in part to finance the generic advertising of those commodities. See 7 C.F.R. 916.45 and 917.39. The district court held that the generic advertising programs do not violate the First Amendment, relying on the Third Circuit's decision in *United States v. Frame*, 885 F.2d 1119 (1989), cert. denied, 493 U.S. 1094 (1990), which upheld against a First Amendment challenge the generic beef promotion program that is established by federal law and financed by mandatory assessments. The Ninth Circuit reversed, holding that the generic advertising programs for California peaches, nectar-

ines, and plums are invalid under the three-part test for reviewing restrictions on commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

1. a. Congress enacted the AMAA based on the following finding (7 U.S.C. 601):

[T]he disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure[,] and * * * these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

The goal of the Act is to "establish and maintain * * * orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. 602(1). The Act specifies several means by which the Secretary is to bring about such conditions. Those means include, among other things, establishing "minimum standards of quality and maturity" and "production research, marketing research, and development projects." 7 U.S.C. 602(3). This case concerns the latter means: marketing promotion projects in the form of generic advertising programs.

To carry out his duties under the Act, the Secretary is authorized to issue marketing orders for certain commodities, including peaches, nectarines, and plums. 7 U.S.C. 608c(1) and (2). A marketing order may include limits on the quantity, quality, grade, and size of the commodity that may be marketed. 7 U.S.C. 608c(6)(A). A marketing order may also provide for "production research, marketing re-

search and development projects designed to assist, improve, or promote the marketing, distribution, and consumption" of the commodity. 7 U.S.C. 608c(6)(I). The Act specifies that such projects may include—with respect to certain commodities, including California-grown peaches, nectarines, and plums—"paid advertising." *Ibid.*³ The Act further provides that "the expense of such projects [is] to be paid from funds collected pursuant to the marketing order." *Ibid.*; see also 7 U.S.C. 610(b)(2)(ii) (handlers shall pay annual assessments equal to their pro rata share of expenses of administering marketing orders).

Before issuing a marketing order for a commodity, the Secretary conducts a formal rulemaking proceeding and must in general obtain approval of the order by either two-thirds of the producers (growers) of the commodity, or the producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. 608c(3)-(4), (8) and (9)(B); see *Block v. Community Nutrition Institute*, 467 U.S. 340, 342 (1984). Once in place, a marketing order is administered under the Secretary's supervision by a committee that is composed of producers (and sometimes handlers) of

³ The provision authorizing marketing orders to provide for marketing research and development projects was added to the AMAA in 1954. Agricultural Act of 1954, Pub. L. No. 83-690, § 401(c), 68 Stat. 906. The provision specifying that those projects may include "paid advertising" with respect to certain commodities was first added to the AMAA by the Food and Agriculture Act of 1962, Pub. L. No. 87-703, § 403, 76 Stat. 632 (authorizing paid advertising of cherries); see also Act of Nov. 8, 1965, Pub. L. No. 89-330, § 1(b), 79 Stat. 1270 (extending "paid advertising" provision to, *inter alia*, California plums and nectarines); Act of Aug. 13, 1971, Pub. L. No. 92-120, § 1, 85 Stat. 340 (extending "paid advertising" provision to California peaches).

the regulated commodity. 7 U.S.C. 608c(7)(C), 610. The members of the committee are appointed by the Secretary, serve without compensation, and are subject to removal by the Secretary at any time. 7 C.F.R. 916.23, 916.62, 917.25, 917.30. Among other duties, the committee recommends a yearly budget for administering the marketing order, which includes a budget for advertising and other types of promotion; the Secretary may accept or reject that recommendation. 7 U.S.C. 608c(7)(C); 7 C.F.R. 916.31(c), 916.62, 917.35(f); see App. 10a-11a (describing budget-approval process in this case). After the Secretary adopts a budget, he promulgates a regulation prescribing assessments on handlers to fund the budget. See 7 U.S.C. 610(c); 7 C.F.R. 916.41, 917.37; see also, *e.g.*, 60 Fed. Reg. 52,067, 52,068 (1995).

A marketing order may be discontinued in two ways. The Secretary must terminate or suspend an order if he finds that it "obstructs or does not tend to effectuate the declared policy" of the AMAA. 7 U.S.C. 608c(16)(A)(i). In addition, the Secretary must terminate an order when he determines that a majority of the producers does not support it. 7 U.S.C. 608c(16)(B).

b. This case concerns two marketing orders issued under the AMAA: the marketing order for California-grown peaches and plums and the marketing order for California-grown nectarines.⁴

⁴ The AMAA requires marketing orders to be restricted "to the smallest regional production areas * * * practicable" and consistent with the Act. 7 U.S.C. 608c(11)(B). For that reason, there may be different orders for the same commodity grown in different States. Compare, *e.g.*, 7 C.F.R. Pt. 948 (marketing order for Irish potatoes grown in Colorado) with 7 C.F.R. Pt. 950 (marketing order for Irish potatoes grown in Maine) and

The marketing order for California peaches and plums was first issued in 1939. See App. 43a. It was amended to authorize marketing promotion projects in 1965. 30 Fed. Reg. 15,995 (1965). It was further amended to specify that such projects could include "paid advertising" for plums in 1971 and for peaches in 1976. See 36 Fed. Reg. 14,381 (1971); 41 Fed. Reg. 14,375, 17,528 (1976). The plum portion of the marketing order ended in 1991, after a majority of plum producers failed to vote for its continuation in a periodic referendum. App. 5a n.1, 43a; 56 Fed. Reg. 23,773 (1991).⁵

The marketing order for California nectarines went into effect in 1958. It has authorized marketing promotion projects since its inception (see 7 C.F.R. 937.45 (1959)) and has specifically authorized "paid advertising" since 1966 (see 31 Fed. Reg. 8177 (1966)).

A portion of the assessments imposed under the two orders has been used to pay for generic advertising programs in each of the years at issue here. See App. 8a n.3.

2. The present case arose from two administrative petitions filed by handlers of California peaches, nec-

7 C.F.R. Pt. 953 (marketing order for Irish potatoes grown in southeastern States).

⁵ Respondents seek a refund of the assessments that they paid under the plum marketing order and that were used for the generic advertising program for plums. The validity of that program is therefore not moot. The marketing order for California-grown peaches and plums has also covered California-grown pears. The pear portion of the order has never been at issue in this case, however, and was suspended in 1992. Accordingly, we do not refer to that portion of the order hereafter.

tarines, and plums challenging the marketing orders for those fruits. After the Secretary dismissed the petitions, respondents brought an action seeking judicial review of the dismissal. The United States then brought 15 enforcement actions against the individual respondents, seeking, *inter alia*, to collect assessments that respondents had refused to pay. Most of the government's enforcement actions were consolidated with the action brought by respondents.

a. The two administrative petitions were filed by respondents and other handlers pursuant to 7 U.S.C. 608c(15)(B), which permits handlers to request the Secretary to modify, or exempt them from, marketing orders that are "not in accordance with law." The petitions challenged various provisions of the marketing orders for California peaches, nectarines, and plums in effect from 1980 through 1988. App. 6a, 41a. The challenges were far-ranging but primarily concerned (1) the substance of the maturity standards; (2) the procedures followed in adopting those standards and other provisions in the marketing orders; and (3) the generic advertising programs provided for by the orders. *Ibid.*⁶ As additional handlers joined those challenges, they, too, temporarily ceased paying their assessments. *Ibid.*

Reversing decisions by an administrative law judge in favor of the handlers, see App. 6a, the Judicial

⁶ Before the Secretary had disposed of the administrative petitions, respondent Wileman Bros. & Elliott, Inc., brought an action in federal district court challenging the maturity standards in the marketing orders. The district court dismissed that action because of Wileman Bros.' failure to exhaust administrative remedies, and the Ninth Circuit affirmed. *Wileman Bros. & Elliott, Inc. v. Yeutter*, No. 87-2938 (Oct. 29, 1990); see also App. 6a-7a.

Officer (JO) of the Department of Agriculture dismissed both administrative petitions. App. 113a-274a.⁷ In the ruling relevant here, the JO rejected the handlers' First Amendment challenge to the Secretary's approval of budgets that included expenditures for generic advertising programs. He determined, *inter alia*, that, assuming that the use of mandatory assessments for generic advertising implicates the handlers' First Amendment rights, it is nonetheless a permissible use under "cases involving 'union-shop' arrangements," as well as under *United States v. Frame*, 885 F.2d 1119 (1989), cert. denied, 493 U.S. 1094 (1990), in which the Third Circuit upheld against First Amendment attack a generic beef promotion program created by federal law and funded by mandatory industry assessments. App. 194a-207a. The JO's decision was the final decision of the Secretary. 7 C.F.R. 2.35.

b. Wileman Bros. and 15 other handlers filed this action in the United States District Court for the Eastern District of California under 7 U.S.C. 608c(15)(B), which confers on the district courts jurisdiction in equity to review the Secretary's decision on administrative petitions filed under Section 608c(15)(A). The United States brought 15 enforcement actions against handlers under 7 U.S.C. 608a(6) to recover unpaid assessments and to require compliance with the maturity standards in the challenged marketing orders. App. 7a; see generally

⁷ As noted above (note 1, *supra*), the JO issued separate decisions on the two petitions. Because only the later-filed petition challenged the generic advertising programs on First Amendment grounds, that challenge is addressed exclusively in the JO's decision dismissing that petition.

United States v. Ruzicka, 329 U.S. 287, 289 (1946). The district court consolidated 13 of the enforcement actions with respondents' action, dismissed two of the enforcement actions without prejudice, and ordered the handlers to pay assessments into the registry of the Court. App. 6a n.2, 7a. Later, the district court entered summary judgment in favor of the Secretary and entered a money judgment against the handlers for approximately \$3.1 million. App. 7a.

The district court upheld the generic advertising programs against the handlers' First Amendment challenge, applying the three-part inquiry undertaken by the Third Circuit in *Frame*. In accordance with that inquiry, the district court first determined that the mandatory funding of generic advertising serves a "compelling" governmental interest. App. 89a. The court relied in part on the legislative history of the AMAA, which showed that the Act responded to serious instability in agricultural markets. *Ibid.* Next, the court determined that the generic advertising programs for California peaches, nectarines, and plums serve an "ideologically neutral" purpose, namely, to "bolster the image of California tree fruit in an effort to increase sales." App. 89a-90a. Finally, the court found that "[t]he assessment programs' interference with first amendment rights is slight." App. 90a. It explained that the programs merely promote products that respondents have voluntarily chosen to market, and that their complaints about those programs reflected only disagreement over the advertising strategy underlying them. App. 90a-91a. The district court also rejected respondents' other challenges, including their claim that the generic advertising programs were arbitrary and capricious, and should therefore

be set aside under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*⁸

3. The court of appeals affirmed in all respects but one: It reversed the district court's ruling on the First Amendment challenge, holding that the generic advertising programs—as authorized by regulations imposing mandatory assessments to fund budgets that included those programs—violate the First

⁸ In other rulings that are not the subject of this petition, the district court identified those claims by respondents over which it had jurisdiction, determined the type of relief that was available for those claims, and held, with respect to those claims, as follows: The minimum-size requirements for nectarines were supported by substantial evidence. App. 58a-62a. The Secretary had good cause for allowing those requirements to take effect in less than 30 days (App. 63a-67a), and he committed, at most, harmless error by adopting them after a comment period of less than 30 days (App. 67a-71a). The assessments imposed under the marketing orders, including the assessments for generic advertising, were not procedurally invalid under the APA. App. 71a-84a. The Secretary did not violate the equal protection guarantee of the Fifth Amendment by requiring the handlers of peaches and nectarines produced in California, but not the handlers of peaches and nectarines produced in other States, to pay assessments for generic advertising. App. 92a-93a. The AMAA did not unconstitutionally delegate legislative authority to the Secretary. App. 94a. The proceedings of the tree fruit committees did not violate the Government in the Sunshine Act, 5 U.S.C. 552b, the Federal Advisory Committee Act, 5 U.S.C. App. 1 *et seq.*, or state law. App. 95a-96a. The handlers failed to demonstrate any illegal conduct by the "California Tree Fruit Agreement" (the term used to identify the committees and staff that administer the two marketing orders at issue) cognizable in the present case. App. 96a-98a. Finally, the handlers were not deprived of procedural due process because of any delay by the Secretary in ruling on their administrative petitions. App. 98a-100a.

Amendment under the three-part test set forth in *Central Hudson* for reviewing restrictions on commercial speech. App. 1a-35a.

Before addressing the First Amendment issue, the court of appeals affirmed the district court's holding that the generic advertising programs are not arbitrary or capricious under the APA. App. 9a-12a. The court of appeals determined that "[t]he formal rulemaking records accompanying the Secretary's original decisions to implement the paid advertising programs for nectarines, plums, and peaches are replete with evidence that supports his decision." App. 9a. The court also determined that there was ample evidence to support the continued need for the programs. It observed that much of that evidence was supplied by the "industry-led committees and their staff," which "engage in a careful process each year * * * in approving the advertising program for the upcoming season." App. 11a. The court rejected the handlers' argument that the Secretary relied too heavily on the committees, observing that the committees are made up of "parties with firsthand knowledge of the state of their industry." App. 12a (citing *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir.), cert. denied, 113 S. Ct. 598 (1992)).

The court of appeals nonetheless sustained respondents' First Amendment challenge to the generic advertising programs. App. 15a-21a. The court held that the assessments for generic advertising "implicate the handlers' First Amendment rights because they are compelled to provide financial support for particular messages—the generic ads—associated with a particular group—peach and nectarine handlers." App. 15a. The court then determined that its First Amendment analysis was "largely governed by"

(*ibid.*) its decision in *Cal-Almond, Inc. v. United States Dep't of Agriculture*, 14 F.3d 429 (1993), which had struck down on First Amendment grounds the generic advertising program established by the almond marketing order then in effect under the AMAA.

As it did in *Cal-Almond*, the court of appeals in this case applied the three-part test of *Central Hudson*. It first determined that the government had a "substantial" interest in promoting peaches, nectarines, and plums, and therefore satisfied the first part of the test. App. 16a-17a. The court determined, however, that the government had not satisfied the second part of the test by showing that the programs "directly advanced" the government's interest. App. 17a-20a. Relying on *Cal-Almond*, the court stated that, to make that showing, the government was required to "demonstrat[e] that the generic advertising program is better at increasing consumption than individualized advertising"; in the court's view, the government failed to make that showing. App. 20a. The court also determined that the government failed to satisfy the third part of the *Central Hudson* test, because it had not shown that the generic advertising programs were "sufficiently narrowly tailored." App. 20a-21a. The court believed that the programs would be more narrowly tailored if they granted individual handlers a credit against their individual assessments for any amounts they spent on their own advertising. *Ibid.*

Addressing the question of remedy, the court of appeals held that respondents were not entitled to money damages but were entitled to a refund of assessments used for generic advertising. App. 32a-34a. The court determined that money damages were

barred by sovereign immunity, but equitable relief in the form of a refund was not. App. 32a-33a. The court remanded the case to the district court for a determination of the amount of the refund due. App. 34a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit erred by relying on *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), to strike down under the First Amendment the generic advertising programs for California peaches, nectarines, and plums conducted pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U.S.C. 601 *et seq.* *Central Hudson* provides a framework for reviewing *restrictions* on commercial speech. The generic advertising programs challenged in this case are not of that character. To the extent that the programs implicate the First Amendment at all, they do so, not by restricting the commercial speech of handlers, but by compelling handlers to fund commercial speech. The most analogous cases are those involving compelled funding of unions and integrated bars, such as *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990). The generic advertising programs comport with the First Amendment under the principles of *Abood* and *Keller*, especially since this case involves the funding of purely commercial speech promoting the purchase of products that respondents have voluntarily chosen to sell. In any event, the generic advertising programs also comport with the First Amendment under the *Central Hudson* test invoked by the Ninth Circuit.

The Ninth Circuit's decision is at odds with the Third Circuit's decision in *United States v. Frame*,

885 F.2d 1119 (1989), cert. denied, 493 U.S. 1094 (1990), which rejected a First Amendment challenge to the generic beef promotion program established by federal law. In upholding the program, the Third Circuit applied what it described as a "higher standard of scrutiny" than was applied in *Central Hudson. Frame*, 885 F.2d at 1134. It thus is clear from *Frame* that the Third Circuit would uphold the generic advertising programs that the Ninth Circuit struck down in this case.

The Ninth Circuit's decision warrants review by this Court. In invalidating the generic advertising provisions of the marketing orders, the court of appeals has essentially held unconstitutional the corresponding provisions of the AMAA that expressly authorize such "paid advertising" programs funded by assessments on handlers. See 7 U.S.C. 608c(6)(I). A holding of unconstitutionality is itself sufficient to call for review by this Court. In addition, however, this case presents an important issue of First Amendment law as to which the lower courts have reached conflicting results; and the decision below creates uncertainty in the administration of numerous federal and state statutes and threatens to have a major impact on the Nation's farm economy. There are numerous federal and state statutes creating generic promotion programs funded by mandatory industry assessments, covering a wide variety of commodities. A significant portion of the agricultural commodities covered by those programs is produced in the Ninth Circuit.

1. a. The Ninth Circuit erred in reviewing the generic advertising programs for California peaches, nectarines, and plums under the *Central Hudson* test. *Central Hudson* provides a framework for

reviewing restrictions on commercial speech. See, e.g., *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995). That framework is inapplicable here, because the marketing orders do not restrict speech, commercial or otherwise. Indeed, they could not do so consistently with the AMAA, which provides: "No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product." 7 U.S.C. 608c(10). Respondents thus remain free to advertise their own products and to criticize the generic advertising programs.⁹

Respondents' challenge is founded, not upon any restriction on their right to engage in commercial speech, but upon the requirement that they fund commercial speech conducted under the generic advertising programs. The most analogous cases are

⁹ Respondents contended in the court of appeals that the generic advertising programs restricted their ability to engage in commercial speech in two ways. First, they argued that, by requiring them to fund generic advertising, the programs reduced the amount of money they had available to buy advertising promoting their own brands. Resp. C.A. Br. 11. That argument proves too much. The same argument could be made regardless of whether assessments under the marketing order are used for generic advertising or for some other purpose wholly unrelated to expression. In either event, the assessments constitute a regulatory expense that reduces the amount of money that the handlers have available for advertising (as well as for any other purpose besides paying the assessment). The imposition of such expenses does not, as a general matter, raise any First Amendment issues. Respondents also argued below that generic advertising promotes the "lie" that all peaches and all nectarines are the same, defeating their efforts to advertise their products as superior. *Id.* at 12. The district court found it "impossible" from those "vague claims" to determine that respondents' First Amendment rights have been significantly infringed. App. 90a, 91a.

those involving compelled funding of union activities by non-union members of the bargaining unit, such as *Abood v. Detroit Bd. of Educ.*, *supra*,¹⁰ and the compelled payment of dues to integrated bars, such as *Keller v. State Bar of California*, *supra*.¹¹ The Court

¹⁰ In *Abood*, this Court reviewed a First Amendment challenge to an "agency shop" agreement for public employees, under which non-union members were required to pay the union a service charge equal to union dues. 431 U.S. at 211-215. The Court held that the agreement did not violate the First Amendment "insofar as the service charges [we]re applied to collective-bargaining, contract administration, and grievance-adjustment purposes," *id.* at 232; however, the service charges could not, consistently with the First Amendment, be used "for political and ideological purposes unrelated to collective bargaining," *ibid.* See also *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 448 (1984); cf. *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963); *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

¹¹ In *Keller*, the Court discerned "a substantial analogy between the relationship of the State Bar [before the Court] and its members, on the one hand, and the relationship of employee unions and their members, on the other." 496 U.S. at 12. The Court in *Keller* accordingly determined that the State Bar was, despite its statutory genesis and resemblance to a government entity in certain respects, "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." *Id.* at 13. Relying on the *Abood* line of cases, the Court held that the State Bar could, consistently with the First Amendment, use mandatory dues to fund activities "germane" to its statutory mission of "regulating the legal profession and improving the quality of legal services," but could not use mandatory dues to "fund activities of an ideological nature which fall outside of

in *Abood* and *Keller* upheld compelled funding for activities by a representative entity (1) that were germane to the entity's statutory mission; (2) that were justified by an important governmental interest and by the interest in avoiding "free riders"; and (3) that did not "significantly add to the burdening of free speech that is inherent in the allowance of" the compelled funding scheme. See *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991); *Keller*, 496 U.S. at 13-15.

In our view, although *Abood* and *Keller* furnish the most appropriate general principles for reviewing the generic advertising programs at issue here, application of those principles must reflect that those programs involve purely commercial speech—namely, advertising that "propose[s] a commercial transaction," *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Commercial speech enjoys only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989). Congress accordingly should be afforded greater latitude in providing for the compelled funding of commercial speech than may be afforded to the compelled funding of the sorts of activities at issue in *Abood* and *Keller*.

In any event, the generic advertising programs for California peaches, nectarines, and plums comport with the First Amendment under the standard of review set forth in *Abood* and *Keller*. As the district

those areas of [germane] activity." *Id.* at 13-14. See also *Lathrop v. Donohue*, 367 U.S. 820 (1961).

court held in this case, the programs serve the compelling governmental interest in protecting and improving the farm economy. App. 89a (AMAA responded to the "great economic problems" of the Nation's farmers) (quoting H.R. Rep. No. 1927, 83d Cong., 2d Sess. 4 (1954)). The programs are an integral part of a comprehensive scheme for regulating supply and demand for agricultural commodities. Some parts of that scheme—for example, the maturity standards—are addressed to the supply; the generic advertising programs address demand by promoting steady and increasing consumption. Cf. *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341-342 (1986) ("reasonable" for legislature to conclude that advertising "would serve to increase the demand for the product advertised"). The generic advertising programs, like other parts of the comprehensive regulatory scheme established by AMAA marketing orders, entail costs that are reasonably borne by members of the industry, who benefit from the "orderly marketing conditions" (7 U.S.C. 602(1)) established by the marketing orders. Moreover, the use of mandatory assessments to fund the administration of the marketing orders, including the provisions authorizing generic advertising programs, avoids the same sort of "free rider" problems that justify agency-shop agreements and integrated bars. Cf. *Abood*, 431 U.S. at 222; *Keller*, 496 U.S. at 12. Finally, as the district court determined, the programs do not unduly infringe on respondents' First Amendment rights, since the programs merely promote the products that respondents themselves have voluntarily chosen to market. App. 90a.

b. Assuming *arguendo* that the *Central Hudson* test were applicable here, the generic advertising programs satisfy that test as well. In reaching a contrary conclusion, the Ninth Circuit misapplied *Central Hudson*. The Ninth Circuit erred, when applying the second part of the test, by requiring the government to "demonstrat[e] that the generic advertising program is better at increasing consumption than individualized advertising." App. 20a; see App. 17a-20a. The two kinds of advertising serve different purposes. Generic advertising aims to increase the overall market for the fruit or vegetable grown by producers covered by the order; individualized advertising primarily aims to give the particular advertiser a bigger share of that market.¹² Moreover, the proof required by the court is almost impossible to mount for any generic advertising program because of the speculative nature of the proof.¹³ Finally, in requiring such proof, the court ignored that the

¹² For similar reasons, the Ninth Circuit erred, when applying the third part of the *Central Hudson* test, by holding that the generic advertising programs should have allowed handlers a credit against their assessments for advertising their own brands. App. 20a-21a. The advertising of individual brands is not necessarily as effective in promoting overall demand for a product as is the generic advertising of the product.

¹³ To make the showing required by the Ninth Circuit, one would arguably have to demonstrate (1) what additional advertising by individual handlers would have occurred in the absence of the generic advertising programs; (2) how effective that hypothetical additional advertising by individual handlers would have been; and (3) how its effectiveness would have compared to the effectiveness of the generic advertising programs (which would have to be estimated without taking into account the effectiveness of any advertising by individual handlers that actually occurred).

generic advertising programs serve "the Act's most fundamental objectives—to wit, the protection of the producers," *Block v. Community Nutrition Institute*, 467 U.S. 340, 352 (1984) (emphasis added), not merely the interests of handlers. And the court ignored as well that the programs are developed by members of the industry, who, as the Ninth Circuit recognized in rejecting respondents' APA challenge, have "firsthand knowledge" of the need for such programs. App. 12a.

2. The Ninth Circuit's decision in this case also cannot be squared with the Third Circuit's holding in *Frame*. In *Frame*, the Third Circuit rejected a First Amendment challenge to provisions of the Beef Promotion and Research Act of 1985 (Beef Promotion Act), 7 U.S.C. 2901 *et seq.*, that impose mandatory assessments on cattle producers and importers to finance a national beef promotion campaign. *Frame*, 885 F.2d at 1122, 1129-1137. Under the analysis of *Frame*, the Third Circuit would uphold the generic advertising programs that the Ninth Circuit struck down here.

Relying on *Abood*, the Third Circuit in *Frame* held that "compelled contributions to the Beef Promotion Program implicate[d] [Frame's] right to be free from compelled association." 885 F.2d at 1133; see *id.* at 1132-1134.¹⁴ The court determined, however, that

¹⁴ In holding that the beef promotion program implicated *Frame's* First Amendment rights, the Third Circuit rejected the government's argument that speech under that program constituted "government speech," the compelled funding of which does not implicate the First Amendment. *Frame*, 885 F.2d at 1131-1133. The government in the present case did not advance a "government speech" argument in the courts below, and we accordingly do not rely on it in this Court as an inde-

"Frame's assertion of a free association claim triggers a higher standard of scrutiny than employed in cases involving only regulation of commercial speech." *Id.* at 1134. The court derived what it regarded as the proper standard from *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).¹⁵ The court in *Frame* concluded that, under *Roberts*, the use of mandatory assessments for the generic beef promotion program would comport with the First Amendment if it served "compelling state interests, unrelated to the suppression of ideas, that [could not] be achieved through means significantly less restrictive of associational freedoms." 885 F.2d at 1134.

The Third Circuit held that those requirements were met. It determined that the Beef Promotion Act served the government's compelling interest in protecting the beef industry; moreover, the portion of the Act imposing mandatory assessments for the generic

pendent ground of decision. We nevertheless believe that the constitutionality of the mandatory-assessment method of funding the commercial speech is reinforced by the degree to which the generic advertising programs further the governmental objective of promoting the sale of products covered by the respective marketing orders, the governmental involvement in the development and adoption of the marketing orders, and the attenuated nature of the connection that an individual handler has to the generic advertising of peaches, nectarines, or plums as a result of the handler's financial contribution to the overall administration of the marketing order.

¹⁵ In *Roberts*, the Court reviewed an administrative order entered under the Minnesota Human Rights Act that required the United States Jaycees to admit women to its local chapters in Minnesota. 468 U.S. at 612-617. The Court held that the order did not violate Jaycee members' rights of intimate or expressive association. *Id.* at 622-629.

promotion program played an integral role in furthering that interest, because of the "free rider" problem associated with attempting to fund such programs on a voluntary basis. *Frame*, 885 F.2d at 1134-1135. The court observed that the "primarily economic" nature of the underlying governmental interest "does not diminish its importance." *Id.* at 1134 (citing *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 455-456 (1984) (interference with First Amendment rights caused by agency-shop agreements "is justified by the governmental interest in industrial peace")). The court also determined that the purpose of the Beef Promotion Act was "ideologically neutral," because it was intended to "bolster the image of beef solely to increase sales." *Frame*, 885 F.2d at 1135. Finally, the court held that the Act did not unduly infringe on the defendant-producer's First Amendment rights. The court observed that the Act authorized a program that was limited to "promot[ing] the product that the defendant himself has chosen to market," and it found that the defendant's "specific objections" to the program did not establish "a dispute over anything more than mere strategy." *Id.* at 1136-1137.

The generic advertising programs at issue here would survive respondents' First Amendment challenge under the analysis in *Frame*, as the district court in this case concluded. See App. 85a-92a. The strength of the governmental interest in promoting the market for peaches, nectarines, and plums is comparable to the governmental interest underlying the beef promotion program at issue in *Frame*. Cf. *Keller*, 496 U.S. at 13 (Court cannot say that the "vital national interests" served by agency-shop agreements at issue in *Abood* were weightier than

the "substantial" governmental interest served by integrated bar). Moreover, the generic advertising programs for peaches, nectarines, and plums, like that for beef, are "ideologically neutral." *Frame*, 885 F.2d at 1135. Finally, as the district court found, respondents' objections to the generic advertising programs reflected merely disagreement over advertising strategy—as did *Frame*'s. App. 90a-91a.¹⁶

In our view, however, the *Frame* court, while reaching the correct result, erred by applying a "higher standard of scrutiny" than would apply to a restriction on commercial speech. 885 F.2d at 1134. The Third Circuit derived its standard from *Roberts v. United States Jaycees*, *supra*. The standard applied in *Roberts*, however, reflected that "a not insubstantial part of the [speech at issue] constitute[d] protected expression on political, economic, cultural, and social affairs." 468 U.S. at 626 (internal quotation marks omitted). This case involves no such expression. Cf. *id.* at 634 (O'Connor, J., concurring in part and concurring in the judgment) (discussing the

¹⁶ By the same token, it seems unlikely that the generic beef promotion program upheld in *Frame* would have been upheld under the Ninth Circuit's analysis here and in *Cal-Almond, Inc. v. United States Dep't of Agriculture*, 14 F.3d 429 (1993). The Ninth Circuit in *Cal-Almond* struck down a generic advertising program for almonds that, it stated, "closely resemble[d]" the program in *Frame*. 14 F.3d at 435. The government did not petition for a writ of certiorari in *Cal-Almond* because the Ninth Circuit's decision there was based in part on specific features of the regulations establishing the generic advertising program for almonds as to which the Secretary was considering significant amendments at the time of the Ninth Circuit's decision. See *id.* at 439-440; see also 59 Fed. Reg. 4247 (1994).

"dichotomy between rights of commercial association and rights of expressive association").

Whatever their relative merits, it is sufficient for present purposes to note that the decisions in *Frame* and this case take divergent approaches and reach conflicting results on the validity under the First Amendment of government-created generic advertising programs funded by mandatory industry assessments. In light of the importance of the constitutional question, this Court should resolve that confusion. Compare *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 300 (1986) (granting certiorari to address validity of union's procedure for refunding agency-shop fees to dissenting members, in light of "[t]he importance of the case, and the divergent approaches of other courts to the issue").

3. Quite aside from the conflicting approaches and rulings in the lower courts, certiorari is warranted in this case because it "raises questions of importance in the administration of the Agricultural Marketing Agreement Act of 1937," *United States v. Ruzicka*, 329 U.S. 287, 288 (1946), as well as in the administration of two other sets of statutory programs. Under the AMAA, the Secretary has promulgated a large number of marketing orders that include generic advertising programs funded by mandatory assessments.¹⁷ In addition, there are many other

¹⁷ Marketing orders issued under the AMAA establish generic promotion programs for (among other products), limes, 7 C.F.R. 911.45; avocados, 7 C.F.R. 915.45; winter pears, 7 C.F.R. 927.47; papayas, 7 C.F.R. 928.45; olives, 7 C.F.R. 932.45; onions, 7 C.F.R. 958.47; tomatoes, 7 C.F.R. 965.48; celery, 7 C.F.R. 967.44; filberts/hazelnuts, 7 C.F.R. 982.58; and dates, 7 C.F.R. 987.33. See also 7 U.S.C. 608c(6)(I) (listing

federal statutes that authorize such programs.¹⁸ Many state statutes authorize such programs as well.¹⁹

those commodities as ones for which marketing orders may provide for "paid advertising").

¹⁸ National promotion programs funded by industry assessments have been established for (among other commodities) beef, 7 U.S.C. 2901 *et seq.*; cotton, 7 U.S.C. 2101 *et seq.*; eggs, 7 U.S.C. 2701 *et seq.*; pork, 7 U.S.C. 4801 *et seq.*; soybeans, 7 U.S.C. 6301 *et seq.*; honey, 7 U.S.C. 4601 *et seq.*; lamb and wool, 7 U.S.C. 7101 *et seq.*; and cut flowers, 7 U.S.C. 6801 *et seq.*

¹⁹ For statutes in States in the Ninth Circuit, see, *e.g.*, Ariz. Rev. Stat. Ann. §§ 3-404(B)(2) (1995) (marketing orders for agricultural commodities may provide for "programs for advertising and sales promotion"), 3-417 (1995) (authorizing industry assessments to pay for administration of marketing orders); Cal. Food & Agric. Code §§ 58889(a) and (b) (West 1986) (state marketing orders may provide for "advertising and sales promotion" directed toward "increasing the sale of the commodity without reference to any private brand or trade name"), 58921 (West 1986) (authorizing mandatory industry assessments to pay for administration of marketing orders); Idaho Code §§ 22-2915, 22-2918 & 22-2921 (1995) (establishing commission authorized to use mandatory assessments for generic promotion of Idaho beans), 22-3005(10), 22-3006 & 22-3010 (1995) (same for Idaho prunes), 22-3105(7) & 22-3107 (1995) (same for Idaho hops), 22-3309(3)(e), 22-3310 & 22-3315 (1995) (same for Idaho wheat), 22-3510(2)(j) & 22-3515 (1995) (same for Idaho dry peas and lentils), 22-3605(2)(j), 22-3606, 22-3607 & 22-3610 (1995) (same for Idaho apples), 22-3802, 22-3805(8) & 22-3806 (1995) (same for Idaho mint and other essential oils); Mont. Code Ann. §§ 80-11-205(1)(d) & 80-11-224(2) (1993) (same for Montana wheat and barley), 80-11-304(6), 80-11-307 & 80-11-310 (1993) (same for Montana alfalfa seed); Nev. Rev. Stat. Ann. §§ 561.409(2), 587.145(2)(d), 587.151(1)(e) & 587.155 (Michie 1994) (same for Nevada alfalfa seed); Ore. Rev. Stat. Ann. §§ 576.305(13), 576.325 & 576.440 (1988) (authorizing commissions for food products to conduct generic advertising

a. The Ninth Circuit's decision would apparently invalidate the operation in that Circuit of many of the statutorily created generic promotion programs funded by mandatory assessments.

It is clear that the Ninth Circuit's decision could invalidate many of the generic promotion programs established under AMAA marketing orders in addition to the programs for California peaches, nectarines, and plums. The Ninth Circuit did not base its decision in this case on any features peculiar to the programs at issue here. The Ninth Circuit did suggest that the challenged programs would be more narrowly tailored if they gave handlers a credit against their assessments for their individual advertising efforts. App. 20a. That suggestion, however, does not significantly narrow the impact of the decision. For one thing, it is unclear whether the Secretary may allow advertising credits for most commodities covered by AMAA marketing orders.²⁰

funded by mandatory industry assessments), 577.290(12) & 577.511 (1988) (same for Oregon Beef Council), 577.730(14) & 577.785(1) (1988) (same for Oregon Sheep Commission), 579.100(1) and (11), 579.210 & 579.270(3) (1988) (same for Oregon Potato Commission); Wash. Rev. Code Ann. §§ 15.28.170 (West 1993) (establishing Washington State Fruit Commission), 15.44.130 (West 1993) (establishing Washington State Dairy Products Commission), 15.65.310, 15.65.390 & 15.65.420 (West 1993) (marketing orders under state law may provide for advertising and promotion to be paid for by mandatory assessments).

²⁰ Under 7 U.S.C. 608c(6)(I), the Secretary is specifically authorized (but not required) to allow credits for advertising by individual handlers of almonds, filberts, raisins, walnuts, olives, and Florida Indian River grapefruit. The absence of specific authorization for credits under other generic

Moreover, although the inclusion of a creditable advertising provision in a marketing order might cure the purported narrow-tailoring defect identified by the Ninth Circuit, it would not cure the other purported defect identified by the Ninth Circuit—that the government had not shown generic advertising to be more effective than advertising by individual handlers. The latter was related to the “directly advances” (rather than the “narrow tailoring”) part of the *Central Hudson* test. App. 20a.

The Ninth Circuit’s decision could also invalidate generic advertising programs under other federal and state statutes.²¹ The Ninth Circuit in *Cal-Almond* stated that the generic advertising program established by the AMAA marketing order for almonds, which that court struck down, “closely resemble[d]” (14 F.3d at 435) the generic promotion program established by the Beef Promotion Act, indicating that the latter could well be invalidated under the court’s analysis. The Beef Promotion Act, in turn, is similar to many other federal statutes that establish generic

advertising programs may imply the absence of such authorization. See *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982).

²¹ In the wake of the Ninth Circuit’s decision in *Cal-Almond*, a First Amendment challenge to the Beef Promotion Act upheld in *Frame* has been brought in the District of Kansas, *Goetz v. Espy*, No. 94-1299 (filed Aug. 2, 1994). In addition, a First Amendment challenge based on the decisions below and in *Cal-Almond* has been asserted in an administrative proceeding before the Department of Agriculture concerning the federal mushroom promotion program. See *In Re Donald B. Mills, Inc., d/b/a DBM Mushrooms*, MPRCIA 95-1; see also note 22, *infra*.

promotion programs for other commodities. See note 18, *supra*. And many of the state statutes establishing such programs resemble either the AMAA or commodity-specific federal promotion statutes such as the Beef Promotion Act. See note 19, *supra*.²²

b. Considering its likely effect upon each set of programs discussed above, the Ninth Circuit’s decision will have a significant impact. The Department of Agriculture has informed us that, in 1994, a total of \$23.7 million was spent nationally on research and promotion under AMAA marketing orders; of that total, more than \$20 million was spent under orders in effect exclusively within the Ninth Circuit. The Department of Agriculture also reports that, under generic promotion programs created by commodity-specific federal statutes such as the Beef Promotion Act (see note 19, *supra*), approximately \$183 million was spent in 1994 nationwide. It is reasonable to assume that a significant portion of that amount was spent in the Ninth Circuit. Finally, all of the States

²² In addition to the pending cases involving First Amendment challenges to federal programs (see note 21, *supra*), there are at least seven other pending cases presenting First Amendment challenges to generic promotion programs established under state law. See *Bidart v. California Apple Comm’n*, No. CV-F-94-6018-OWW (E.D. Cal.); *Duarte Nursery, Inc. v. California Grape Rootstock Improvement Comm’n*, No. CV-F-95-5428-OWW (E.D. Cal.); *Dukesharer Farms, Inc. v. Michigan Cherry Committee*, No. 1-95-CV-742 (W.D. Mich. filed Oct. 19, 1995); *John I. Haas, Inc. v. Washington State Commodity Bd.*, No. CV-95-3165 AAM (E.D. Wash. filed Nov. 17, 1995); *Matsui Nursery, Inc. v. California Cut Flower Comm’n*, No. CV-S-96-102 EJG (E.D. Cal. filed Jan. 17, 1996); *California Kiwifruit Comm’n v. Moss*, No. C018368 (3d Dist. Cal. App.); *Wileman Bros. & Elliott, Inc. v. Voss*, No. F02317 (5th Dist. Cal. App.).

in the Ninth Circuit except Alaska and Hawaii—*i.e.*, Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington—have enacted statutes creating marketing orders or promotion boards under which generic promotion of commodities may be conducted using mandatory assessments. See note 19, *supra*. The Attorney General of California stated in an amicus brief filed below that in 1993 that State alone had 47 marketing programs patterned on federal marketing programs that spent \$91 million on generic advertising and education. Attorney General of California C.A. Amicus Br. 1-2 (rehearing stage).

This Court should grant review to resolve the question of the constitutionality of these important statutory programs affecting major segments of the Nation's agricultural economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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(2)

Supreme Court of the United States
FILED

951184 JAN 24 1996

OFFICE OF THE CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 93-16977

D.C. No. CV-90-00473-OWW

WILEMAN BROTHERS & ELLIOTT, INC.; KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
CHIAMORI FARMS, INC.; PHILLIPS, INC.; KOBASHI FARMS,
INC.; TANGE BROS., INC.; NAGAO FARMS; NILMEIER
FARMS; CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS;
WILMER HUEBERT FARMS; KOBASHI FARMS; NAKAYAMA
FARMS, INC.;

AND

MIHARA FARMS, PLAINTIFFS-APPELLANTS,

v.

MICHAEL ESPY, SECRETARY OF AGRICULTURE,
DEFENDANT-APPELLEE.

ORDER AND AMENDED OPINION

Appeal from the United States District Court for the
Eastern District of California Oliver W. Wanger,
District Judge, Presiding

Argued and Submitted February 13, 1995—
San Francisco, California

Filed June 27, 1995
Amended September 18, 1995

BEFORE: Thomas Tang* and Diarmuid F. O'Scannlain,
Circuit Judges; Robert R. Merhige, Jr.,**
District Judge.

Opinion by Judge O'Scannlain

ORDER

The opinion filed on June 27, 1995 at slip op. 7401 is amended as follows:

Slip op. at 7409, n.1: After "1991" delete the remainder of the first sentence. The sentence is amended to read as follows: "The plum portion of the order was terminated in 1991."

Slip op. at 7409, n.1: Delete the word "also" in the second sentence of footnote one. The sentence is amended to read as follows: "The provisions relating to pears are no longer at issue."

Slip op. 7436: Add the following sentence at the end of the first full paragraph after the citation to *Cal-Almond*: "On remand, the district court may consider arguments regarding any assessments which were levied under the generic advertising programs."

The panel has voted to deny the petitions for rehearing. Judge O'Scannlain has voted to reject the suggestion for rehearing en banc, and Judge Merhige has so recommended.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petitions for rehearing are DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

O'SCANNLAIN, Circuit Judge:

We must delve into one of the more byzantine, and all-encompassing, areas of federal administrative regulation—that governing fruits and vegetables. In the process, we decide whether various regulations governing the size, maturity, and advertising of California tree fruits are arbitrary and capricious or otherwise in violation of the rights of those who handle and process the fruits.

I

Wileman Brothers & Elliott, Inc. and other growers, handlers, and processors of tree fruits in California (collectively "the handlers") challenge various regulations contained in the nectarine and peach marketing orders, 7 C.F.R. §§ 916, 917, promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* The marketing orders set standards for, among other things, fruit maturity and minimum size. The marketing orders also impose assessments on handlers for the costs of a generic advertising program. The handlers claim that several of these regulations violate their free speech rights, due process rights, the Agricultural Marketing Agreement Act, and the Administrative Procedure Act.

A

The Agricultural Marketing Agreement Act of 1937 (the "Act") is the offspring of the Agricultural Adjustment Act, one of the pillars of the New Deal legislative program. The purpose of the Act is "to establish and maintain ... orderly marketing conditions for agricultural

commodities in interstate commerce." 7 U.S.C. § 602(1). The Act authorizes the Secretary of Agriculture to promulgate marketing orders for certain fruits and vegetables. The marketing orders regulate the quality of the commodity and the quantity that may be shipped to market. 7 U.S.C. §§ 608c(6), (7). Everything from avocados to prunes may fall within the reach of these orders.

Marketing orders must be subjected to the notice and comment requirements of the Administrative Procedure Act ("APA"). 7 U.S.C. §§ 608c(3), (4). In addition, marketing orders must be approved by either two-thirds of the affected producers or by producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. § 608c(9)(B).

Marketing orders are implemented by committees composed of members of the regulated industry. 7 U.S.C. §§ 608c(7)(C), 610. Committee members are appointed by the Secretary and supervised by the Agricultural Marketing Service, an agency within the United States Department of Agriculture ("USDA"). 7 C.F.R. §§ 916.23, 916.62, 917.25, 917.30. The committees recommend rules and regulations to the Secretary to effectuate the marketing orders and to govern such matters as fruit size, fruit maturity, and advertising. The Secretary may then adopt the committees' recommendations through informal rulemaking. 7 C.F.R. §§ 916.51-52, 917.40-41. All committee rules and regulations are "subject to the continuing right of the Secretary to disapprove of the same at any time." 7 U.S.C. § 608c(7)(C); 7 C.F.R. §§ 916.30, 917.62.

The expenses to administer the marketing orders are funded through assessments imposed on fruit handlers based upon the volume of fruit they ship. 7 U.S.C. § 610(b)(2)(ii). Expenses fall into four general categories: administration, inspection services, research, and advertising and promotion. The committees are required to submit annual budgets to the Secretary, along with a recommendation as to the rate of assessment for the year. 7 C.F.R.

§§ 916.31(c), 917.35(f). The Secretary approves the committees' budgets and the assessments to be imposed on handlers each year in the form of a regulation.

Any handler may file a petition with the Secretary requesting a modification of the marketing order or an exemption. 7 U.S.C. § 608c(15)(A). An administrative law judge ("ALJ") hears the petition initially, and appellate review is available from the Judicial Officer ("JO") of the USDA. The Secretary's decision, as made by the JO, may be appealed to the district court. 7 U.S.C. § 608c(15)(B). The Secretary is also authorized to seek injunctive relief to compel compliance with all marketing order requirements. 7 U.S.C. § 608a(6).

B

In 1958, the Secretary promulgated Marketing Order 916, which regulates nectarines grown in California. 7 C.F.R. pt. 916. The Nectarine Administrative Committee administers the order. The Committee has authority to make rules governing the production and quality of nectarines within its jurisdiction. 7 C.F.R. § 916.30(c). In 1959, the Secretary promulgated Marketing Order 917, which regulates the handling of peaches, pears, and plums grown in California.¹ 7 C.F.R. pt. 917. The Peach Commodity Committee and the Pear Commodity Committee administer the order. These committees also have authority to make rules governing the production and quality of peaches and pears within their jurisdiction. 7 C.F.R. § 917.33(b).

The marketing orders are primarily quality control measures, and each order contains numerous specific regulations. The handlers challenge three particular regulations: (1) the assessments imposed upon handlers to

¹The plum portion of the order was terminated in 1991. The provisions relating to pears are no longer at issue.

support a generic advertising program; (2) the "well-matured" standard for fruit maturity; and (3) the fruit minimum size standards. These regulations will be discussed in greater detail below.

Appellant Wileman Bros. & Elliott, Inc. ("Wileman") farms approximately 3000 acres of tree fruits. Appellant Kash, Inc. farms approximately 1300 acres of peaches, plums, and nectarines. Both farms pack and market their own fruit, as well as the fruit of other farms, through their own packing houses. Wileman, Kash, and the other appellants have encountered problems with some of their fruit varieties under the maturity and minimum size standards. Beginning in 1987, Wileman and the other handlers began withholding the assessments they were required to pay under the marketing orders.²

The complexity of the legal proceedings in this case have been matched by their prolixity. In April 1987, Wileman filed a petition pursuant to 7 U.S.C. § 608c(15)(A) with the USDA challenging the maturity standards and several other portions of the marketing orders. In June 1988, Wileman filed a second petition challenging the maturity standards as amended in 1988 and the generic advertising regulations. In May 1989, the ALJ issued a 400-page final decision on the first petition and ruled for Wileman. In May 1991, the ALJ issued a 369-page final decision on the second petition and again ruled for Wileman.

In the interim, Wileman had also filed a complaint in district court challenging the maturity standards and seeking a temporary restraining order. On August 7, 1987, the district court concluded that it lacked subject matter

²Pursuant to a July 6, 1989 order of the district court, the handlers have paid the assessments due from 1987 to the present into a trust fund account pending resolution of their claims. The majority of handlers subject to the marketing orders continued to pay their assessments, though the amounts increased due to the lost funds from the objecting handlers.

jurisdiction because Wileman had not exhausted its administrative remedies. On appeal, this court affirmed in an unpublished disposition. *Wileman Bros. & Elliott, Inc. v. Yeutter*, No. 87-2938 (9th Cir. Oct. 29, 1990). We noted, however, that we were "appalled by the failure of the Secretary to deal expeditiously with the substantial grievances alleged in this complaint."

In September 1991, the JO of the USDA ruled on Wileman's consolidated petitions, as well as similar claims by fifty-one other handlers, and reversed both of the ALJ's decisions. In a voluminous two-part decision, the JO ruled in favor of the Secretary on all issues.

Over the course of these proceedings, the Secretary also brought a total of fifteen enforcement actions against the handlers pursuant to 7 U.S.C. § 608a(6) to compel payment of the assessments and compliance with the maturity standards. By order of the district court, all assessments due from 1987 to the present have been paid into a trust fund pending resolution of the handlers' claims.

Wileman, along with fifteen other handlers, sought review of the JO's decision in district court pursuant to 7 U.S.C. § 608c(15)(B). The Secretary's enforcement actions were consolidated with the handlers' civil case. On January 27, 1993, on cross-motions for summary judgment, the district court granted summary judgment to the Secretary. The district court also entered judgment for the Secretary for \$3.1 million in past due assessments from the handlers. The handlers appeal.

II

The handlers challenge the generic advertising program administered under the marketing orders on the grounds that it (1) is arbitrary and capricious under the APA, (2) fails to abide by the notice and comment procedures of the APA, and (3) violates their First Amendment free speech

rights. We discuss each claim, as well as the relevant aspects of the generic advertising program, in turn.

In 1954, Congress amended the Act to permit the Secretary to promulgate marketing orders "providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order." 7 U.S.C. § 608(6)(I). Subsequently, the Secretary, through formal rulemaking, amended the marketing orders to authorize paid generic advertising programs for nectarines (1966), plums (1971), and peaches (1976). 7 C.F.R. §§ 916.45, 917.39. Ever since, the committees have developed the details of the generic advertising program—radio and TV commercials ("California nectarines are the juiciest"), newspaper inserts ("How to make a peach pie with California peaches"), etc.—and have included an advertising component in their annual budget recommendations. After approving the committees' budget recommendations, the Secretary issues annual assessment regulations, and the handlers are required to pay their pro rata share.³ 7 U.S.C. § 610(b)(2)(ii).

The handlers first claim the annual assessment regulations are arbitrary and capricious because the Secretary has never justified the need for generic advertising, as opposed to brand-name specific advertising or no collectively-financed advertising at all. The handlers do not challenge the Secretary's original decision after formal rulemaking procedures to authorize a generic advertising program; rather, they claim the Secretary has acted arbitrarily and capriciously in failing to evaluate the benefits of generic advertising in order to determine whether it is worth

³For example, in 1992, nectarine handlers were required to pay \$0.1825 per 25-pound package of nectarines they shipped. Of this, roughly 53% went to marketing expenses. 57 Fed. Reg. 45,559 (1992).

continuing. According to the handlers, the Secretary has simply rubberstamped the committees' recommendations.

Under the APA, we must analyze whether the agency's action is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). "When the arbitrary and capricious standard is performing that function of assuring factual support, there is no substantive difference between what it requires and what would be required by the substantial evidence test." *Association of Data Processing Serv. Orgs. v. Board of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984); see also *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991). Under the substantial evidence standard of review, we consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the agency's decision.⁴ *Baxter*, 923 F.2d at 1394. "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park v. Volpe*, 402 U.S. 402, 417 (1971).

The Secretary finds support for his annual assessment regulations and the continuation of the generic advertising program from two sources—the Secretary's own rulemaking records and the recommendations made by the committees. The formal rulemaking records accompanying the Secretary's original decisions to implement the paid advertising programs for nectarines, plums, and peaches are replete with evidence that supports his decision. The following is a typical excerpt:

⁴The ALJ's decisions are treated as part of the record. *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir.), cert. denied, 464 U.S. 893 (1983). When the agency and the ALJ disagree, as they have in this case, we may give less deference to the agency's findings than they would otherwise receive. *Id.*

The record shows a wide consensus among the peach and pear industries that promotional activities have been beneficial in increasing demand and should be continued.

Media generally is expensive but some things can be done selectively in this field that are inexpensive and yet create an impact on the buying trade as well as the consuming public. Trade paper ads, particularly at the beginning of the season, together with the editorial support which trade papers are willing to accord an advertiser are helpful in launching a program for seasonal fruits such as peaches and pears. Spot radio or TV commercials in the principal markets during peak movement periods have proved to be successful. It has been found in many fresh promotional programs that spot announcements, particularly when developed with a "dealer tag" at the end of each spot, have considerable influence in triggering retail promotions.

41 Fed. Reg. 14,375, 14,376-77 (1976). Indeed, the handlers concede that the Secretary's decision was supported by substantial evidence at its inception; it is its continuation that concerns them.

One need not be intimately familiar with the tree fruit industry to suppose that the wholesale and retail markets for fruit and the nature of media advertising have changed significantly in the past twenty years. Changed conditions should prompt the Secretary to revisit the generic advertising program at some point. After all, the Secretary is not passively allowing the generic advertising programs to continue in a vacuum, but is actively approving annual

budgets for particularized programs in a changing marketplace. Although the Secretary does not need to reinvent the wheel every year, the Secretary must have at least some relatively current information to rely upon. Otherwise, the advertising program, well-advised in its inception, might become arbitrary and capricious in its application.

Under the unique regulatory scheme of the Act, the Secretary may relay on the industry-led committees and their staff to do his homework for him and to provide up-to-date information. See *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir.) ("We have no difficulty with the Secretary's decision to rely on the [Navel Orange Administrative Committee] to filter and digest public comments and make a recommendation."), *cert. denied*, 113 S.Ct. 598 (1992). The Nectarine Administrative Committee and the Peach Commodity Committee engage in a careful process each year prior to and during their annual spring meetings in approving the advertising program for the upcoming season. Prior to the full committee meeting, the Subcommittee on Advertising and Promotion meets to review in detail the program developed by its staff. The staff in turn uses monthly reports on price trends, consumer interests, and general market conditions in the formation of the proposed advertising program.

In *Riverbend Farms*, 958 F.2d at 1488, this court upheld volume regulations in the navel orange marketing orders against a challenge by handlers that they were arbitrary and capricious. In adopting the regulations, the Secretary apparently relied entirely upon the recommendations of the Navel Orange Administrative Committee ("NOAC"). In response to the suggestion that the Secretary was merely rubberstamping the committees' work, the court stated: "Although the Secretary normally follows the NOAC's suggestions, he retains the authority to depart from or ignore them altogether." *Id.* The same is true here.

Although the Secretary has apparently always adopted the committees' budget recommendations, he retains the authority to reject them at any time under 7 U.S.C. § 608c(7)(C).

Finally, it is only because the handlers themselves, through the committees, recommend a budget with a generic advertising component that the program is renewed by the Secretary every year. In fact, in most years the recommendations have been unanimous. We cannot assume that the handlers—the parties with firsthand knowledge of the state of their industry—would make recommendations that have an adverse effect on their businesses. Of course, the interests of the voting committee members may not always coincide with those of every handler in the industry.⁵ However, this court has previously noted that the Supreme Court “upheld the constitutionality of the system despite the fact that it may produce results with which some growers or handlers will disagree.” *Saulsbury Orchard and Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1197 (9th Cir. 1990) (citing *United States v. Rock Royal Coop.*, 307 U.S. 533 (1939)).

We therefore conclude that the Secretary's annual assessment regulations for the generic advertising programs are not arbitrary and capricious.

III

The handlers next claim that the Secretary's annual assessment regulations are rules promulgated without opportunity for notice and comment in violation of the APA.

As noted above, the Act requires each handler to pay its pro rata share of the expenses of the marketing order. 7

⁵As we discuss below, the interests of the voting committee members may not always accord with the First Amendment rights of every handler in the industry either.

U.S.C. § 610(b)(2)(ii). The Nectarine Administrative Committee and the Research Commodity Committee hold open meetings each spring, at which a budget for the upcoming year is discussed and approved. All handlers are notified of the meetings and are free to attend. The proposed budgets are available to all handlers and the public, and comments may be submitted to the committees. After the budget is passed, the committees recommend the budget to the Secretary. From 1980 to 1987, the Secretary issued regulations approving the proposed budgets and setting the assessment rates without first publishing a proposed rule and without providing opportunity for comment. In 1988 and 1989, a ten-day comment period was provided. Since 1989, a thirty-day comment period has been provided.

As an initial matter, we must determine whether the regulations are indeed “rules” within the meaning of the APA. In *Cal-Almond, Inc. v. USDA*, 14 F.3d 429 (9th Cir. 1993), this court held that virtually identical assessment regulations adopted by the Secretary upon the recommendation of the California Almond Board were “rules” under the APA. The APA's definition of a “rule” includes, among other things, “the approval or prescription for the future of rates.” 5 U.S.C. § 551(4). The almond marketing order defined the assessment, which was to be collected in the future, as a “rate per pound of almonds.” 7 C.F.R. § 981.81(a) (1993). Thus, the court held, the assessment was a rule. *See Cal-Almond*, 14 F.3d at 441.

The same analysis applies to the marketing orders in the instant case. The peach marketing order permits the Secretary to establish a “rate of assessment which handlers shall pay with respect to each fruit.” 7 C.F.R. § 917.37. The nectarine marketing order does the same. 7 C.F.R. § 916.41. Thus, the annual peach and nectarine assessments are “rules.”

The *Cal-Almond* court proceeded, however, to hold that the Secretary's error in failing to provide for notice and

comment on the assessment regulations was harmless. See 14 F.3d at 442. "[T]he failure to provide notice and comment is harmless only where the agency's mistake clearly had no bearing on the procedure used or the substance of the decision reached." *Riverbend Farms*, 958 F.2d at 1487 (quotation omitted). The harmless error analysis "must therefore focus on the process as well as the result." *Id.* (quotation omitted). The *Cal-Almond* court pointed out that each almond handler was notified of the proposed assessment rate. At the California Almond Board's annual meetings, handlers and other interested parties were free to comment on the proposals. After approval by the committees, the proposed budget was submitted to the Secretary, who used the proposed rate every year in the final assessment regulation. Thus, the handlers were not prejudiced by the Secretary's failure to provide notice and comment because the committee process served as an adequate substitute. See *Cal-Almond*, 14 F.3d at 442. See also *Riverbend Farms*, 958 F.2d at 1487-88 (same holding with respect to weekly navel orange volume restrictions developed through similar procedures).

As discussed above, virtually identical procedures were used by the Nectarine Administrative Committee and the Peach Commodity Committee in the instant case to develop budgets under the nectarine and peach marketing orders. The handlers do not dispute that they were aware of the proposed budgets and were free to make written comments to the committees prior to their approval and recommendation to the Secretary. The handlers have not demonstrated that the procedures in this case were somehow less adequate than those in *Cal-Almond* or *Riverbend Farms*. Consequently, we hold that the Secretary's failure to provide notice and comment on the assessment regulations from 1980 to 1987 was harmless.

IV

The handlers next claim that the assessments for the generic advertising program force them to provide financial support for messages with which they disagree in violation of their First Amendment free speech rights.⁶ The handlers also claim that their ability to disseminate advertising of their own is greatly curtailed by being forced to pay the assessments. The handlers believe that the advertising program helps their competitors more than it helps them, and that they can better spend their marketing dollars on their own.

The First Amendment right to freedom of speech includes a right not to be compelled to render financial support for others' speech. *Cal-Almond*, 14 F.3d at 435 (citing *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)). This is also true when commercial speech is at issue. See *id.* The assessments implicate the handlers' First Amendment rights because they are compelled to provide financial support for particular messages—the generic ads—associated with a particular group—peach and nectarine handlers.

The First Amendment analysis in the instant case is largely governed by *Cal-Almond*. In *Cal-Almond*, this court held that the USDA's almond marketing order, which implemented a generic advertising program for almonds, violated handlers' First Amendment rights. Like the peach and nectarine marketing orders at issue here, the almond order imposed an assessment on almond handlers based on

⁶The handlers identify two specific messages disseminated by the generic advertising with which they disagree—that "red is better," and that "all California fruit is the same." One handler identified a specific ad that he found objectionable due to its alleged subliminal sexual messages. The handlers also object to a promotional chart, financed by the assessments, listing the "Red Jim" variety of nectarine. The "Red Jim" is not a generic variety of nectarine but a proprietary one, the rights to which are owned by a member of the Nectarine Administrative Committee.

the volume of almonds they shipped. A substantial portion of the assessments were used to fund a generic pro-almond public relations program. The court determined that the infringement on the almond handlers' free speech rights should be analyzed under the test for restrictions on commercial speech set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). See *Cal-Almond*, 14 F.3d at 436. Applying this test, the court held that the marketing program was unconstitutional. See *id.* at 437-40.

Under *Central Hudson*, restrictions on lawful, non-misleading commercial speech are evaluated under a three-part test.⁷ First, the asserted government interest behind the restrictions must be substantial. Second, the restrictions must directly advance that interest. Third, the program must not be more extensive than necessary to serve that interest. See *Central Hudson*, 447 U.S. at 566. The USDA has the burden of justifying the program by presenting evidence sufficient to satisfy these requirements. *Edenfield v. Fane*, 113 S.Ct. 1792, 1800 (1993). We examine each prong in turn.

A

First, the Secretary claims that the government has a substantial interest in enhancing returns to peach and nectarine growers. *Cal-Almond* held that the government has a substantial interest in "stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry." *Cal-Almond*, 14 F.3d at 437. See also *United States v. Frame*,

⁷The speech undertaken through the generic advertising program falls squarely within the definition of "commercial speech." See *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986). Namely, it is aimed at increasing peach and nectarine sales. The handlers do not claim that any other type of speech is implicated.

885 F.2d 1119, 1134 (3d Cir. 1989) (government has substantial interest in salvaging the beef industry), *cert. denied*, 493 U.S. 1094 (1990). The handlers point to no reason why the government's interest in promoting peaches and nectarines is any less substantial than it is for almonds.

B

Second, the Secretary claims that the generic advertising program directly advances the government's interest in promoting the peach and nectarine growing industries. The program may not be sustained if it "provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 566. The burden is on the Secretary to present objective evidence to demonstrate that the program directly advances the government's interest. *Edenfield*, 113 S. Ct. at 1800.

The Supreme Court assumes as a matter of law that advertising increases consumption of the product being advertised. *Cal-Almond*, 14 F.3d at 439 (citing *Posadas*, 478 U.S. at 342). However, according to *Cal-Almond*, the question is not whether the generic advertising program has increased peach and nectarine sales—it undoubtedly has. Rather, the question is whether the mandatory generic advertising program sells the product more effectively than the "specific, targeted marketing efforts of individual handlers." *Id.* Because the almond handlers presented evidence that the assessments hindered their own advertising efforts, and because the Secretary could not provide evidence that the generic advertising program was more effective, the *Cal-Almond* court held that the generic

advertising program did not directly advance the government's interest.⁸ The *Cal-Almond* court concluded:

We agree with [the handlers'] argument that each handler knows best how to sell his own almonds; we are unwilling to presume, in the absence of hard evidence to the contrary, that a government agency is better at marketing than an individual business person.

Id.

The same state of affairs pertains with respect to the generic advertising programs for nectarines and peaches. First, the handlers claim their own advertising efforts are being hampered. For example, appellant Kash, Inc. claims it benefits more from in-store promotions, and that it would devote more resources to such advertising if it did not have to contribute to the generic advertising program. Appellant Gerawan Farming, Inc. suggests that it would advertise its own label. Even if individual handlers were to utilize the same media as used by the generic advertising program, their effort would undoubtedly differ in the details. The larger handlers, such as Wileman and Kash, were required to contribute \$50,000 or more towards the generic advertising program in some years. This is a significant sum of money that could have been used in their own marketing efforts.

Second, the handlers claim there is no evidence that generic advertising significantly benefits the tree fruit industry. Indeed, they point to the testimony of the

⁸In *Cal-Almond*, the court also noted that one large almond handler, Blue Diamond, may have been manipulating the advertising program for its own benefit. See 14 F.3d at 438-39. There is no evidence of such insider control of the committees here. Nevertheless, the question is not whether competitors on the committee are violating the handlers' First Amendment rights, but whether the Secretary is by imposing the assessments that fund the program.

Chairman of the Management Services Committee, who stated that although each year the industry pays more for the same amount of advertising, the growers' economic position has not improved.

The Secretary, however, claims there is evidence that demonstrates the efficacy of generic advertising. The Secretary suggests that the formal rulemaking record leading to the amendment of the marketing orders to implement the advertising program contains "extensive support." However, the rulemaking records merely recite that advertising will have a beneficial effect on tree fruit consumption. See 41 Fed. Reg. 14,375, 14,376-77 (1976); 31 Fed. Reg. 5635, 5636 (1966). This uncontroversial assertion, while belaboring the obvious, says nothing about whether mandatory, collectively-financed advertising is more effective than advertising undertaken by individual handlers (or even whether generic advertising is better than brand name advertising).

The Secretary also points to two studies located in the record before the ALJ—the Carmelita Enterprises Report and the NPD/Nielson Inc. Report. The handlers poke several methodological holes in the studies. Most importantly, the handlers claim the studies only demonstrate that advertising increases consumption—again, a rather uncontroversial proposition. The studies do not even discuss whether collectively-financed generic advertising is more productive than the advertising efforts of the marketplace left to its own endeavors.⁹ Finally, the Secretary includes a chart in his brief showing that peach and nectarine production increased significantly in the 1980s. However, this chart provides no evidence as to causation; the increase may have been due to weather conditions or

⁹In fact, the Carmelita Enterprises Report notes that in-store point-of-purchase advertising may be better than generic television advertising. This is the type of advertising appellant Kash, Inc. claims it would utilize to a greater extent if it did not have to pay the assessments.

cultivation techniques as much as it was due to the generic advertising programs.

In sum, the Secretary has demonstrated that advertising increases consumption of peaches and nectarines but has not gone the necessary next step of demonstrating that the generic advertising program is better at increasing consumption than individualized advertising, as *Cal-Almond* requires. Thus, the generic advertising programs for peaches and nectarines do not "directly advance" the government's interest and fail the second prong of the *Central Hudson* test.

C

Third, the Secretary claims that the generic advertising program is sufficiently narrowly tailored. The Secretary must show that the marketing program "employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989).

An obvious alternative to the mandatory, collectively-financed advertising program is a program like the one used under the Almond Marketing Order. The almond handlers had the option of seeking a credit (i.e. a reduction of their assessments) for their own authorized advertising endeavors. 7 C.F.R. § 981.41(c) (1993). The *Cal-Almond* court nevertheless found that the program was not narrowly tailored because the regulations denied credit for certain types of advertisements, such as advertisements promoting products with "competing nuts." 7 C.F.R. § 441(c)(5)(ii). By contrast, the peach and nectarine handlers do not even have the option of seeking a credit for their own advertising endeavors.

One objection to the implementation of a more narrowly tailored program is that a non-mandatory program would

give rise to free-rider problems. That is, non-paying handlers would free-ride on the benefits of a generic advertising program while spending their fair share of the assessments on their own advertising. See *Frame*, 885 F.2d at 1133-37 (noting that free-riders would be able to benefit from a collectively-financed beef marketing program if they were not required to pay the assessments). This argument is weak in the case of the peach and nectarine programs, however. First, the credited advertising option under the almond marketing program was more narrowly tailored and yet managed to avoid the problem of free riders; objecting handlers simply had to provide their own mode of transportation in the form of authorized advertising. Second, the handlers point out that there are thirty-three states that commercially handle peaches, and twenty eight that handle nectarines. Yet, California is the only state where handlers are subject to generic advertising assessments. If the Secretary is concerned about free-riders, there are already plenty of them in other states.

In short, the almond marketing program was less restrictive than the programs for peaches and nectarines; yet, the *Cal-Almond* court held that it was not narrowly tailored. Thus, the generic advertising programs for peaches and nectarines fail the third prong of the *Central Hudson* test as well.

In sum, although we agree that the Secretary has a substantial interest in promoting peaches and nectarines, we hold that forced contributions to pay for generic advertising programs contravene the First Amendment rights of the handlers. The generic advertising programs neither "directly advance" the government's interest nor are they narrowly tailored. They therefore fail the second and third prongs of the *Central Hudson* test and violate the First Amendment.

V

The handlers also challenge the fruit maturity regulations contained in the marketing orders. The Act authorizes the Secretary to regulate fruit by grade and quality in the marketing orders. 7 U.S.C. § 608c(6)(A). In theory, such quality restrictions maintain producer prices by indirectly limiting the quantity of fruit which may be shipped to market, and by excluding less desirable fruit which may depress the price of the entire crop. For several years, the maturity standard in the marketing orders for nectarines and peaches was determined by U.S. Grade 1. For nectarines, this required the fruit to be "mature but not soft or overripe ... [with] at least 75 percent of the nectarines in any lot [showing] some blushed or red color." 7 C.F.R. § 51.3147. After receiving complaints from customers, the tree fruit committees decided that the marketing orders should be amended to provide for a higher maturity level. The standard, which later became known as the "well-matured" standard, would be based on a test using a spectrum of color chips developed by the Federal-State Inspection Service, an agency within the USDA.¹⁰

In 1980, the Secretary amended the marketing orders to provide that fruit must grade at least U.S. No. 1 and that "maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service." 45 Fed. Reg. 32,308 (1980) (interim final rule); 45 Fed. Reg. 42,252 (1980) (final rule). In 1988, the "well-matured" standard employing the color chip scheme was codified in the marketing orders. 53 Fed. Reg. 19,226, 19,232 (1988) (interim final rule) (codified at 7 C.F.R. §§ 916.356; 917.459).

¹⁰The maturity regulations for nectarines and peaches are slightly different in their wording and in the color chip schemes actually employed, but the handlers do not distinguish between them in their arguments.

In 1992, in response to complaints from handlers, the Secretary again modified the regulation by establishing a two-tiered maturity standard for nectarines and peaches. 57 Fed. Reg. 20,735 (1992) (interim final rule); 57 Fed. Reg. 42,681 (1992) (final rule). The minimum maturity standard is now "mature," and handlers may voluntarily seek the "well-matured" designation. The determination of whether fruit is "mature" is essentially the same as it was before the color chip scheme (i.e. U.S. No. 1). The color chip system is still used to determine if a fruit meets the "well-matured" standard. 7 C.F.R. §§ 916.356; 917.459.

The handlers claim the pre-1992 "well-matured" standard was arbitrary and capricious. They claim the use of color chips fails to determine the internal maturity of a fruit and discriminates against certain yellow varieties of nectarines that they grow. The handlers also claim that it is arbitrary to impose the same maturity requirements on fruit shipped great distances such as to the East Coast as are imposed on those shipped within California.

A

As a threshold matter, the district court held that the handlers' claims are moot because of the Secretary's 1992 revisions to accommodate "mature" fruit. Both the handlers and the Secretary now argue that the issue is not moot; however, we must consider this jurisdictional issue on our own account. *Majnas v. Superior Court*, 936 F.2d 1068, 1071 (9th Cir. 1991).

The handlers claim that, if we find the pre-1992 regulations to have been invalid for any reason, they are entitled to relief. As we discuss in Part VIII below, sovereign immunity bars the handlers' claims for consequential damages from the Secretary. However, it does not bar the refund of improper assessments. A significant portion of the handlers' assessments each year has gone to

the Federal-State Inspection Service to pay for inspection services, which include enforcement of the challenged maturity regulations.¹¹ Because the handlers might be entitled to a refund of the portion of their assessments that were used for improper regulations, there is a live controversy as to who is entitled to the assessment monies currently held in trust.

B

As an additional threshold matter, we also must determine whether the "well-matured" regulations were validly promulgated in 1980. If they were not, then we need only address the substance of the regulations as they were promulgated in 1988, at which point the Secretary re-promulgated the "well-matured" standard. 53 Fed. Reg. 19,226 (1988).

In *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 336 (9th Cir. 1990), this court held that tree fruit committee members had not acted in accord with the marketing orders in promulgating the heightened maturity standards in 1980 and thus were not immune from suit in an antitrust action brought by several handlers. The court apparently looked to the regulation promulgated by the Secretary in May 1980, 45 Fed. Reg. 32,308 (1980), and determined that it did not clearly authorize the committees to promulgate and to enforce heightened maturity standards on their own. Rather, the "supplementary information" accompanying the regulation merely stated that "provision is made for a higher maturity standard," 45 Fed. Reg. 45,252 (1980), without stating *who* would promulgate it. The committee's subsequent maturity regulations implementing the color chip scheme had not been "recommended" to the Secretary as required by 7 C.F.R.

¹¹For example, in 1992, nectarine handlers were required to pay \$0.1825 per 25-pound package of nectarines they shipped. Of this, roughly 25% went to inspection services. 57 Fed. Reg. 45,559 (1992).

§ 916.52(a). The committee members' actions in promulgating the maturity standards were treated as being unauthorized, and thus were not entitled to immunity. *Giannini*, 909 F.2d at 336.

Contrary to the handlers' assertions, *Giannini* did not squarely hold that the maturity regulations were invalidly promulgated in 1980. Not only was *Giannini* primarily concerned with the issue of immunity from an antitrust suit, it was decided in the context of an appeal of a Rule 12(b)(6) dismissal for failure to state a claim. In the context of reviewing the dismissal, the court only reviewed the marketing orders themselves to see if the committee members were clearly authorized to promulgate the heightened maturity regulations. *Id.* at 335. The *Giannini* court could not resolve the ambiguity it found in the regulation promulgated by the Secretary and had to hold in favor of the plaintiffs. This court, because it is addressing the issue on the merits, can look beyond the marketing orders themselves to resolve any ambiguities that may exist. In so doing, it is clear that the Secretary intended to raise the maturity standards and to allow the committees to promulgate the implementing regulations, just as they had with numerous standards in the past. *See* 45 Fed. Reg. 32,308 (1980).

C

We turn now to the merits of the question of whether the Secretary's decision to adopt the "well-matured" regulation was supported by substantial evidence. *See Baxter*, 923 F.2d at 1394.

The rulemaking record surrounding the 1988 decision to promulgate the "well-matured" standard contains signifi-

cant evidence that supports the Secretary's decision.¹² The "supplemental information" accompanying the interim final rule reveals that the Secretary relied on a market study, performed by a marketing consultant, known as the Thuerk Report. 53 Fed. Reg. 19,226, 19,229 (1988). The Thuerk Report analyzed the results of meetings with 25 companies, representing 38.7% of the retail supermarkets in the nation. The Secretary summarized the Report as follows:

With respect to maturity, the findings indicate that early season fruit which is picked immature does not provide satisfaction to the consumer and does not encourage repeat purchases, and does not benefit the market.

Id. at 19,229. The "supplemental information" also contains the findings of a pomologist (a fruit growing expert) from the University of California at Davis that "low maturity fruit tended to be more susceptible to bruising (especially vibration bruising), and also more susceptible to flesh browning following bruising." *Id.*

¹² As for the regulations in effect from 1980 to 1988, we note that the "supplemental information" accompanying the final rule states that "[t]his action is based upon the recommendations and information submitted by the Nectarine Administrative Committee." 45 Fed. Reg. 32,308 (1980). As discussed above, this court has previously held that the Secretary may rely on a committee recommendation to support a decision. *Riverbend Farms*, 958 F.2d at 1488. The handlers have pointed to no reason why the committee's decisionmaking process in recommending the heightened maturity standards in 1980 was flawed.

These were additional factors that might discourage repeat purchases.¹³

In sum, we are satisfied that the Secretary "indicate[d] the major issues of policy that were raised in the proceedings and explain[ed] why the agency decided to respond to these issues as it did." *Cal-Almond*, 14 F.3d at 445 (quotation omitted). We therefore hold that the "well-matured" standard—both as promulgated in 1980 and as re-promulgated by the Secretary in 1988—is not arbitrary and capricious.

VI

The handlers also challenge the fruit minimum size regulations contained in the marketing orders. The Act authorizes the Secretary to regulate fruit by size in the marketing orders. 7 U.S.C. § 608c(6)(A). In 1988, upon the recommendation of the Nectarine Administrative Committee, the Secretary promulgated regulations that increased the minimum size requirements for seventy-five varieties of nectarines. 53 Fed. Reg. 19,226 (1988) (interim final rule); 54 Fed. Reg. 12,419 (1989) (final rule). Subsequent regulations have made minor changes in the size requirements for several varieties of nectarines. The current minimum size regulations are codified at 7 C.F.R. § 916.356.

¹³ The Secretary also acknowledged receiving negative comments on the maturity standard. To several of these comments, the Secretary simply answered that "the favorable comments and other information sufficiently refuted the unfavorable comments." 53 Fed. Reg. at 19,229. To others, he gave specific responses. For example, one handler apparently complained that the "well-matured" standard did not make sense for fruit shipped to the East Coast, an argument made by the handlers in the instant case. To this, the Secretary responded by pointing to the testimony of a buyer in Massachusetts who supported the standard. *See id.*

The handlers claim that the nectarine minimum size regulations are arbitrary and capricious.¹⁴ The handlers contend that the regulations were promulgated for the impermissible purpose of volume control and discriminate against certain smaller varieties of nectarines. This court must determine whether the Secretary's decision to adopt the minimum size regulations was supported by substantial evidence. *See Baxter*, 923 F.2d at 1394.

As we noted above in the context of the annual assessment regulations, the Secretary may rely on the committees to make sound recommendations on fruit size regulations. *See Riverbend Farms*, 958 F.2d at 1488. The Nectarine Administrative Committee's deliberations resulted in the challenged minimum size regulations being recommended to the Secretary with the following justification:

According to the committee, the proposed changes are necessary to remove from the market those sizes of fruit which are not being well received by consumers. These actions are intended to foster repeat purchase and maintain consumer satisfaction. Early season purchases of small-sized nectarines have a negative impact on total nectarine sales because consumers do not make repeat purchases after being dissatisfied with their original purchases. According to the committee, increased size requirements are needed to make nectarines more marketable and are essential for the consumer satisfaction

¹⁴Although the handlers also refer to the minimum size regulations for peaches in their challenge, it appears that there was no change in the size requirements for peaches in 1988. 53 Fed. Reg. 19,234 (1988). Rather, the packing requirements were altered with an incidental, de minimis effect on the size requirements. 53 Fed. Reg. 12,692 (1988). The handlers have failed to make any specific challenge to the peach size regulations.

needed to maintain current markets and to build new markets.

53 Fed. Reg. 12,687, 12,688 (1988).

The rulemaking record also reveals that the Secretary had substantial evidence to support his decision.¹⁵ First, in response to a request for comments on the proposed regulations, the Secretary received numerous letters from growers and handlers in support of the proposed regulations. The general sentiment expressed in the letters was that consumers wanted bigger fruit, so that is what the growers and handlers should give them. 53 Fed. Reg. 19,226 (1988). Second, the Secretary relied on a market study known as the Thuerk Report that supported the proposed regulations. The Report concluded that "findings indicate that early season fruit which is small in size does not provide satisfaction to the consumer, does not encourage repeat purchases, and nor does it benefit the market [sic]." *Id.* at 19,227.

The rulemaking record also reveals that the Secretary addressed the negative comments that were received. There were several arguments against the standards. Most importantly, some handlers argued that the minimum size requirement would drastically reduce the total volume of fruit shipped. To this, the Secretary responded:

The Department disputes the contention that the [minimum size] proposal would drastically reduce the volume of fruit shipped because the industry had recognized the fact that in past seasons small size nectarines have been a detriment to the trade and as

¹⁵The rulemaking record can be found in a "supplemental information" published along with the interim final rule, 53 Fed. Reg. 19,226 (1988), and in the statement published with the final rule, 54 Fed. Reg. 12,419 (1989).

such the industry has directed its efforts toward production and marketing of better quality and larger sized fruit.

Id. at 19,227-28. The Secretary subsequently noted that the size regulations may have the opposite effect of that suggested by the handlers. Namely, evidence from the 1988 season demonstrated that "production volume and sales increased with the higher size requirements in effect."¹⁶ 54 Fed. Reg. 12,419, 12,420 (1989).

The handlers make several additional arguments against the regulations. First, the handlers point out that the Secretary also proposed minimum size regulations for plums but dropped the proposal after receiving a large number of negative comments. Rather than reflect arbitrariness, however, this simply reflects the Secretary's responsiveness to the stronger opposition. The handlers also point out that the size regulations do not apply to all varieties of nectarines or peaches. This, the handlers argue, shows that the regulations are arbitrary, because consumers would be likely to reject *all* small nectarines not just small nectarines of certain varieties. However, the Secretary, in the statement accompanying the final rule, addressed this argument with the statement that "[d]ifferent size requirements for different varieties recognize varietal characteristics and market preferences." 53 Fed. Reg. 19,226, 19,227 (1988). Finally, the handlers cite evidence that fruit that fails to meet the minimum size standards nevertheless could be marketed. However, the very point of the regulation was to make sure California fruits were bigger and would thus gain the cachet in the consumer's mind of being big.

¹⁶Some handlers also argued that the effective date of the new regulations was too soon and that growers would not be able to modify their cultivating practices in time. To this, the Secretary responded: "[A]t the time the committee made its recommendation most growers had begun to undertake ordinary cultural practices on their orchards to attain desirable fruit sizes." 53 Fed. Reg. 19,226, 19,228 (1988).

In sum, regardless of what the handlers may think of the policies underlying the minimum size regulations, the rulemaking record contains sufficient evidence and a plausible explanation from the Secretary. "So long as [the agency] explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary." *Riverbend Farms*, 958 F.2d at 1487. In this case, not only did the Secretary explain its decision to adopt the size regulations, but a significant number of handlers and growers seem to think it was a wise idea.

VII

The handlers claim the Act violates the nondelegation doctrine because it gives unguided authority to the Secretary to levy assessments. The district court suggested that the handlers are "fifty years too late in pressing an unlawful delegation claim." In fact, they are fifty-six years too late.

In *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 574-77 (1938), back in the days when the nondelegation doctrine actually had some vitality, the Supreme Court rejected a similar nondelegation challenge to the Act on the ground that the "Declaration of Policy" section provided sufficient guidance to the Secretary in the development of marketing orders. This section enumerates such purposes as: maintaining orderly marketing conditions; maintaining an orderly flow of supply; promoting production research and marketing research; developing container and pack requirements; developing minimum quality and maturity requirements; and developing grading and inspection requirements. 7 U.S.C. § 602. The Secretary's authority to levy assessments to effectuate these orders is guided by the very same purposes. The Supreme Court has rejected the argument that a delegation of the power to tax (i.e. levy assessments) requires stricter limits

on an agency's discretion than a delegation of the power to develop regulations. *Skinner v. Mid-American Pipeline Co.*, 490 U.S. 212, 220-24 (1989). Thus, the authority to levy assessments on handlers is not an unconstitutional delegation of legislative authority.

VIII

The handlers seek two types of relief. First, the handlers seek unspecified money damages for the allegedly improper maturity and minimum size regulations. Because we uphold both sets of regulations, we need not address this request for relief. Even as to their First Amendment claim, the district court properly held that the handlers' requests are barred by the doctrine of sovereign immunity. In short, claims for money damages from the United States are barred unless the United States has waived its sovereign immunity. *United States v. Testan*, 424 U.S. 392, 401-02 (1976). There is nothing in the Act or the APA that demonstrates a congressional intent to waive sovereign immunity for the claims raised by the handlers.¹⁷

Second, the handlers seek a refund of the assessments levied from 1980 to 1986 and the release of the assessments paid into a trust fund from 1987 to the present and currently held by the Registry of the Court. Since they have prevailed on their First Amendment claim, we must evaluate this remedy. The district court held, and we agree, that the refund claims are not barred by sovereign immunity because they are an equitable action for the return of improper assessments.

In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Supreme Court drew a distinction between "an action at

¹⁷Under the Act, a handler's petition to the Secretary is limited to "stating that any [marketing] order ... is not in accordance with law and praying for a modification thereof or to be exempted therefrom." 7 U.S.C. § 608c(15)(A). There is no mention of money damages.

law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing ... for the recovery of specific property or monies." *Id.* at 893 (emphasis added). The Court held that while the former type of claim could not be brought against the federal government, the latter, even if it required monetary payments, could. *See id.* *See also McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 20, 32-44 (1990).

The critical question, then, is whether the handlers' request that the improper assessments be returned to them is properly characterized as a claim for damages or as an equitable claim. In *Bowen*, the Supreme Court distinguished the two as follows: "Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Bowen*, 487 U.S. at 894-95 (quoting D. Dobbs, *Handbook on the Law of Remedies* 135 (1973)). *See also id.* at 914 (Scalia, J., dissenting) ("Whereas damages compensate a plaintiff for a loss, specific relief prevents or undoes the loss—for example, by ordering return to the plaintiff of the precise property that has been wrongfully taken"). Here, the handlers seek the return of the precise property that was wrongfully taken from them—the assessments levied in violation of their First Amendment rights. *Cf. Marshall Leasing, Inc. v. United States*, 893 F.3d 1096, 1099 (9th Cir. 1990) (holding that an action for recovery of specific property is an equitable action and is not barred by sovereign immunity). The fact that the property taken from the handlers was money does not alter its character as a specific remedy in this case. *See Bowen*, 487 U.S. at 893.

In addition, this court, on several occasions, has suggested that a refund of improper assessments is the

appropriate remedy for prevailing handlers. For example, in *Cal-Almond*, this court stated that "we have already held that a sufficient remedy for handlers who prevail in their administrative petitions is a refund of any assessments found not to have been due." 14 F.3d at 448 (citing *Saulsbury Orchards*, 917 F.2d at 1195). See also *United States v. Riverbend Farms, Inc.*, 847 F.2d 553, 559 (9th Cir. 1988) ("If the Secretary or courts (upon proper appeal) substantiated the challenge, the handler would be entitled to a refund."); *Navel Orange Admin. Comm. v. Exeter Orange Co.*, 722 F.2d 449, 452 (9th Cir. 1983). Indeed, in the prior appeal of the instant case, this court stated: "We have previously indicated, however, that a remedy would be available to ... handlers who ultimately prevail in their petitions." *Wileman Bros.*, No. 87-2938 (9th Cir. Oct. 29, 1990). In sum, principles of sovereign immunity do not bar a refund of the specific assessments that were taken from the handlers, a remedy which we have repeatedly indicated would be available.

We emphasize, however, that the handlers are only entitled to a refund of the assessments that were used for the generic advertising programs each year. Because of the fact-intensive nature of this remedial inquiry, we remand to the district court for computation of the refund amount. See *Cal-Almond*, 14 F.3d at 449. On remand, the district court may consider arguments regarding any assessments which were levied under the generic advertising programs.

IX

For the above reasons, we hold that the three regulations at issue—generic advertising, "well-matured," and minimum size—are not arbitrary and capricious or otherwise in violation of the Administrative Procedure Act. However, we hold that the generic advertising assessments do indeed violate the handlers' First Amendment rights. We therefore

remand to the district court to fashion an appropriate remedy consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED. Each party shall bear its own costs.

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16977
D.C. No. CV-90-00473-OWW
ORDER

WILEMAN BROTHERS & ELLIOTT, INC.; KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
CHIAMORI FARMS, INC.; PHILLIPS, INC.; KOBASHI FARMS,
INC.; TANGE BROS., INC.; NAGAO FARMS; NILMEIER
FARMS; CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS;
WILMER HUEBERT FARMS; KOBASHI FARMS; NAKAYAMA
FARMS, INC.;

AND

MIHARA FARMS, *Plaintiffs-Appellants*,

v.

MICHAEL ESPY, SECRETARY OF AGRICULTURE,
Defendant-Appellee.

Filed October 3, 1995

Before: THOMAS TANG,* DIARMUID F. O'SCANNLAIN,
Circuit Judges; ROBERT R. MERHIGE, JR.,**
District Judge.

ORDER

The Order and Amended Opinion filed on September 18,
1995 at slip op. 11753 is further amended as follows:

Slip op. 11759: Delete the last two full paragraphs of the
order.

*Due to the death of Judge Tang on July 18, 1995, the petitions for rehearing were voted upon only by Judges O'Scannlain and Merhige. Judge O'Scannlain voted to reject the suggestion for rehearing en banc, and Judge Merhige so recommended.

**The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16977

D.C. No. CV-90-00473-OWW

WILFMAN BROTHERS & ELLIOTT, INC.; KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
CHIAMORI FARMS, INC.; PHILLIPS, INC.; KOBASHI FARMS,
INC.; TANGE BROS., INC.; NAGAO FARMS; NILMEIER
FARMS; CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS;
WILMER HUEBERT FARMS; KOBASHI FARMS; NAKAYAMA
FARMS, INC.;

AND

MIHARA FARMS, *Plaintiffs-Appellants,*

v.

MICHAEL ESPY, SECRETARY OF AGRICULTURE,
Defendant-Appellee.

Filed October 17, 1995

ORDER

Before: TANG,* O'SCANNLAIN, Circuit Judges; MER-
HIGE,** District Judge.

*Due to the death of Judge Tang on July 18, 1995, the petitions for rehearing were voted upon only by Judges O'Scannlain and Merhige. Judge O'Scannlain voted to reject the suggestion for rehearing en banc, and Judge Merhige so recommended.

**The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

The panel has voted to deny the petitions for rehearing. Judge O'Scannlain voted to reject the suggestion for rehearing en banc, and Judge Merhige so recommended.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petitions for rehearing are DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-90-473-OWW

CONSOLIDATED WITH

CV-F-88-568-OWW

CV-F-87-392-OWW

CV-F-90-088-OWW

CV-F-91-381-OWW

CV-F-91-319-OWW

WILEMAN BROS. & ELLIOTT, INC.; AND KASH, INC.,
Plaintiffs,

v.

EDWARD MADIGAN, SECRETARY OF AGRICULTURE,
*Defendant.*MODIFIED MEMORANDUM OPINION AND ORDER
RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

On March 13, 1992, the Court heard the parties' cross-motions for summary judgment. Upon due consideration of the written and oral arguments of the parties and the administrative record, the Court now enters its order granting defendant's motion for summary judgment.

Plaintiffs are growers and handlers of nectarines, plums and peaches. Acting under 7 U.S.C. § 608c(15)(B), plaintiffs have filed a complaint seeking review of the Secretary of Agriculture's dismissal of their action

challenging Marketing Orders 916 (regulating the handling of nectarines) and 917 (regulating the handling of pears, plums and peaches), promulgated under the Agricultural Marketing Agreement Act of 1937 (AMAA of "the Act"), 7 U.S.C. § 601, *et seq.*

Two separate administrative proceedings are involved. Pursuant to 7 U.S.C. § 608c(15)(A), plaintiff Wileman Bros. and Elliott, Inc., initially filed a petition with the U.S.D.A. on April 20, 1987 ("Wileman I").¹ This action, later joined by plaintiff Kash, Inc., challenged the validity of the marketing orders from 1980-1987. A second petition, initially filed on June 6, 1988, challenged the marketing orders as amended in 1988 ("Wileman II").² The petitions were considered independently of each other by Administrative Law Judge ("ALJ") Dorothea A. Baker, who found in favor of plaintiffs. Judicial Officer Donald A. Campbell consolidated the cases and reversed ALJ Baker's decisions on appeal.

The parties agree that there are no material facts in dispute, and that this action is appropriate for summary judgment.

By prior order of the Court, plaintiffs have been paying assessments required by the marketing orders into a trust fund account pending the outcome of these motions.

I. BACKGROUND

Congress passed the AMAA "to establish and maintain such orderly marketing conditions for agricultural commodities" as will establish "parity prices" for those

¹ AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3. All citations to the administrative record are herein referred to by either Wileman I or II, followed by the number of the part of the record, and the page or exhibit number. The administrative record in Wileman I consists of 42 parts; Wileman II consists of 74 parts.

² AMA Docket Nos. F&V 916-3 and 917-4.

commodities. 7 U.S.C. § 602(1). The Act authorizes the Secretary to issue marketing orders for certain commodities including fruits such as nectarines, peaches and plums. 7 U.S.C. § 608c(2)(A).

The Secretary may issue marketing orders upon a finding that the order "will tend to effectuate the declared policy of the Act,"³ after providing adequate notice and hearing, as defined under the Administrative Procedures Act (APA), 5 U.S.C. § 551 *et seq.* 7 U.S.C. § 608c(3), (4). Additionally, the marketing orders must be approved by either two-thirds of affected producers, or by producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. § 608c(9)(B).

Marketing order may contain terms:

[l]imiting, or providing methods for the limitation of, the total quantity of any such commodity or product or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce ...

7 U.S.C. § 608c(6)(A).

Under the AMAA, marketing orders are implemented by committees composed of members of the affected industry. 7 U.S.C. §§ 608c(7)(C), 610. Members of the committees are appointed by the Secretary, serve without compensation and are subject to removal at any time by the Secretary. 7 C.F.R. §§ 916.23, 916.62, 917.25, 917.30. Based on

³While the Act authorizes the Secretary to enter into marketing "agreements" with handlers, 7 U.S.C. § 608b, the Secretary may also issue marketing "orders" which are binding on handlers even where the handler does not wish to be a party to an "agreement." 7 U.S.C. § 608c(3), (4), (6) and (9).

comments received from members of the industry, the committees make recommendations to the Secretary and administer the Secretary's orders subject to the review and approval of the Secretary. 7 U.S.C. § 608c(7)(C); 7 C.F.R. §§ 916.30, 917.33. "Each and every regulation, decision, determination or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time." 7 C.F.R. §§ 916.62; 917.30. Committee members are entitled to immunity from antitrust liability to the extent that their actions have been authorized by the AMAA. 7 U.S.C. § 608b; *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 335 (9th Cir. 1990).

Marketing Order 916, which regulates the handling of nectarines, was promulgated by the Secretary in 1958. 23 Fed. Reg. 4616 (June 25, 1958). Marketing Order 916 is administered by the Nectarine Administrative Committee, consisting of eight members appointed by the Secretary. 7 C.F.R. § 916.20.

Marketing Order 917 was issued in 1939 to regulate the handling of pears, plums and peaches grown in California. 4 Fed. Reg. 2135 (May 26, 1939). Those portions of the order affecting pears are not at issue here. The plum portion of Marketing Order 917 was terminated as of September 12, 1991. Marketing Order 917 is administered by a Control Committee consisting of 25 members selected by the Secretary. 7 C.F.R. §§ 917.16-19. A separate committee administers the marketing order for each of the commodities. 7 C.F.R. § 917.20. The Peach Commodity Committee is still in existence, while the Plum Commodity Committee ceased to exist when the plum marketing order was terminated.

II. STANDARDS AND SCOPE OF REVIEW

7 U.S.C. § 608c(15)(A) permits any handler subject to an order to petition the Secretary for its modification or an

exemption. After a mandatory hearing before an Administrative Law Judge, administrative appellate review is afforded by the Judicial Officer of the Department of Agriculture. The Secretary's decision, as made by the Judicial Officer, "shall be final, if in accordance with law." 7 U.S.C. § 608c(15)(A). The handler may appeal the Secretary's ruling to the appropriate district court, which, if it determines that the Secretary's ruling is not in accordance with law, "shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." 7 U.S.C. § 608c(15)(B).

Judicial review requires a two-step analysis of the Secretary's decision. The court must first determine whether the Secretary's decision is based on "substantial evidence." 5 U.S.C. § 706(2)(E). As outlined in *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315-316 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969):

The power of the District Court in reviewing the decision of the Secretary, following his adjudicatory hearing, is not a *de novo* fact finding process. It is limited to a determination of whether the rulings of the Secretary are in accordance with law and his findings are supported by substantial evidence. If they are, they may not be disturbed. Because there attaches to the determination of an administrative agency a presumption of the existence of facts justifying the determination, the burden of proof falls on the party challenging the validity of the agency's ruling. (citations omitted).

Substantial evidence is "more than a scintilla. It means such relevant evidence as a reasonable mind might accept

as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting, *Consolidated Edison Co. V. N.L.R.B.*, 305 U.S. 197, 229 (1938). Where the Secretary's determinations turn on purely legal questions concerning the requirements of the applicable statutes, they are reviewed *de novo*. *Desir v. Ilchert*, 840 F.2d 723, 726 (9th Cir. 1988).

The court must also analyze whether the Secretary's decision is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). "To make this finding, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29, 43 (1983).

The standard does not change where, as here, the administrative agency disagrees with the conclusions of its

ALJ.⁴ The ALJ's findings are part of the record to be weighed against other evidence. *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir. 1983), *cert. denied*, 464 U.S. 893 (1983). The weight accorded the ALJ's findings is greatest where credibility based on witness demeanor is at issue. With respect to derivative inferences, however, the reviewing court's deference is to the agency and not to the ALJ. *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1486 (9th Cir. 1984).

The parties cannot agree as to what evidence should properly be reviewed in this § 608c(15)(B) proceeding.⁵

⁴Plaintiffs contend that no deference should be afforded the findings of the Judicial Officer as he is not a neutral magistrate. They allege that he has a history of merely "rubber-stamping" ALJ rulings which favor the Secretary, while consistently reversing those rulings which are unfavorable. They further allege that in this case, the Judicial Officers' decision is a "regurgitation of U.S.D.A. counsel's appellate brief choreographed to ensure victory for U.S.D.A." in which he "manipulated and distorted facts to fit a preconceived result." Plaintiffs devote 25 pages of their brief to outlining instances of the Judicial Officer modifying or deleting the findings of the ALJ.

To the extent that the Judicial Officer's rulings are arbitrary and capricious or were made in the absence of substantial evidence, it is the duty of the reviewing court to find that they are not in accordance with law. Nothing more is required as plaintiffs have not demonstrated that the Judicial Officer was impermissibly biased as a matter of law. The allegations and case citations submitted by plaintiffs do not establish the clear evidence required to overcome the presumption that a public officer has properly discharged his official duties. *See American Federation of Government Emp. v. Reagan*, 870 F.2d 723, 727 n.33 (D.C. Cir. 1989).

⁵The same issue arose in the administrative adjudication, although the parties adopted different positions than they now take. The government contended that in a § 608c(15)(A) proceeding the decisionmakers are to look only at the information in front of the Secretary at the time rulemaking occurred. It argued that no new facts should be introduced in the administrative trial, and to the extent it was, it should play no part in either the decision of the ALJ or the Judicial Officer. The Judicial Officer agreed that the ALJ erred in allowing plaintiffs to introduce new evidence, holding that "[i]t is well settled that the lawfulness of a Marketing Order or a provision thereof or a regulation issued thereafter must be judged by the facts contained in the formal or informal hearing record, rather than by facts petitioners would seek to introduce at a § 608c(15)(A) hearing." *Wileman II*,

The government argues that under the unique statutory scheme of the AMAA, the reviewing court is to look not only at the rulemaking record, but at the much broader record developed in the administrative trial before the ALJ. Plaintiffs contend that the record which must be reviewed is limited to Administrative Trial Exhibits 31, 32, 33 and 297, which the parties stipulated constituted the entire rulemaking record.

The law is unclear. The government provides no authority for its position, while plaintiffs cite *U.S. Lines v. Federal Maritime Commission*, 584 F.2d 519, 534 (D.C. Cir. 1978), which stands for the settled proposition that only information included in the administrative record may be relied on by the agency during judicial review. The case does not define the composition of the administrative record, where, as here, an administrative rulemaking record exists separate from the 15(A) proceedings record before the ALJ.

The AMAA is a unique statute which prevents direct judicial review of the Secretary's regulations, a right plaintiffs would otherwise have. The court is prohibited from ruling on the legality of agency regulations, but must rule on the adequacy of the Secretary's determination that his own regulations are valid. 7 U.S.C. § 608c(15)(B). It is unnecessary to decide this issue. Although the entire record certified by the Secretary has been fully reviewed, sufficient evidence exists in the four trial exhibits which the parties stipulated constitute the entire rulemaking record to resolve all matters in contention in this § 608c(15)(B) proceeding.

Judicial Officer's Opinion at 47. The Judicial Officer is correct in stating that courts have upheld the Secretary's decision to exclude new evidence in a 15(A) hearing. *See Dairymen's League Coop. Ass'n v. Brannan*, 173 F.2d 57, 66 (2d Cir.), *cert. denied*, 338 U.S. 825 (1949); *United States v. Mills*, 315 F.2d 828, 836 (4th Cir.), *cert. denied*, 374 U.S. 832 (1963).

III. DISCUSSION

Plaintiffs' First Amended Complaint seeks an order declaring the Secretary's Final Decision and Orders are not in accordance with law. Marketing orders 916 and 917 were substantially revised in 1988, 1991 and 1992. Much of the Judicial Officer's decision is therefore now moot. *Accord Wileman Bros. & Elliott, Inc., v. Yeutter*, 87-2938, unpublished opinion of October 29, 1990, at 10 n.3 (9th Cir.) (noting plaintiffs' argument as to procedural flaws in promulgation of maturity standards moot due to promulgation of new maturity regulations in 1988). Review of the decision is limited to the portions of Marketing Orders 916 and 917 which are still operative, and those portions no longer in existence but under which monetary relief could be granted.

A. Plaintiffs' Right to Monetary Awards

1. Recovery of Damages for Destroyed or Seized Fruit

Plaintiffs allege they have lost five million dollars as the result of the seizure and destruction of fruit which failed to meet the maturity and size standards established in the marketing orders.⁶ Plaintiffs allege in this action, as well as in an ongoing antitrust suit against members of the committees, that heightened maturity, *i.e.*, ripeness, standards were unlawfully implemented. They contend that in 1980 the committees issued decrees barring the sale of

⁶Plaintiffs' complaint alleges only that the maturity regulations resulted in financial loss. They now contend in their motion for summary judgment that the size regulations also caused loss. Plaintiffs advance other claims in this motion not alleged in their complaint. The government has responded to these claims. When deciding a summary judgment motion a court may evaluate not just the issues pleaded but those which can reasonably be raised in an amended pleading. *In re Zweibon*, 565 F.2d 742, 748 n.20 (D.C. Cir. 1977); *National Agr. Chemicals Ass'n v. Rominger*, 500 F. Supp. 465, 473 (E.D. Cal. 1980). All of plaintiffs' claims have been considered.

fruit which was not "well-matured." The previous minimum maturity requirement was "mature." In order to enforce the heightened standard, a system of color chips and descriptive tables was developed, in which it was necessary for handlers to demonstrate that their fruit was the color of typically well-matured fruit of that particular variety.

In 1988, the "well-matured" standard was codified in the marketing orders, however, plaintiffs allege that the rulemaking process was in contravention of the APA. In 1988, the Secretary also issued rules barring the sale of smaller sized nectarines, peaches and plums. Plaintiffs contend that the promulgation of these rules was also procedurally flawed. Plaintiffs allege that the Secretary's enforcement of these requirements forced them to discard up to fifty percent of their tree fruit crops in some years.

Plaintiffs seek monetary recovery from the Secretary on two bases: (1) consequential damages for forced compliance with rules promulgated in contravention of the APA; (2) unlawful taking of their fruit without just compensation under the Fifth Amendment.⁷ As to the consequential damages claims, without a waiver of sovereign immunity by the United States, plaintiffs cannot recover monetary damages. *See United States v. Testan*, 424 U.S. 392, 401-02 (1976) ("Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim whether it be the Constitution, a statute, or a regulation does not create a cause of action for money damages unless . . . the basis 'in itself . . . can fairly be interpreted as mandating compensation by the Federal

⁷To the extent that plaintiffs' first amended complaint raises a parallel taking clause claim regarding assessments imposed to fund the committees' operations, the claim has been abandoned. Nowhere in plaintiffs' voluminous briefs was the issue raised, even though the government refuted the validity of the claim in its opening brief.

Government for the damage sustained'” quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1008-09 (Ct. Cl. 1976)). “[T]he United States has not waived its sovereign immunity with respect to liability for consequential damages caused by invalid marketing orders.” *Cal-Almond, Inc. v. Yeutter*, 756 F. Supp. 1351, 1356 n.2 (E.D. Cal. 1991). Neither the AMAA nor the APA provide a waiver of sovereign immunity so as to permit plaintiffs to recover monetary damages against the United States.⁸

This Court also lacks jurisdiction to consider a taking claim. As explained in *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 590 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984):

There is district court jurisdiction for civil actions against the United States, such as a taking claim, only if the damages sought do not exceed \$10,000. 28 U.S.C. § 1346(a)(2). Because appellants contend that each claim against [appellee] amounts to at least \$5,000,000 . . . jurisdiction would lie not with the district court, but with the United States Claims Court, 28 U.S.C. § 1491.

See also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1020 (1984) (“Once a taking has occurred, the proper forum for [plaintiff’s] claim is the Claims Court”).⁹

⁸Plaintiffs also seek consequential damages against the Secretary resulting from the alleged actions of the members of the committees, as his agents, in creating and maintaining the Tree Fruit Reserve in violation of federal and state antitrust law. Sovereign immunity bars this claim.

⁹To the extent that plaintiffs argue that the taking occurred because of the illegal actions of the Secretary, i.e., he enforced rules which were never validly promulgated, they appear to lack a cause of action in the Claims Court also. See *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 898 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) (“The Tucker Act suit in the

Plaintiffs suggest that under the AMAA, this Court has jurisdiction to determine whether or not a taking occurred, while the Claims Court could later determine the amount of recovery. Plaintiffs cite no authority for the proposition that the issues of liability and damages can be bifurcated in such a manner.¹⁰ Allowing plaintiffs to seek partial adjudication of their taking claim in district court would circumvent the jurisdictional limits of the Tucker Act, 28 U.S.C. § 1491.¹¹

2. Recovery of Assessments

Plaintiffs seek the refund of assessments which they paid from 1980 to the present.¹² The expenses to administer the marketing orders are funded through assessments imposed on handlers based upon the volume of fruit they ship. 7 U.S.C. § 610(b)(2)(ii). The committees are required to submit budgets to the Secretary, along with a recommendation as to the rate of assessment for the year. 7 C.F.R. §§ 916.31(c), 917.35(f). Expenses fall into four categories;

Claims Court is not, however, available to recover damages for unauthorized acts of government officials.”) Yet the potential lack of an alternate forum has no bearing on the fact that the United States has not waived its sovereign immunity for a claim of consequential damages.

¹⁰The single authority that plaintiffs cite, *Galloway Farms, Inc. v. United States*, 834 F.2d 998 (Fed. Cir. 1987), holds that jurisdiction is proper only in the Claims Court. *Id.* at 1000. It does not suggest that a district court can decide liability issues if it lacks jurisdiction. If plaintiffs cite to the case as authority for the judicial system’s dislike of bifurcation (e.g., bifurcating the taking claim from the rest of plaintiffs’ claim), such a procedure would waste judicial resources by requiring two courts to try most aspects of the claims.

¹¹Plaintiffs have not requested a transfer of these claims to the Claims Court via 28 U.S.C. § 1631.

¹²Plaintiffs seek the refund of assessments levied from 1980 through 1986 and the release of funds maintained in a trust account equal to the assessments levied from 1987 to the present. On July 6, 1989, the Honorable Edward D. Price ordered plaintiffs’ assessments from the years 1987 and 1988 placed in a trust fund. The parties stipulated on February 23, 1990, that future assessments also would be placed in the trust fund until this litigation is resolved.

administration costs, inspection services, research, and the largest of the four, advertising and promotion. The Secretary then makes a final decision, in the form of a rule, as to the committees' budgets and the assessment rates to be imposed.¹³

The government argues that, as with the claims for money damages discussed above, the doctrine of sovereign immunity bars recovery of these assessments regardless of the merits of plaintiffs' claims. The Supreme Court's holding in *Bowen v. Massachusetts*, 487 U.S. 893 (1988), demonstrates that the claim for recovery of assessments cannot properly be characterized as one for imposition of monetary damages against the United States. *Bowen* involved a state's attempt to be reimbursed for Medicaid payments originally paid by the federal government. On appeal, the federal government argued the district court lacked jurisdiction to hear the state's claim, as it was not an action "seeking relief other than money damages." *Id.* at 891. The Court rejected that argument, holding that "the monetary aspects of the relief that the States sought are not 'money damages' as that term is used in the law." *Id.* at 893.

Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which

¹³For instance, on October 2, 1992, the Secretary published a final rule setting assessment rates for California nectarines and peaches. 57 Fed. Reg. 45559 (1992). He adopted the budget and assessments of both committees. The nectarine committee set a total budget for 1992-93 at \$4,106,247. \$569,940 was designated for administrative expenses, \$1,009,085 for inspection costs, \$125,322 for research and \$2,192,400 for marketing development. An assessment rate of \$0.1825 per 25-pound package was imposed. *Id.*

may include an order providing . . . for "the recovery of specific property or monies." . . . The fact that a judicial remedy may require one party to pay money damages to another is not a sufficient reason to characterize the relief as "money damages."

Id. (citations omitted) (emphasis in original).

Plaintiffs cannot recover for losses in the form of consequential damages because the United States has not consented to be liable for plaintiffs' injuries to their property. However, equitable relief can be fashioned requiring "the recovery of specific monies." Where such equitable relief is appropriate, the purpose is not to compensate for injuries suffered, but to return property to its rightful owner. As the Court concluded in *Bowen*, a congressional bar on the award of "monetary damages" is not the same as prohibiting the grant of "monetary relief." *Id.* at 896.¹⁴

The Ninth Circuit has expressed the same view. In refusing to excuse plaintiffs from the requirement that they exhaust their administrative remedies, the Ninth Circuit rejected plaintiffs' argument that even if they were to prevail in the administrative proceedings they could not obtain a refund. *Wileman Bros. & Elliott, Inc., v. Yuetter*, 87-2938, unpublished opinion of October 29, 1990, at 9 (9th Cir.). The court stated, "We have previously

¹⁴See also *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1099 (9th Cir. 1990) (claim seeking return of automobile forfeited pursuant to 21 U.S.C. § 881 cognizable under APA); *Zellous v. Broadhead Assoc.*, 906 F.2d 94, 98 (3rd Cir. 1990) (claim seeking reimbursement of utility payments made to HUD cognizable under APA); *Northern Cheyenne Tribe v. Lujan*, 804 F.Supp. 1281, 1287-88 (D. Mont. 1991) (claim seeking return of rental and bonus payments made to federal government cognizable under APA); *Sterling v. United States*, 749 F.Supp. 1202, 1207 (E.D.N.Y. 1990) (claim seeking return of money seized by DEA agents cognizable under APA); *Sarit v. Drug Enforcement Admin.*, 759 F.Supp. 63 68 (D.R.I. 1991) (same).

indicated, however, that a remedy would be available to nonmilk handlers who ultimately prevail in their petitions." *Id.* The identical language was used in *Saulsbury Orchards & Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1195 (9th Cir. 1990); and in *Naval Orange Admin. Committee v. Exeter Orange Co., Inc.*, 722 F.2d 449, 452 (9th Cir. 1983), the court stated:

If the ultimate determination of the administrative proceeding, emanating either from the Secretary of Agriculture or from the federal courts through the statutory right of appeal, should substantiate [the handler's] challenges to the marketing orders, then refund of any paid assessments found not to have been due would be in order.

See also United States v. Riverbend Farms, Inc., 847 F.2d 553, 559 (9th Cir. 1988) ("We are satisfied that the district court, upon proper application, can shape relief to protect the handler's rights in case any challenge to the marketing order is ultimately substantiated").

The government has not suggested that section 704 of the APA prevents these issues from being decided. Section 704 bars a district court from reviewing an agency action when there is an adequate remedy in another forum. *See, e.g., Bowen* at 903. Such a potential remedy is a suit for money damages in the Claims Court, *i.e.*, the equitable claim seeking recovery of the assessments would be transformed into a claim for money damages equal to the amount of the assessments. *See Marshall Leasing*, 893 F.2d at 1100 (district court properly refused to hear plaintiffs' equitable claim for recovery of seized automobile based on taking clause grounds because adequate remedy at law for money damages in Claims Court). "A court must examine two factors in determining whether an

adequate remedy at law exists: whether monetary relief would be adequate if received and whether there is a forum in which the claim for relief can be heard." *Id.* The first requirement is not at issue here, but the second is.

Although not clearly stated, plaintiffs' complaint and cross motion for summary judgment seek recovery of assessments on four grounds: the invalidity of the rule establishing assessments due to procedural flaws in its promulgation; the First Amendment; the implied equal protection guarantee of the Due Process Clause of the Fifth Amendment; and an unlawful delegation of congressional authority. It is necessary to determine whether the Claims Court has in the past refused to exercise jurisdiction over any such claims. If it has, it is not an adequate forum. *See Bowen*, 487 U.S. at 905.¹⁵

The Claims Court has rejected claims seeking monetary damages based on the First Amendment and the Due Process Clause of the Fifth Amendment. *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984); *Marshall Leasing*, 893 F.2d at 1101. In the 1960's, the Claims Court apparently exercised jurisdiction in summarily rejecting two unlawful delegation claims on the merits. *See Grymes Hill Manor Estates v. United States*, 373 F.2d 920 (Cl. Ct. 1967); *Norman v. United States*, 392 F.2d 255 (Cl. Ct. 1968), *cert. denied*, 393 U.S. 1018 (1969). If the same test used by the Claims Court in *United States v. Connolly*, were applied, however, an unlawful delegation claim cannot survive. Jurisdiction in the Claims Court is proper only if the constitutional provision "can fairly be interpreted as mandating compensation for the damages sustained." 716 F.2d at 886, *quoting, United States v. Mitchell*, 463 U.S. 206, 217 (1983). Article 1, section 1 of the Constitution does not mandate monetary compensation.

¹⁵It is unnecessary to analyze the Claims Court's jurisdiction to hear the procedural invalidity claim, as the District Court has jurisdiction over that claim under 7 U.S.C. § 608c(15)(B).

B. Effect of Recent Amendments to the Marketing Orders

Marketing Orders 916 and 917 have undergone major changes since plaintiffs filed their administrative actions. This is particularly true of the issues raised in *Wileman I*. Many of the regulations complained of no longer exist. The most basic change is the elimination of the rules regulating plums. On September 16, 1992, the Secretary issued a final rule establishing a two-tiered maturity standard for nectarines and peaches. 57 Fed. Reg. 42681 (1992). The minimum maturity standard was lowered to "mature." Handlers may voluntarily seek the designation of "well matured." This higher grade classification is "intended to help handlers of well matured fruit to realize any price premiums which such fruit may bring." *Id.*

The regulatory language describing the method of determining whether the tree fruit is "mature" is very similar to that used from 1980 through 1987.¹⁶ Peaches must "meet the requirements of U.S. No. 1 grade" but the "Federal or Federal-State Inspection Service shall make final determinations on maturity through the use of color chips or such other tests as determined appropriate by the inspection agency." 57 Fed. Reg. 20735 at 917.459(a)(1).¹⁷

¹⁶The new nectarine regulations contain additional requirements regarding scarring. They are not at issue here.

¹⁷The regulations for nectarines are nearly identical. The term "color guides" is substituted for "color chips." § 916.356(a)(1).

One issue that is not entirely moot is any contention that any use of color chips to determine maturity is arbitrary and capricious. The new regulations continue to allow the inspection services to determine maturity based on the use of color chips. In their reply brief, however, plaintiffs concede that "with respect to many varieties the use of color chips will likely provide a fair range of maturity." Plaintiffs instead protest that color chips are an ineffective method of determining the maturity of several red and yellow varieties of nectarines. It is unnecessary to reach the question of whether the use of color chips as to specific varieties of fruit is arbitrary and capricious. There is no

Adoption of the two-tiered classification system appears to address plaintiffs' complaints about the current system. They have argued that consumers, particularly those in locations far from California, would prefer to buy fruit which was less ripe when it left the handlers' facilities. The new system allows them to do so. Most importantly, plaintiffs are no longer forced to destroy fruit which is not well matured. Plaintiffs will not be prejudiced by a voluntary well matured standard. Consumer willingness to pay a premium for well-matured fruit will determine the efficacy of the standard in the marketplace.

In 1992, the Secretary also revised the rules governing the adjudication of requests to depart from the maturity guidelines. The 1988 regulations gave subcommittees of each commodity committee, the power to approve all variances. Growers or handlers denied variances by these maturity subcommittees could appeal to a committee made up of chairpersons of the other two commodity committees and the supervisor of the Federal-State Inspection Service (FSIS). Plaintiffs contend that the participation by competitors on these committees denies them their due process right to have the variance adjudicated by an impartial tribunal. The new regulations entrust the determination of maturity variance requests to the FSIS, rather than committee members. 57 Fed. Reg. 20735 (1992) at 916.356(a)(1)(ii); 917.459(a)(1)(ii).

C. Mootness

Adoption of new regulations moots the claims for declaratory relief as to expressly or impliedly repealed

evidence that the Federal-State Inspection Service intends to apply color chips to every variety in determining whether it meets the lower grade of "mature," nor is it required by regulation to do so. The new rules indicate that the stringent color chip system in place prior to 1992 will not apply to fruit for which a grade of "mature" is sought. This system is reserved for fruit to be graded "well matured."

regulations. As to nectarines, procedural claims regarding size regulations, as well as claims seeking recovery of assessments based on alleged violations of the APA and the Constitution remain. As to peaches and plums, only plaintiffs' claims based on recovery of assessments remain.

D. Minimum Size Regulations of Nectarines

Of the issues which remain in controversy, the first concerns regulations promulgated in 1988 increasing minimum size requirements for nectarines. See 7 C.F.R. § 916.356. The AMAA expressly authorizes regulation of fruit by size. 7 U.S.C. § 608c(6)(A). Similar authorization is found in Marketing Order 916. 7 C.F.R. § 916.356. The 1988 regulations increased minimum size requirements for 75 specific varieties of nectarines. 53 Fed. Reg. 19225 at 19228 (1988). Subsequent regulations have made minor changes in requirements by variety. See 54 Fed. Reg. 27856 (1989); 55 Fed. Reg. 24215 (1990); 56 Fed. Reg. 40220 (1991); 56 Fed. Reg. 45884 (1991); 57 Fed. Reg. 27348 (1992); 57 Fed. Reg. 42681 (1992). Plaintiffs allege that the nectarine size regulations as promulgated in 1988 violate the APA in that they are arbitrary and capricious and were promulgated without the Secretary providing proper notice and comment.

Plaintiffs make identical allegations as to 1988 size regulations for plums and peaches. The plum issue is moot. As to peaches, the Judicial Officer correctly found that the 1988 regulations had little impact on minimum size requirements. See *Wileman II*, Judicial Officer's Opinion at 173-74. The interim final rule stated that two varieties of peaches would no longer be subject to size requirements. 53 Fed. Reg. 19234 (1988). It also standardized the size requirement for all varieties of peaches which are shipped in commercially insignificant quantities (*i.e.*, less than 10,000 packages). Such varieties shipped from November 1 to July 2 were now required to meet the same minimum

requirements as those shipped July 3 to October 31. *Id.* at 19234-35. While changes in the nectarine regulations were significant, the changes in size regulations for peaches made in 1988 are *de minimis*. They did not draw a single comment in response to the Secretary's notice for comments. See 53 Fed. Reg. at 19234.¹⁸ Their promulgation is not considered here.

1. Arbitrary and Capricious

The ALJ found the 1988 size regulations to be arbitrary and capricious. The Judicial Officer disagreed. Review of the informal rulemaking record reveals sufficient evidence to support the Secretary's discretionary decision to impose minimum size requirements on nectarines.

The initial recommendation for the 1988 size regulations was made by the Nectarine Administrative Committee after a December 6, 1987 meeting. 53 Fed. Reg. 12687 at 12688 (1988). The agency sought comments which it then responded to in publishing its interim final rule on May 27, 1988. "Many of the comments" were submitted by or on behalf of plaintiffs. 53 Fed. Reg. 19226 at 19227 (1988); see also *Wileman II*, pt. 31, exhibit GG-HH containing: April 28, 1988 letter of F.T. Elliott III; April 28, 1988 letter of Brian Leighton (19 pages); April 27, 1988 letter of F.T. Elliott Jr.; April 27, 1988 letter of John R. Olive (Sales Manager of *Wileman*).

Review of the "supplemental information" published along with the interim final rule reveals that the agency fully considered all comments received. It summarized positive and negative comments and cited the results of

¹⁸Review of the comments received after the interim final rule was published does reveal a 59-page letter written by Brian Leighton, plaintiffs' former counsel, dated June 22, 1988, commenting on the plum, nectarine and peach regulations, which mentions size regulations for peaches in two lines. See *Wileman II*, pt. 31. The Secretary fully considered this comment in issuing the final rule regarding peaches. See 54 Fed. Reg. 12427 at 12428 (1989).

two studies, concluding that they bolstered a move to larger fruit. 53 Fed. Reg. at 19227.¹⁹ After contemplating all opinions expressed and evidence submitted, the agency concluded:

The changes are necessary to remove from the market those sizes of fruit which are not

¹⁹The Secretary utilized a report, entitled *Final Report of California Summer Fruits Retailer Research* by Ervin D. Thuerk. 53 Fed. Reg. 19226 at 19227:

Mr. Thuerk is a marketing consultant with the Thuerk Pr-Con Company in Westlake Village, California. Mr. Thuerk directed a project designed to ascertain individual retailers' attitudes and their wants and needs for fruit quality and maturity. Meetings were held with 25 companies in approximately 20 cities, representing nearly 17,000 retail supermarkets. These supermarkets equal 38.7 percent of the total industry units operated. Information was obtained on: (1) Product needs in the fresh produce market; (2) retail marketing trends and how they are changing; (3) consumer attitudes and their changing wants and needs; (4) the development of future programs for the marketing of California fruits; and (5) attitudes toward industry standards and marketing programs.

Id. Plaintiffs do not contest the scope of the Thuerk Report. The Secretary concluded, "The finding indicate that early season fruit which is small in size does not provide satisfaction to the consumer, does not encourage repeat purchases, and not does it benefit the market." *Id.*

The summary of Thuerk's findings includes the following statement, "65 percent of the retailers are stressing larger sizes for all fruits. This is what the consumer is buying—'bigger is better, even though we know different.' ... Also, numerous references were made to the need for more consistency or uniformity of sizing in the packs." Thuerk Report, Wileman II, pt. 41, ex. 32(GG) at 3. The report also contains the following quote from a retailer: "Tell the growers we face real problems marketing small fruit. We will not use 4x5 plums or 96/108 size nectarines and peaches."

The administrative record before the Secretary also contained letters from growers in support of the size regulations. See Wileman II, pt. 38, ex. 31(HH). For instance, one grower stated his opinion that smaller fruit is not acceptable to consumers and that achieving larger size fruit can be achieved at minimal cost. *Id.*, April 8, 1988 letter of LeRoy Giannini ("For reasons best known to them, it has become crystal clear the modern-day consumer has become increasingly disinterested in taking those very smallest prices of fruit into their homes. That message has been made loud and clear to the Industry").

being well-received by consumers. These actions are intended to foster repeat purchase and maintain consumer satisfaction. Early season purchases of small-sized nectarines have a negative impact on total nectarine sales because consumers do not make repeat purchases after being dissatisfied with their original purchases. Increased size requirements are needed to make nectarines more marketable and are essential for the consumer satisfaction needed to maintain current markets and to build new markets. No shortage is expected as a result of the size changes, rather, healthier market conditions for California nectarines are anticipated.

Id. at 19228.

The agency specifically considered, and rejected, two arguments plaintiffs again raise here. The first is that size limitations would decrease the volume of fruit shipped. The agency responded:

The Department disputes the contention that the proposal would drastically reduce the volume of fruit shipped because the industry has recognized the fact that in past seasons small size nectarines have been a detriment to the trade and as such the industry has directed its efforts toward production and marketing of better quality and larger size fruit. The Department finds that this action is needed to provide fresh markets with larger sizes of fruit preferred by these markets.

Id. at 19227-28. The agency revisited the issue of volume control in publishing the final rule one year later. 54 Fed.

Reg. 12419 (1989). It again rejected plaintiffs' comments, noting that information from the 1988 season demonstrated that "production volume and sales increased with the higher size requirements in effect." *Id.* at 12420.

A second area of contention was the effective date of the new regulations. "[S]ome commentators contended that it is too late for growers to modify their cultural practices (i.e., pruning and thinning) in order to meet the more restrictive size requirements contained in the proposal." 53 Fed. Reg. at 19228. Others rejected that argument, arguing "such small size fruit should be removed from the market as it would be very difficult to move and would in turn adversely affect the pricing structure of the market." *Id.* at 19227. The Secretary resolved the debate by finding,

[A]t the time the committee made its recommendation most growers had begun to undertake ordinary cultural practices on their orchards to attain desirable fruit size. Any committee recommendation reflects the sentiments of the industry and the feasibility and practicality of the contemplated action.

Id. at 19228.²⁰ That the agency disagreed with plaintiffs' contentions, does not, of course, make its actions arbitrary and capricious. "So long as it explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir.), *cert. denied*, 113 S.Ct. 598 (1992).

²⁰Plaintiffs appear to contend that the Secretary's decision as to the effective date of the regulations was arbitrary and capricious because, in rejecting similar size regulations proposed by the plum committee, he cited growers' inability to make cultural changes at such a late date in the season. See 53 Fed. Reg. 19218 at 19220 (1988). Contrary to demonstrating arbitrary decisionmaking, these apparently inconsistent decisions regarding the inability to make cultural changes can reasonably be explained by the differences in the two commodities. Plaintiffs concede that grower opposition to the implementation of size regulations for plums was much greater than for nectarines.

2. Procedural Requirements

Plaintiffs next allege that the 1988 size regulations for nectarines are invalid because they were promulgated in contravention of the procedural requirements provided by the APA.²¹ The ALJ agreed, but was reversed by the Judicial Officer. Specifically, plaintiffs allege that the agency provided only 15 days for public comment and no waiting period before the regulations became effective.

The proposed rule was published on April 18, 1988. 53 Fed. Reg. 12687 (1988). Only a 15-day comment period was provided, as the Secretary determined:

A comment period of less than 30 days is deemed appropriate for this proposal. The harvest and shipment of the 1988 nectarine crop is expected to start April 25, 1988, and growers and handlers should be given as much notice as possible of any changes, if

²¹Plaintiffs contend that internal regulations of the agency provide evidence of the invalidity of the size or assessment regulations. Plaintiffs cite to "Department Regulation" DR 1512-1, issued December 15, 1983, which states in part:

The Department is committed to providing the public reasonable opportunity to participate in rulemaking. For rules that have substantial effect, it is recommended that comment periods on proposed regulations be thirty-days or more.

DR 1512-1 contains the following disclaimer:

[T]his directive ... is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States [or] its agencies ...

(emphasis in original). The agency's compliance or noncompliance with DR 1512-1 is not judicially reviewable. *Cal-Almond, Inc., v. USDA*, No. CV-F-91-123-REC, Order of June 3, 1992 at 21; *State of Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986) (interpreting identical language in Executive Order 12,291).

adopted, to permit the industry to plan accordingly. Moreover, the Department already has received letters in opposition to the proposed nectarine size changes indicating the industry is aware of the committee's recommendation.

53 Fed. Reg. at 12690. The interim final rule was published on May 27, 1988. 53 Fed. Reg. 19226 (1988). It became effective immediately. An additional 45-day comment period was provided. The Secretary determined:

Pursuant to 5 U.S.C. 553, it is found and determined that it is impracticable, unnecessary, and contrary to the public interest to give notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until 30 days after publication in the Federal Registrar because: (1) Shipments of 1988 crop nectarines have begun and this action should cover as much of the 1988 crop as possible. . .

. . . An opportunity needs to be provided for interested persons to file comments, but, as mentioned earlier, it is imperative that the size and maturity requirements and variance procedures apply to as much of the 1988 crop as possible.²²

53 Fed. Reg. at 19231-32. The final rule was published on May 27, 1989. 54 Fed. Reg. 12419 (1989).

In analyzing procedural compliance, it is important to separate out the Secretary's decision that good cause

²² Additional reasons are provided by the Secretary but they deal with the portion of the rule affecting change in maturity standards.

existed to forgo the 30-day waiting period from his decision that good cause existed to implement the regulation prior to providing the full 30-day comment period. In ruling on volume restriction regulations promulgated weekly pursuant to the navel orange market order, the Ninth Circuit recently explored the concept of the good cause exception, as well as the Secretary's history of non-compliance with the APA. *Riverbend Farms*, 958 F.2d at 1485. It held that the good cause exception which allows an agency to forego the 30-day waiting period between publication of a final rule²³ and its effective date is independent from the good cause exception excusing an agency from abiding by the notice and comment requirements:

Unlike the notice and comment requirements, which are designed to ensure public participation in rulemaking, the 30-day waiting period is intended to give affected parties time to adjust their behavior before the final rule takes effect. This is sensible; until the final rule is published, the public is not sure of what the rule will be or when the rule will actually be promulgated. In addition, a window of time usually causes no harm.

Id.; see also *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289-90 (7th Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980) (good cause more easily found as to 30-day waiting period).

The court held that good cause to make weekly volume restriction regulations immediately effective was demonstrated. The affected parties had advance notice sufficient

²³ Here, the interim final rule rather than the final rule is at issue as the regulations became effective upon promulgation of the interim final rule.

to permit them to adjust their behavior and requiring a 30-day waiting period would cause great harm. 958 F.2d at 1485. Both conditions exist here. Growers and handlers knew well in advance that the Secretary intended to institute size regulations for the 1988 season. The proposed rule, published 39 days prior to the regulation becoming effective, expressly stated that intention:

The harvest and shipment of the 1988 nectarine crop is expected to start April 25, 1988, and growers and handlers should be given as much notice as possible of any changes, if adopted to permit the industry to plan accordingly.

53 Fed. Reg. at 12690. Also, as discussed above, the Secretary found in publishing the interim final rule:

[A]t the time the committee made its recommendation most growers had begun to undertake ordinary cultural practices on their orchards to attain desirable fruit size.

53 Fed. Reg. at 19228. Further evidence of growers' knowledge is a letter referenced in the "supplemental information" published along with the proposed rules. The writer opposed the proposed regulations, but understood as of March 1988, that the Secretary intended to apply them in the 1988 season. 53 Fed. Reg. at 12688. Review of letters written by plaintiffs in response to the proposed rules demonstrate a similar understanding.²⁴

The Secretary correctly found that requiring the 30-day waiting period in this case would cause harm to the

²⁴In these letters, plaintiffs protest that others are unaware of the new regulations, yet provide no support for this allegation. See *Wileman II*, pt. 31, exhibit HH.

nectarine industry. 53 Fed. Reg. at 19231-32. In issuing the interim rule, the Secretary found "[e]arly season purchases of small-sized nectarines have a negative impact on total nectarine sales because consumers do not make repeat purchases after being dissatisfied with their original purchases." *Id.* at 19228. Following the logic of the agency's factual finding, allowing the sale of small-sized fruit for another thirty days at the beginning of the season would have had a detrimental impact on the sale of nectarines throughout the season. Agencies may depart from APA procedures "where compliance would jeopardize their assigned missions." *Riverbend Farms* at 1484. Here, the Secretary had a basis to determine that compliance with the 30-day waiting period would harm the sale of a commodity he had a duty to promote.

Waiting an additional thirty days to enforce the rules also would have created inequities within the industry. The California stone fruit industry is a highly regulated industry in which growers and handlers reasonably depend on the Secretary to issue rules which will be applicable throughout a growing season. Different varieties of nectarines are harvested at different times beginning in late spring and continuing throughout the summer. If an additional thirty days had been required, those growers whose fruit matured early in the season would have had an unfair advantage (*i.e.*, the ability to sell small fruit) over those who harvest later in the season.²⁵

The second procedural flaw alleged is the agency's failure to provide a 30-day comment period prior to the

²⁵Plaintiffs claim, without support, that the agency created the time urgency by "sitting" on the committee's recommendations for four months. Plaintiffs complained throughout these proceedings that the Secretary failed to properly supervise the marketing committees. However, here, plaintiffs complain the Secretary took too long to review the marketing committees' size regulation recommendations.

regulation becoming effective.²⁶ The government advances alternate justifications to address this contention. First, it suggests that a fifteen day comment period is in itself sufficient. While the APA mandates no minimum comment period, *Riverbend Farms*, 958 F.2d at 1484, the government has not cited any case in which such a brief comment period was, by itself, found adequate.

Second, the government suggests that the various opportunities given the public to comment on the regulations—the committee meeting, the period prior to publication of the proposed rule, the 15 days provided in March, and particularly, the 45 days provided after the regulation went into effect—add up to more than satisfy the 30 days the Secretary failed to provide. No authority is cited. The Ninth Circuit rejected the idea that a post-promulgation comment period can cure the lack of pre-promulgation notice and comment in *Western Oil & Gas v. United States E.P.A.*, 633 F.2d 803, 810-811 (9th. Cir. 1980). Yet, a 1987 district court opinion, *Sullivan v. Farmers Home Admin.*, 691 F. Supp. 927, 932 (E.D.N.C. 1987), analyzed the holding in *Western Oil* at length, and provides a convincing argument as to why it should be inapplicable here:

The post-hoc comment period at issue in the EPA cases [*i.e.*, *Western Oil*], clearly was not an adequate substitute for prior comment and argument and, thus, did not provide meaningful participation in the decision making process. The promulgation of the final regulations by the EPA ended the decision making process. There was never any indication that the EPA would seriously consider public input made during the post-

²⁶ An adequate notice period was provided, as the proposed rule was published 39 days prior to it becoming effective.

hoc comment period. The situation in the current case is completely different.

The distinguishing factor between the EPA cases and this case is the continuation of the decision making process by FmHA after the promulgation of the "interim" final regulations. The fundamental issue is whether plaintiffs were afforded adequate opportunity for meaningful participation in the decision making process. Here, the answer is yes. Unlike the EPA, FmHA clearly remained receptive to information and argument submitted during the comment period. The regulations of May 22, 1986, were promulgated by the agency merely as "interim" regulations. Following the comment period, FmHA evaluated and addressed those ideas submitted in writing, and even incorporated some of these suggestions into the final regulations of August 18, 1987.

A nearly identical situation exists here. The regulations were promulgated in "interim final" form. Following the post-promulgation comment period, the Secretary evaluated and addressed plaintiffs' comments in writing. While the Secretary declined to incorporate plaintiffs' suggestions, review of the "supplemental information" published with the final rules demonstrates that he fully considered plaintiffs' views.

The reasoning advanced by the court in *Sullivan* has been independently adopted by other courts. In *Universal Health Serv. of McAllen v. Sullivan*, 770 F. Supp. 704 (D.D.C. 1991), *aff'd* 978 F.2d 745 (D.C. Cir. 1992), the court held:

Although post-promulgation opportunity for comment is not a substitute for pre-

promulgation notice and comment, failure to comply with the pre-promulgation procedures of § 553 of the APA may "be cured by an adequate later notice" if "the agency's mind remain[ed] open enough at the later stage."

Id. at 721, quoting *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988). The court found that the Department of Health and Human Services's failure to engage in pre-promulgation notice and comment was at least partially cured by it having adequately considered post-promulgation comments prior to publishing final rules. *Id.* In 1992, a court cited to *Universal Health Serv. of McAllen* in holding a post-promulgation comment period completely cured a failure by the Department of Transportation to provide notice and comment. *Five Flags Pipe Line Co. v. U.S. Dept. of Trans.*, No. 89-0119, 1992 WL 78773 at *5 (D.D.C. April 1, 1992).

Third, the government suggests that the regulations can be upheld under the good cause exception.²⁷ Under the good cause exception, notice and comment is not required when doing so would be: (1) impracticable; (2) unnecessary; or (3) contrary to the public interest. 5 U.S.C. § 553. For the reasons stated above, good cause here existed for the Secretary to implement the regulations with an abbreviated comment period. The good cause exception "authorizes departures from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission. The agency thus must minimize conflict with those APA requirements it is capable of

²⁷The Secretary did not expressly invoke a good cause exception in implementing the regulations without providing a 30-day comment period. He did so only as to his decision to forgo the 30-day waiting period. Yet, he implicitly did so by providing his rationale in comments published along with the proposed and interim final rules, as outlined above.

complying with." *Riverbend Farms*, 958 F.2d at 1485. The agency has done so here by providing a partial comment period prior to making the regulations effective and an additional comment period for 45 days after that date.

Moreover, the agency committed procedural error in failing to provide a full 30-day comment period, such error was harmless. 5 U.S.C. § 706. *Riverbend Farms* warns that "we must exercise great caution in applying the harmless error rule in the administrative rulemaking context," but holds the failure to provide notice and comment to be harmless "where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.'" 958 F.2d at 1487 (citations omitted). As documented above, the proposed changes were fully discussed in the committee's public meeting held in December, 1987. The agency received comments prior to publishing the proposed rule, and later responded to them. Most importantly, plaintiffs submitted detailed comments opposing the size regulations. The Secretary fully considered and responded to these comments in publishing the interim final and final rules. Fifteen additional days of pre-promulgation comment time would not have affected the promulgation of these regulations.

E. Assessments

Plaintiffs assert a variety of challenges to the Secretary's imposition of assessments on handlers which fund promotional and research efforts, as well as the costs of inspection services and the administration of the three fruit committees. The amount of the assessments is set on a yearly basis and is tied to the volume of fruit each handler ships. The impetus of plaintiffs' claims attacking the assessments is their objection to the committees' generic advertising campaigns. The major focus of the committees' promotional efforts has been to market California tree fruit

to consumers nationally. The advertising emphasizes the qualities of each type of fruit and the superiority of California-grown fruit. No advertising by specific brand is allowed. Plaintiffs claim their money can be better spent elsewhere.

1. *Reasoned Decisionmaking As to Generic Advertising*

Plaintiffs first allege that the annual assessments from 1980 until the present were unlawfully imposed because the Secretary has failed in his duty under the APA to engage in reasoned decisionmaking as to the need for generic advertising. Plaintiffs argue, in effect, that the annual regulations imposing assessments are arbitrary and capricious because the Secretary has never justified the need for generic advertising on the record. Plaintiffs allege that the Secretary merely instituted the program by publishing the assessment rate and has each year simply adjusted the amount owed. The ALJ agreed with plaintiffs. The Judicial Officer disagreed.

Review of the record demonstrates plaintiffs' claims to be unsubstantiated. In 1954, Congress amended the AMAA to authorize the Secretary to promulgate regulations:

[e]stablishing or providing for the establishment of marketing research and development projects designed to assist, improve or promote the marketing, distribution and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order.

Pub. L. No. 83-690, § 401, codified at 7 U.S.C. § 608c(6)(I). The authority to implement paid advertising programs was extended to plums and nectarines in 1965, Pub. L. No. 89-330, and to California-grown peaches in 1971, Pub. L. No. 92-120.

The Secretary then conducted formal rulemaking hearings on the record, pursuant to 5 U.S.C. §§ 556 and 557 of the APA. As to plums and peaches, formal rulemaking took place in 1965 to allow for "development projects designed to assist, improve, or promote the marketing, distribution, and consumption of fruit," 7 C.F.R. § 917.39 (1965). The marketing order was amended to include authority for "paid advertising" for plums, after an additional formal rulemaking was conducted in 1971. Formal rulemaking conducted in 1976 resulted in amendment of § 917.39 to include authority for paid advertising for peaches. The current version of § 917.39 reads:

The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of fruit. Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid from funds collected pursuant to § 917.37.

As to nectarines, formal rulemaking hearings were held in 1958 to allow funding for research and promotion, and again in 1966 to allow paid advertising. The applicable section of marketing order 916 is identical to § 917.39. 7 C.F.R. § 916.45.

Plaintiffs do not challenge the adequacy of the formal hearings, nor the findings made by the Secretary in amending the marketing orders.²⁸ Indeed, the Secretary's

²⁸In their post-hearing brief filed at the agency level, plaintiffs for the first time alleged that the formal rulemaking was defective because only a 10-day

findings as to the benefits of advertising are extensive. For example, in publishing his recommended decision as to plums, 36 Fed. Reg. 8735 (1971), the Secretary found:

The records show the consensus of the industry is that promotional activities for plums have been beneficial in increasing demand and should be continued. Plums compete for shelf space and retail promotion with many processed and fresh fruits, many of which are now nationally advertised and promoted. In competing for this space and attention, plums should benefit from a promotional program which offers the retailer an attractive quality product which the industry helps sell with an advertising and promotional campaign.

36 Fed. Reg. at 8736. The Secretary also reviewed in detail marketing considerations pertinent to paid advertising:

The third technique is paid advertising, often referred to as "media". Media is expensive but some things can be done in this field that are inexpensive and yet create an impact on the buying trade as well as the consuming public. Trade paper ads, particularly at the beginning of the season, together with the editorial support which trade papers are willing to accord an advertiser are helpful in launching a program for a seasonal fruit

comment period was given. See *Wileman II*, Judicial Officer's Opinion at 38. At oral argument before this Court, plaintiffs raised for the first time objections as to the adequacy of the substantive formal rulemaking record in 1965. Neither issue is considered here as judicial review is limited to matters raised by plaintiffs in their § 608c(15)(A) petition and ruled on by the Secretary.

such as the plum. Spot radio or TV commercials in the principal markets during peak movement periods is a possibility. It has been found in many fresh promotional programs that spot announcements, particularly when developed with a "dealer tag" at the end of each spot, have considerable influence in triggering retail promotions. "Dealer tags" are blank spots at the end of the announcements in which the announcer refers to a local retailer as a good place to purchase the product. These spots can be merchandised in such a way as to secure extra display space, and promotional price and tie-in advertising financed by the retailer.

Since most of the food page publicity occurs in newspapers, some newspaper advertising might be indicated partly because newspapers are understandably influenced in favor of advertisers when scheduling editorial space. Such ads at the beginning of the season could take the form of announcing the seasonal availability of the fruit while later ads could elaborate upon the deliciousness of the fruit and pinpoint periods of greatest availability.

The Plum Commodity Committee should have the responsibility of developing and carrying out each season's advertising and promotional program.

36 Fed. Reg. at 8737. See also 41 Fed. Reg. 14375 at 14376-77; 31 Fed. Reg. at 5635 at 5636 (1966). It cannot be said in light of this history that the Secretary did not evaluate the benefits of generic advertising.

Plaintiffs contend that this formal rulemaking is somehow irrelevant. Since the regulations state that "[t]he committees, with the approval of the Secretary, *may* establish . . . development projects . . . including paid advertising," plaintiffs contend that formal rulemaking only gave the Secretary the "theoretical discretion" to approve paid advertising and that it is necessary for the Secretary to conduct informal rulemaking as to the viability of paid advertising prior to actually allowing the committees to conduct advertising campaigns. "The Secretary must evaluate and provide reasons for the implementation of *any* advertising program, which the Secretary has *never* provided." Plaintiffs' Summary Judgment Brief at 231 (emphasis in original).

Plaintiffs cite no legal authority for this suggestion that the Secretary must expand his rule-making efforts. Nor have plaintiffs demonstrated changed conditions underlying the agency's findings such as might require the rules to be reconsidered. Upon formal rulemaking, the Secretary determined that paid advertising should be authorized as an appropriate expense that served industry interests. He allowed the committees to institute such programs subject to his approval. He has given such approval by ratifying the committees' annual budgets. No legal or logical reason exists to require that the Secretary annually re-institute informal rule-making to enable industry advertising.

The Secretary fully considered the benefits of advertising in amending the marketing orders through formal rulemaking, the adequacy of which plaintiffs have not challenged. Plaintiffs' contentions concerning advertising are rejected.

2. Procedural Requirements

Plaintiffs next challenge the annual assessment regulations on procedural grounds. They allege that the rates were published in violation of the APA because each year

the Secretary failed to provide an adequate notice and comment period as well as an adequate statement of basis and purpose. From 1980 through 1987 the assessment rates were published only in the form of a final rule. No notice and comment period was provided. In 1988 and 1989 expenses and assessment rates were published first as a proposal and a 10-day comment period was provided. In all years, the Secretary relied on a good cause exception to provide less than thirty (30) days for notice and comment. Rates were typically published in the summer months and were effective retroactively to the start of the harvest season on March 1 of each year.

As to the lack of a notice and comment period, the Judicial Officer found, and the ALJ agreed,²⁹ that good cause existed for the Secretary not to have engaged in notice and comment procedures because establishing the assessment rate is only a mechanical task. The Judicial Officer further found the APA is inapplicable to the Secretary's actions in setting annual budgets for the committees.

At the time of the publication of the final rule setting forth the assessment rate, all discretionary budget determinations have previously been made, and the budgetary-approval process is not subject to the Administrative Procedure Act. Since the final rule announcing the assessment rate sets forth a statutorily-required ministerial calculation, good cause exists for dispensing with notice-and-comment rulemaking. As shown above, however, the Secretary has access to a large amount of data and

²⁹While not entirely clear, the ALJ appears to have later reversed her position in this regard in *Wileman II*. Compare *Wileman I*, decision of ALJ at 338-44 with *Wileman II*, decision of ALJ at 195-96.

recommendations with respect to all items of the budget, including the minutes of the public meetings at which the budget is discussed.

Wileman II, Judicial Officer's Opinion at 86.

An agency's determination as to the applicability of the APA, as well as the appropriateness of a good cause exception for non-compliance with the APA, are questions of law to be reviewed *de novo* by the district court. *See Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 757 n.4 (9th Cir. 1992). *De novo* review of the record supports the finding that good cause existed to dispense with full notice and comment requirements. The annual assessment rate is determined by the statutorily required calculation set forth in 7 U.S.C. § 610(b)(2)(ii). The Secretary only performs the mechanical function of dividing anticipated expenses by the expected shipments of the commodity. Both sets of projected numbers are formulated by the committees after holding public meetings. *See e.g.*, Wileman I, pt. 38, ex 22 (minutes of subcommittee for promotion and research); pt. 23, ex. 2, N-1-A (minutes of nectarine committee).³⁰

The Secretary is not required to provide notice and comment as to the projected yearly budget of the committees. He has already conducted formal rulemaking which authorized him to approve the committees expending money for specific activities sanctioned by Congress, such as research and advertising. While plaintiffs are correct in asserting that the committees' budgets have a substantive impact upon them, the Secretary's authority to impose assessments for appropriate expenses was

³⁰The projected budgets and crop shipments are also described in detail in the Marketing Policy sent to the Secretary. *See e.g.*, Wileman I, pt. 29, ex. 8, AMS-[2]-H. Field Office memorandum sent to the Secretary also discuss these projections. *See e.g.*, Wileman I, pt. 29, ex. 8, AMS-1.

established long ago.³¹ If expenses are within authorized categories, the Secretary has the same discretionary right to set the committees' budgets as he does for any other entity under his control. Plaintiffs provide no authority for the proposition that the APA requires the Secretary's funding decisions on authorized programs to be open to public debate. The AMAA and the marketing orders provide plaintiffs access to annual budgetary decisions at the committee level by providing for public meetings.

A finding that good cause existed to shorten or eliminate the notice and comment period is more easily justified,³² when the assessment rate is viewed as the product of two calculations which the public has no right to comment upon at that stage of the promulgation.³³ Where the Secretary has no discretion in applying the rate formulation, in deciding who will be assessed, or in determining the period in which the rate will apply, there is no unresolved issue upon which meaningful comment can be submitted. *See also Cal-Almond, Inc. v. U.S.D.A.*, No. CV-F-91-064 REC, order of June 3, 1992, at 10 (reaching same conclusion as to annual almond assessments).

Good cause here is supported by the need for the Secretary to communicate the assessment rate to the

³¹As the Judicial Officer explained in quoting the ALJ in part:

It is true that the budgets of these Committees [and other USDA agencies whose budgets are approved by the Secretary without notice and comment rulemaking] affect payment from others, whether they be general taxpayers, fruit handlers, or recipients of some other fee-based Government service. But in all cases this ultimately is a case of Secretarial discretion in approving the expenses of the Committees which *in themselves* impose no direct financial requirement on others.

Wileman I, opinion of Judicial Officer at 82 (emphasis in original).

³²The government has not suggested that the promulgation of the assessment rate itself is exempt from APA requirements.

³³Plaintiffs have not suggested that the APA is applicable as to the Secretary's estimate of the volume of fruit likely to be shipped in the year.

industry in as expedient a manner as possible. The system is such that the growers do not definitively know what the assessment rate will be until midway through the harvesting season. Plaintiffs contend that the Secretary creates this urgency by allowing the committees to delay holding their public meetings until May of each year. In fact, since the Secretary is required to compute the assessment rate based on projected crop production and committee budgets, it is reasonable that the public meetings be set far enough into the season to enable intelligent estimates of both numbers to be made. The marketing orders anticipate that the committees will submit their recommendations only after the season begins. *See, e.g., 7 C.F.R. § 916.31(c)*. The marketing orders similarly anticipate that the Secretary will not set the rate prior to the season beginning. *See e.g., 7 C.F.R. § 916.41(b)*. Given such constraints, it is incumbent upon the Secretary to issue the rates in a timely manner. It is not unreasonable to determine that prompt imposition of the actual rate was more important than advance notification of a proposed rate, where, at that point in the process, neither the Secretary nor the public had a ability to affect the outcome.³⁴

Additionally, even if the Secretary failed to provide proper notice and comment without adequate good cause existing to warrant an exception, the failure is harmless error, pursuant to the test described by the Ninth Circuit in *Riverbend Farms*.

Plaintiffs also contend that the final rules issued by the Secretary specifying the assessment rates are deficient in that no "basis and purpose statement" was provided as

³⁴This is not to condone a return to the former practice of totally eliminating the notice and comment period in issuing assessment rates. Even where, as here, the practical impact of providing the opportunity for notice and comment is slight, the larger policy goals behind the APA remain important. An agency must minimize conflict with the APA by complying to the extent to which it is capable. *Riverbend*, 958 F.2d at 1485.

required by 5 U.S.C. § 553(c). Plaintiffs note that from 1980 through 1987, the final rule amounted to a single paragraph stating that expenses of a certain amount were authorized and a certain assessment rate established. This identical issue was fully considered by District Judge Robert E. Coyle in ruling on a § 608c(15)(B) petition concerning almond assessments. *Cal-Almond, Inc. v. U.S.D.A.*, No. CF-F-91-064 REC, order of June 3, 1992, p. 12-16. Judge Coyle's reasoning is persuasive.

The purpose of Section 553(c) is to "facilitate judicial review." *Alabama Ass'n of Ins. Agents v. Bd. of Governors of Fed. Res. Sys.*, 533 F.2d 224, 236-37 (5th Cir. 1976), *modified on other grounds*, 558 F.2d 729 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). Such a statement enables courts to be aware of the legal and factual framework underlying the agency's action. The nature and content of the action undertaken determines the degree of explanation required. *Id.* Here the Secretary, as required by statute, is performing the mechanical function of dividing anticipated expenses by the expected shipments of the commodity. As outlined above, the basis for these projected calculations is fully explained in committee minutes, marketing policies, and field office memoranda sent to the Secretary. While the format adopted by the Secretary since 1988, in providing detailed "supplemental information," is preferable, eight years of assessments will not be invalidated for failure to include an explanation which is readily discernable by other means.

3. Retroactivity of Assessments

Plaintiffs cite *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), for the proposition that the assessment rates are invalid because they were retroactively applied. The ALJ agreed with this contention, but was reversed by the Judicial Officer. The Secretary's final rule establishing assessment rates was published each year in the middle of

the harvesting season, often in June or July, sometimes as late as October. Yet, in publishing the rates, the Secretary stated that they were effective as of March 1, the start of the harvest season.

In *Bowen*, the Supreme Court held that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* at 208. While, as the government contends, there is arguably an *implicit* grant of such power in the AMAA, no express authorization exists in the Act. *But see Cal-Almond, Inc. v. U.S.D.A.*, No. CV-F-91-064 REC, order of June 3, 1992, at 11 (total assessment amounts are necessarily determined by crop year-end).

The holding in *Bowen* is inapplicable here, but for a different reason than advanced by the government. The government relies on Justice Scalia's concurrence in *Bowen* which differentiates between a truly retroactive rule and a rule having only a "secondary" retroactive effect. *Bowen*, 488 U.S. at 219. The latter type is said to be permissible based on the example of a Treasury tax regulation that imposes tax liability on future income in a manner that makes past investments less valuable. While such a regulation can "unquestionably *affect* past transactions . . . it does not for that reason cease to be a rule under the APA." *Id.* (emphasis in original). Justice Scalia concluded, "[t]hat is not retroactivity in the sense at issue here, *i.e.*, in the sense of altering the *past* legal consequences of past actions." *Id.* (emphasis in original).

The Ninth Circuit has recently adopted this reasoning in two cases, *National Medical Enterprises, Inc. v. Sullivan*, 957 F.2d 664 (9th Cir. 1992), and *American Mining Congress v. United States E.P.A.*, 965 F.2d 759 (9th Cir. 1992). In the former case, a Medicare regulation imposing a cap on reimbursements was only secondarily retroactive

because even though it phased out existing rules, it "merely provided that *at some future date*" reimbursement would cease. 957 F.2d at 671 (emphasis in original). In *American Mining Congress*, the court upheld an EPA regulation requiring owners of inactive mines to apply for a permit regulating future storm water discharges, as not altering past legal consequences of past actions. 965 F.2d at 769. Plaintiff there "ignore[d] the distinction between merely 'affecting rights' and 'retroactively imparting an obligation *cum* liability.'" *Id.* quoting *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1127 (D.C. Cir. 1985).

The government argues that assessment regulations are only secondarily retroactive because the regulations have exclusively future effects, as the obligation to pay does not become binding until the rule is published. Yet, Justice Scalia expressly rejected the notion that "a rule has future effect merely because it is made effective in the future." *Bowen*, 488 U.S. at 218. In Justice Scalia's hypothetical, and the two Ninth Circuit cases, the regulation only had a detrimental retroactive effect on past actions as a *consequence of the occurrence of some future action* (*i.e.*, the investment produced income, the amount of Medicare reimbursements reached a specified level, installation of treatment systems became necessary to meet permit requirements).

Here, disregarding, as is required, that act of publishing the rules, there is no future effect *as to the assessments owed for fruit handled prior to publication of the final rule*. The effect is entirely retroactive. If plaintiffs were to stop doing business a month prior to the rates being published, under the regulations they would remain liable for assessments for fruit handled from March 1 until the last day of business. As such, these regulations do not fit under the "secondary effect" exception defined by Justice Scalia or adopted by the Ninth Circuit.

Justice Scalia's concurrence contains a much stronger basis for determining that *Bowen* is inapplicable to these

facts. The type of rulemaking at issue in *Bowen* was that which "alter[s] the *past* legal consequences of past actions." 488 U.S. at 219 (emphasis in original). See also *American Mining Congress*, 965 F.2d at 769. Here, the final rule establishing an assessment rate does not alter past legal consequences of past actions. Section 610(b)(2)(ii) of the AMAA states:

Each order relating to any other commodity or product³⁵ issued by the Secretary under this title *shall provide* that each handler subject thereto *shall pay* to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find reasonable and are likely to be incurred by such authority or agency, during any period specified by him . . . (emphasis supplied).

Congress has decreed that the handlers must pay all expenses reasonably incurred by the fruit committees. This obligation exists whether publication of the assessment rate occurs in February or October of each year and without regard to when the expenses are incurred.

No additional duties are imposed on the handlers. If the Secretary published an assessment rate in February and found in November that a shortfall existed, he could sue the handlers to make up the difference. Section 610(b)(2)(iii) allows the committees to directly sue any handler refusing to pay its fair share. Publication of the assessment rates imply quantifies the amount of the obligation already imposed by Congress. This is not a situation, as in *Bowen*, where an agency changes the rules in the middle of the game.

³⁵*I.e.*, other than milk.

4. First Amendment Claims

Plaintiffs next claim that the forced imposition of assessments for the purpose of generic advertising violates their first amendment rights.³⁶ They advance two theories. The first is their right to be free of forced association. They allege they are being forced to participate in a generic advertising program which is contrary to their personal, professional, ideologic, philosophic and commercial beliefs.

Secondly, plaintiffs allege they are denied the right not to engage in speech. They contend the program is misguided in its methods and unsuccessful in its results.³⁷ To the extent the program increases sales of tree fruit, they allege it is inefficient in that it encourages "free-riding;" *i.e.*, increased sales by non-assessed competitors outside California. Plaintiffs concede that they do wish to advertise, but prefer to advertise their own brands, highlighting the individual attributes of their fruit, such as the lack of pesticides used. The financial drain of assessments is said to substantially curtail their advertising ability.

Plaintiffs and the government focus their respective arguments around a 1989 Third Circuit case, *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). Both sides agree that *Frame* is the only published case in which a court has considered this issue.

³⁶As the ALJ found for plaintiffs on non-constitutional grounds, she did not reach their first amendment, fifth amendment and unlawful delegation claims. The Judicial Officer rejected all three.

³⁷Plaintiffs also contend that the program is not truly generic because assessments are used to advertise varieties of fruit grown exclusively by one grower. As their sole evidence of this claim, plaintiffs allege that in 1989 a promotional chart was distributed nationally which "included the promotion of the 'Red Jim' nectarine, and exclusive propriety variety of one of the commodity committeemen." Plaintiffs' Brief for Summary Judgment at 268. Review of the poster reveals that the variety in question is included in a chart of 25 varieties of California summer tree fruits. *Wileman II*, pt. 51, ex. 256. This a *de minimis* violation, if any, and is not considered further.

Frame analyzed the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901-11, which requires cattle producers and importers to pay a one dollar assessment on each head of cattle sold. The assessments finance a national beef promotional campaign. The Secretary appoints members to the Cattlemen's Beef Promotion and Research Board which administers the Beef Promotion and Research Order. The Board elects an Operating Committee which is given the responsibility of developing an advertising program and budget, subject to the approval of the Secretary. An affected producer argued the program violated his first amendment rights of free association and free speech, his fifth amendment equal protection rights, and constituted an unlawful delegation of legislative authority. All these claims were rejected.

Plaintiffs candidly admit that no court has ever found a violation of the right to be free of compelled commercial speech.³⁸ They cite to *Abod v. Detroit Bd. of Education*, 431 U.S. 209 (1977), and its progeny, which establish the right to be free of compelled political speech and ask the Court to extrapolate a similar protection for purely commercial speech.³⁹ It is unnecessary to reach the question of whether such a right exists, as violations of commercial speech rights are analyzed under a lower

³⁸The plaintiff in *Frame* conceded that, as to his compelled speech argument, the speech at issue qualified as commercial speech. 885 F.2d at 1133. Here, plaintiffs' argument seems to stray from a straight-forward concession that the speech at issue here is purely commercial to an implication that it is something more. Commercial speech is expression related solely to the economic interest of the speaker and his audience. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748 (1976). The only goal of the speech at issue here is to convince consumers to buy growers' fruit. It is purely commercial speech.

³⁹There is no reason to accept plaintiffs' further invitation to impose a stricter test than that established by the Supreme Court for ordinary commercial speech cases.

standard of scrutiny than forced association claims.⁴⁰ See *Frame* at 1133. Given the similarity of the claims in this factual setting, the lesser standard is subsumed into the greater.⁴¹ See *Frame* at 1134. As discussed below, no violation is found to exist even under the higher standard.

The court in *Frame* found support for the cattle producer's right to be free of compelled association in *Abod*, which held state laws forcing employees to pay a service charge equal to the amount of union dues to be unconstitutional. *Frame* also found *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), requires a "compelling interest" standard of scrutiny be employed in forced association cases. *Frame* expressed its inquiry as follows:

[W]e will sustain the constitutionality of the Beef Promotion Act only if the government can demonstrate that the Act was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms.

885 F.2d at 1134.

The court examined three areas of inquiry: the government's interest, the degree of ideological neutrality, and the degree of infringement on First Amendment rights.

⁴⁰The test for evaluating the constitutionality of commercial speech regulation was outlined in *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980): (1) Does the state assert a substantial government interest? (2) Is the regulation in proportion to that interest? and (3) Is the incursion on commercial speech carefully designed to achieve the government's goal?

⁴¹Plaintiffs phrase the two arguments in alternate form, asking the Court to consider the compelled commercial speech claim if the forced association claim is rejected. There is no need to do so. The *Frame* test is inclusive enough to evaluate both claims, given their factual similarity.

Based on a review of the legislative history, the government's interest was held to be compelling due to the congressional finding that the economic health of the beef industry was at risk, as was the traditional way of life of the American cattleman. *Id.* at 1134-35. The purpose behind the act, the promotion of beef sales, was held to be ideologically neutral. *Id.* at 1135.

The court found the interference imposed upon the cattlemen's rights to be slight, when compared to infringements held objectionable in other cases. The Board was authorized "only to develop a campaign to promote the product that the defendant himself has chosen to market." *Id.* at 1136. Unlike cases such as *Abood*, the Board "will not engage in activities that necessarily implicate a broad range of ideological, moral, religious, economic, and political interests, such as negotiation of wage increases, medical benefits, and limitations on the right to strike." *Id.* Citing *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984), which holds that spending for non-political purposes burdens first amendment rights less significantly than does spending for other purposes, the court found it significant that the act expressly prohibits spending for political purposes. 885 F.2d at 1136.

The court rejected the cattle producer's specific objections to promotional activities. He had claimed that the Board "promotes a specific point of view, *i.e.*, that the consumption of beef is desirable, healthy, nutritious," and disagreed with the board's "message and methods." *Id.* at 1137. The court rejected these complaints as "vague." *Id.* The producer "failed to characterize his objections to the advertisements in a manner that would allow a reviewing court to reasonably infer a dispute over anything more than strategy." *Id.* While the "government's burden is a heavy one," the court concluded the "importance of the governmental interest justifies the slight incursion on Frame's associational and free speech rights." *Id.* at 1134.

Review of the legislative history of the amendment to the AMAA which allows the Secretary to impose assessments for the purposes of promoting "the marketing, distribution and consumption" of commodities subject to marketing orders demonstrates a compelling government interest.⁴² The legislative history paints a bleak description of the condition of the American farmer. H.R. Rep. No. 1927, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S.C.C.A.N. 3399. Production was too high and consumption too low. "Net farm income has declined 13 percent in the past 2 years while other sectors of our economy have achieved new records." *Id.* at 3402. "This very abundance has brought great economic problems to our farm people. Their income has dropped and their costs have increased." *Id.* at 3401. Instability in agriculture was found to have adverse effects on the nation's economy and security. *Id.* at 3402. The House Agriculture Committee concluded that the act "presents a farm program to protect the income of farmers while comprehending the interests, the needs, and the security of all segments of the economy and of all our people." *Id.* at 3403. The act achieved these goals through a variety of means, including encouraging "the expansion of markets and consumption at home and abroad." *Id.* at 3403. The act was also found to have the societal objective of "maintain[ing] a maximum of freedom of enterprise in farming, keeping it a business in which free and self-respecting men and women can earn a decent living for themselves and their families." *Id.* at 3407.

The purpose underlying the generic advertising programs is ideologically neutral. Its only goal is to bolster the

⁴²The amendment was part of legislation entitled the Agricultural Act of 1954, Pub. L. No. 83-690, which was intended to stabilize the agricultural industry through a variety of means, chief among which was a system of price supports.

The brief legislative histories of the amendments to the AMAA which include specific authorization for the use of paid advertising for the three fruits contain no discussion as to the need for assessments. *See* 1965 U.S.C.C.A.N. 4142; 1971 U.S.C.C.A.N. 1406.

image of California tree fruit in an effort to increase sales. "It harbors no intent to 'prescribe orthodoxy' or 'communicate an official view.'" *Frame*, 885 F.2d at 1135 (citing *Wooley v. Maynard*, 430 U.S. 705 (1977) and *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943)).

The assessment programs' interference with first amendment rights is slight. The marketing committees are "authorized only to develop a campaign to promote the product[s] that [plaintiffs] have chosen to market." See *Frame* 885 F.2d at 1136. Plaintiffs concede they are presently advertising on their own. There is no allegation that the marketing committees have taken actions to censor or limit plaintiffs' advertising activities.

The committees are allowed to engage only in commercial speech on behalf of fruit growers and handlers. As a consequence, the committees' activities will not implicate the range of interests which potentially result in broad constitutional incursions. The government concedes that if the committees were allowed to expend money for lobbying purposes or to fund political campaigns, the infringement would be intolerably great. This is not the case, as the marketing committees are not authorized to spend assessment funds for political activities.⁴³

As to plaintiffs' specific objections to the promotional activities authorized by the marketing committees, most appear to be complaints as to the marketing strategy employed. "[T]he individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Aboud*, 431 U.S. at 223. Plaintiffs' complaints of this type are both great and small. At the broadest level, they complain that the advertising program simply does not work. To the extent that it does increase sales of fruit

⁴³ Plaintiffs' claims against individual committee members alleging they expropriated assessments for non-authorized purposes, including lobbying, will be addressed and resolved in that lawsuit.

generally, they allege it does not result in sales of California-grown fruit, as there is a lack of information in the stores which would allow consumers to differentiate California fruit from fruit grown in other regions. To the extent the program results in greater sales of California fruit, it does not benefit the varieties plaintiffs sell, because the campaign emphasizes the red color of California fruit, while they specialize in yellow varieties. Plaintiffs further allege: the promotion would be more effective for their needs if the campaigns were targeted at wholesale buyers and included in-store taste tests; radio ads often are scheduled at odd times of day, such as early morning, and the quality of the ads are poor. In short, plaintiffs allege they could do a much better job marketing their fruit. These are simply disagreements over strategy.

Plaintiffs' other bases for objecting to the promotional campaigns are not entirely clear. They provide the total dollar amounts of assessments imposed on their fruit as evidence of the economic burden, yet the issue is not the degree to which the assessment programs impose a financial hardship, but the degree to which they impose on first amendment rights. Plaintiffs cannot overcome the reality that the assessments are being used to promote a product which they produce.

Scattered throughout plaintiffs' briefs are additional objections which are difficult to characterize or quantify. They assert that the advertising condones "lying" in that it promotes the "lie" that red colored fruit is superior, that it rewards mediocrity by advertising all varieties of California fruit to be of equal quality, that it promotes sexually subliminal messages as evidenced by an ad depicting a young girl in a wet bathing suit, and that it promotes the "socialistic programs" of the Secretary. It is impossible from these "vague claims" to determine that plaintiffs' first amendment rights have been significantly infringed.

While the AMAA implicates the first amendment rights of handlers forced to participate, it was enacted in

furtherance of an ideologically neutral compelling state interest, and infringes on their rights to a minimal degree no more than necessary to achieve the stated goal.

5. Equal Protection Claim

The Fifth Amendment contains an implicit right of equal protection barring the federal government from discriminating between individuals or groups. *Washington v. Davies*, 426 U.S. 229, 239 (1976). Plaintiffs allege that they are being discriminated against because advertising assessments are imposed on handlers of California fruit, but not upon those who handle out-of-state or foreign fruit. Plaintiffs acknowledged the weakness of this argument at the oral hearing by conceding that they consider their other arguments to be "substantially stronger." *Frame* rejected a similar claim. 885 F.2d at 1137-38.

The Supreme Court has held:

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause [and correspondingly the Federal Government does not violate the equal protection component of the Fifth Amendment] merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequity.'"

Schweiker v. Wilson, 450 U.S. 221, 234 (1981) quoting *Dandridge v. Williams*, 397 U.S. 471 (1970) (citations omitted, bracketing in original). "This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is

particularly a legislative task and an unavoidable one. Perfection in making the necessary classification is neither possible nor necessary."⁴⁴ *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

Here, a rational relationship exists. Review of 7 U.S.C. § 608c(11) demonstrates that Congress believed the policies of the AMAA were best accomplished by regionalization. Congress was cognizant of the fact that different geographic areas and different commodities have different marketing needs. Marketing orders "shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out" the declared policy of the act. 7 U.S.C. § 608c(11)(B). Congress declared the policy of the AMAA to be to "establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish" parity prices for farmers and protection for the interests of consumers. 7 U.S.C. § 602(1)(2). In its policy statement, Congress expressly empowered the Secretary to employ market development programs as one method of achieving the orderly marketing of specified commodities, including plums, nectarines and California peaches. 7 U.S.C. § 602(3), referencing § 608c(6)(I). It is not necessary to evaluate whether imposing assessments upon the fruit of one region and not others is wise. It is enough that Congress had a reasonable basis for determining that such a policy was necessary. The stated need for market stability is a sufficient basis.

⁴⁴Plaintiffs suggest that a "compelling interest" standard of scrutiny is appropriate here as fundamental first amendment rights are at issue. Given the minimal impact of these rights, as outlined above, this heightened standard need not be applied.

6. Unlawful Delegation of Legislative Authority Claim

The last of plaintiffs' constitutional challenges is an allegation that the AMAA is unconstitutional because it unlawfully delegates legislative authority to the Secretary to impose assessments on behalf of the marketing committees. Plaintiffs are fifty years too late in pressing an unlawful delegation claim. See *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 337 n.9 (9th Cir. 1990) (noting the "virtual absence of cases striking down a delegation"). "With respect to federal agencies, only very broad, literally standardless grants of legislative power will offend the Constitution." *Id.*; see also *Skinner v. Mid-America Pipeline*, 490 U.S. 212, 218 (1989) ("so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress had been obeyed,'" no unlawful delegation of legislative power has occurred).

As described above, the statute's "Declaration of Policy," 7 U.S.C. § 602, delineates the goals of the AMAA, as well as the methods the Secretary may employ in achieving those goals. Far from a "literally standardless grant of legislative power," the Act allows the Secretary to impose assessments for a limited range of activities after rulemaking has been completed. That plaintiffs disagree with many of these activities does not make them unlawfully delegated.

The argument that the unlawful delegation has been made not to the Secretary, but to the marketing committees themselves, is equally unavailing. As the court found in *Frame*, delegation of the responsibility for the implementation of an advertising campaign is not an unlawful delegation. 885 F.2d at 1128. No lawmaking authority has been entrusted to the committees. All budgets, plans and projects formulated by the committees become final only upon the approval of the Secretary.

F. Compliance with the Sunshine Act, California's Brown Act, and the Federal Advisory Committee Act.

Plaintiffs allege that the three fruit committees have failed to comply with the Sunshine Act, California's Brown Act, and the Federal Advisory Committee Act. Plaintiffs then admit that the Sunshine Act is inapplicable and never again discuss the impact of the Brown Act, except to drop a footnote stating that the committees fall within its purview because they are "local agencies," which plaintiffs define as including "any non-profit corporations created by one or more local agencies." No authority is provided for the proposition that the United States Department of Agriculture is a "local agency," or explanation as to how the Brown Act is applicable in the context of this case.

As to the Federal Advisory Committee Act, 5 U.S.C. App., plaintiffs concede in their reply brief that "the annual spring and fall meetings of the committees were properly noticed and held openly." They cite no evidence that the committees attempted to discourage public attendance or participation at the meetings, or that plaintiffs have been unable to express their views. Instead, plaintiffs allege that committee members created an "alter-ego corporation," known as the Tree Fruit Reserve, the purpose of which is to allow certain committee members to predetermine the outcome of committee meetings and arrange for the theft of the annual assessments.

To the extent the Federal Advisory Committee Act is applicable to the fruit committees,⁴⁵ plaintiffs have failed to explain how the actions of the committees themselves contravene its requirements. Resolution of allegations as to the acts of individual committee members or the Tree Fruit

⁴⁵The Judicial Officer found the statute to be inapplicable to the committees, as their role is primarily operational rather than advisory. It is not necessary to resolve this issue.

Reserve is left to plaintiffs' suit against them. To the extent plaintiffs allege that this conspiracy involved the Secretary and USDA employees, their alleged illegal conduct is not at issue in this review of administrative rulemaking.

G. Legality of the California Tree Fruit Agreement

Plaintiffs allege that the California Tree Fruit Agreement ("CTFA") is a non-entity which has never been granted authority by the Secretary pursuant to the APA. This appears to be an uncontested statement. The CTFA is mentioned only in Marketing Order 917, where there is a minor reference to sending reports and requests to the "Control Committee, California Tree Fruit Agreement." 7 C.F.R. § 917.110. The basic problem with developing plaintiffs' argument further is that there appears to be no agreement as to what the term "California Tree Fruit Agreement" means. The Judicial Officer offers a description which reflects the fluidity of the definition of CTFA depending on the circumstances:

The term "California Tree Fruit Agreement" (CTFA) is a term that has different meanings, depending on the context in which it is used. The term is variously used by different people, or even the same people at different times, to refer to any or all of the various groups of people associated with Marketing Orders 916 and 917, or to Marketing Order 917 itself. To growers, handlers, and others associated with the industry, "CTFA requirements" may mean, at times, explicit USDA regulations under Order 916 or Order 917, or specific maturity tests either as determined by the Inspection

Service or as determined by changes and variances made by the administrative committees. Inspection Service personnel use the term to refer to any Committee members or staff personnel or to requirements under the two Marketing Orders, as distinct from Inspection Service personnel and the requirements in the U.S. Standards. The Committees' members and the hired staff personnel tend to use the term "CTFA" to mean the hired staff employees, and use "CTFA requirements" to mean any Marketing Order requirements, although such usage is not consistent.

* * * * *

In a 1977 memorandum of agreement between the Control Committee of CTFA (i.e., the Control Committee of Order 917), the Nectarine Administrative Committee, and the Pear Program Committee, the term CTFA is defined to mean Order 917, and it is agreed that the Control Committee of Order 917 will provide all paid staff services and facilities for Order 916 and a California State Processed Pear Marketing Order through a somewhat complicated arrangement whereby the latter two Marketing Order Committees have input into the staff hiring and other expenditures (through a joint Management Services Committee). The staff employees paid under this arrangement are sometimes referred to as the CTFA, or the CTFA staff.

Wileman I, Judicial Officer's Opinion at 57-58.

If plaintiffs employ the term CTFA synonymously with Marketing Order 917, it is authorized. If CTFA is meant to refer to the committees, they too have been authorized. If it refers to employees hired by the committees to help administer the marketing orders, their employment also has been authorized.⁴⁶ There is no prohibition against committees hiring employees and using a name, CTFA, to designate functionaries of the committees. There similarly appears to be no bar to the committees entering into agreements to share the same administrative staff.

The powers of such employees are delineated by the marketing orders. Employees may implement the Secretary's regulations only as authorized by the committees. To the extent that plaintiffs allege that certain employees exceeded this authority and took actions to harm plaintiffs' interests, these claims have been heard in a separate lawsuit.

H. Administrative Process as a Denial of Due Process

Plaintiffs finally allege that they were denied due process rights by a requirement that they exhaust administrative remedies under section 608c(15)(A). Plaintiffs specifically allege that the lack of a post-deprivation remedy and the Secretary's delay in ruling on the appeal of the ALJ's decisions constitute violations of due process. As to the first issue, plaintiffs contend that the Supreme Court's decision in *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), stands for the proposition that, in challenging the imposition of assessments, they are entitled to either a pre-deprivation hearing or a post-deprivation remedy. This issue is moot. It has

⁴⁶Both marketing orders list among the duties of the committees: "To appoint such employees, agents and representatives as it may deem necessary, and to determine the compensation and define the duties of each." 7. C.F.R. § 916.31(b); 917.34(d).

been determined above that plaintiffs would have been entitled to a post-deprivation refund of their assessments had the illegality of the assessment regulations been established.

As to the issue of delay, the tortuous course of events of this dispute has previously been noted at the appellate level and by this Court. The Ninth Circuit found these delays to be "appalling." *Wileman Bros. & Elliott, Inc., v. Yeutter*, 87-2938, unpublished opinion of October 29, 1990 (9th Cir.). Each of the two proceedings took more than three years, from time of filing to issuance of the Judicial Officer's final order.⁴⁷

Delay naturally resulted from the two-step review procedure established under the AMAA and was exacerbated by disputes between the ALJ and the Judicial Officer. Much of the delay was caused by the actions of plaintiffs. The thousands of pages of testimony adduced at the administrative hearings, as well as the hundreds of pages of briefs filed in this Court by plaintiffs, have placed a considerable burden on the tribunals hearing the case. Four hundred sixty-five exhibits were introduced at the two administrative hearings, which lasted a total of 29 days. Plaintiffs exhaustively argued every possible procedural, regulatory, and constitutional point, all of which had to be heard, considered and decided. This is not to suggest that plaintiffs proceeded in bad faith, but rather to note that their method of litigating the case naturally led to significant delays. This Court has required over nine months to review and decide these voluminous and complex motions for summary judgment. While, in retrospect, all parties concerned could and should have taken steps to shorten the process, each has contributed to

⁴⁷The first (15)(A) petition was filed more than five and one-half years ago on April 20, 1987. The first administrative proceeding (Wileman I) was not concluded until July 9, 1990. The second proceeding (Wileman II) began with plaintiffs' filing on June 6, 1988 and concluded on September 30, 1991.

the delay. Under these circumstances, that delay has not resulted in a denial of due process.

IV. CONCLUSION

Plaintiffs' motion for summary judgment is DENIED. The sums held in the trust accounts of plaintiffs' counsel shall be disbursed to the Secretary.

Defendant's motion for summary judgment is GRANTED. Defendants shall lodge an order with the Court within five (5) days in conformance with this decision.

SO ORDERED.

DATED: January 27, 1993.

Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Case No. CV-F-40-473 OWW

Consolidated with
CV-F-88-568 OWW
CV-F-87-392 OWW
CV-F-90-088 OWW
CV-F-91-318 OWW
CV-F-91-319 OWW

WILEMAN BROTHERS & ELLIOTT, INC.,
A CALIFORNIA CORPORATION; AND KASH, INC., A
CALIFORNIA CORPORATION, *PLAINTIFFS*,

v.

MICHAEL ESPY¹, SECRETARY OF AGRICULTURE,
DEFENDANT.

Case No. CV-F-91-625 OWW

GERAWAN FARMING, INC., A CALIFORNIA CORPORATION,
PLAINTIFF,

vs.

MICHAEL ESPY, SECRETARY OF AGRICULTURE,
DEFENDANT.

¹Michael Espy, Secretary of Agriculture, is hereby substituted for Edward Madigan pursuant to Federal Rules of Civil Procedure, Rule 25(d)(1).

Case No. CV-F-91-686 OWW
 ASAKAWA FARMS, ET AL. *PLAINTIFFS*,
 vs.

MICHAEL ESPY, SECRETARY OF AGRICULTURE,
DEFENDANT.

Lead Case No.:
 CV-F-92-5185 OWW

Consolidated Cases:
 CV-F-92-5186 OWW
 CV-F-92-5187 OWW
 CV-F-92-5188 OWW
 CV-F-92-5189 OWW
 CV-F-92-5190 OWW
 CV-F-92-5191 OWW
 CV-F-92-5192 OWW

UNITED STATES OF AMERICA, *PLAINTIFF*,

v.

SHIG NAGAO, *DEFENDANT*.

ORDERS AND JUDGMENT

Whereas the following cases are currently pending before this Court:

(1) CV-F-90-473 OWW, wherein Wileman Bros. & Elliott, Inc. and Kash, Inc. seek judicial review under § 15(B) of two 15(A) Administrative petition decisions issued by the Secretary, challenging the use of color chips and the well-matured maturity standard for peaches, plums and nectarines; size elimination regulations, and the legality of advertising and other assessments; among other issues.

(2) CV-F-87-392 OWW, wherein Wileman Bros. & Elliott, Inc. and Kash, Inc. seek an injunction against the Secretary of Agriculture prohibiting the use of color chips and the well-matured standard for peaches, plums and nectarines;

(3) CV-F-91-625 OWW, wherein Plaintiff Gerawan Farming, Inc. seeks 15(B) judicial review of the 15(A) administrative petition ruling issued by Defendant Secretary of Agriculture involving issues similar to those addressed by Wileman Bros. & Elliott, Inc. and Kash, Inc.'s 15(B) proceeding described above;

(4) CV-F-88-568 OWW, wherein Plaintiff USA seeks peach, plum and nectarine assessments for the harvest seasons of 1987 and 1988 against Wileman Bros. & Elliott, Inc. and Kash, Inc.

(5) CV-F-90-088 OWW, wherein Plaintiff USA seeks against Wileman Bros. & Elliott, Inc., Kash, Inc., and Gerawan Farming, Inc. peach, plum and nectarine assessments for the 1989 and 1990 harvest seasons; and for peaches and nectarines harvested during 1991 and 1992. This suit also involved the Court's denial of the Secretary's request for preliminary injunction against Gerawan to mandate compliance with the Secretary of Agriculture's size elimination regulations for nectarines and peaches on the ground that such request was moot at the time of the hearing;

CV-F-88-569 OWW and CV-F-90-088 OWW also involved the Court's Order and a stipulation between the parties for the holding of all assessments in an attorney-client trust fund account pending the final determination as to the validity of the marketing order provisions which are challenged in the 15(B) proceedings (CV-F-90-473 OWW and CV-F-91-625 OWW).

(6) CV-F-91-318 OWW and CV-F-91-319 OWW, wherein the Court denied USA's request for a preliminary injunction to compel Wileman Bros. & Elliott, Inc. and

Kash, Inc. to submit to the use of color chips and the well-matured standard and to pay assessments out of trust prior to the finality of the 15(B) litigation;

(7) CV-F-91-686 OWW, wherein Plaintiffs Asakawa Farms, Chiamori Farms, Phillips Farms, Kobashi Farms, Inc., Tange Bros., Inc., Nagao Farms, Nilmeier Farms, Chosen Enterprises, George Huebert Farms, Wilmer Huebert Farms, Kobashi Farms, Nakayama Farms, Inc., and Mihara Farms seek 15(B) review against the Secretary of Agriculture's ruling on their various 15(A) administrative petitions which raise similar issues as those involved in the Wileman and Kash 15(B) proceeding described above;

(8) CV-F-92-5185 OWW, wherein USA seeks against Nagao Farms, for advertising and other assessments for the 1990 harvest season, \$5,325.86, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(9) CV-F-92-5186 OWW, wherein USA seeks against Nilmeier Farms, for advertising and other assessments for the 1990 harvest season, \$6,034.77; and 1991 assessments in the amount of \$3,782.84, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(10) CV-F-92-5187 OWW, wherein USA seeks against Phillips Farms, for advertising and other assessments for the 1990 harvest season, \$41,541.74; 1991 assessments in the amount of \$5,786.09; and 1992 assessments in the amount of \$10,361.08, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(11) CV-F-92-5188 OWW, wherein USA seeks against Wilmer Huebert Farms, for advertising and other assessments for the 1990 harvest season, \$9,647.07; and 1991 assessments in the amount of \$316.47, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(12) CV-F-92-5189 OWW, wherein USA seeks against Kobashi Farms, for advertising and other assessments for the 1990 harvest season, \$10,312.65; 1991 assessments in

the amount of \$5,513.26; and 1992 assessments in the amount of \$7,131.59, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(13) CV-F-92-5190 OWW, wherein USA seeks against George Huebert Farms, for advertising and other assessments for the 1990 harvest season, \$9,910.59; 1991 assessments in the amount of \$802.95; and 1992 assessments in the amount of \$3,637.78, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(14) CV-F-92-5191 OWW, wherein USA seeks against Mihara Farms, for advertising and other assessments for the 1990 harvest season, \$6,590.97; and 1991 assessments in the amount of \$1,788.52, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(15) CV-F-92-5192 OWW, wherein USA seeks against Kobashi Farms, Inc., for advertising and other assessments for the 1991 harvest season, \$15,099.50; 1991 assessments in the amount of \$8,582.41; and 1992 assessments in the amount of \$13,318.30, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;²

WHEREAS, the parties to all of the aforementioned cases have agreed that the cases should be consolidated, and good cause appearing therefore,

IT IS ORDERED that all of the aforementioned cases are hereby consolidated with Lead Case No. CV-F-90-473 OWW. It is further stipulated and agreed by all parties and hereby ordered that Gerawan Farming, Inc.'s 15(B) proceeding, the assessment collection action as related to Gerawan (CV-F-90-088 OWW), the 13 handlers' 15(B) proceeding (CV-F-91-686 OWW) and the assessment collection action against the 8 remaining handlers (Consolidated Case No. CV-F-92-5185 OWW) shall be governed by the findings and judgment as Wileman Bros. & Elliott,

²By Order dated April 15, 1993, the Court ordered the cases listed in paragraphs (8) through (15) consolidated for all purposes, under Lead Case No. CV-F-92-1585 OWW.

Inc. and Kash, Inc. receive in their appeal of the 15(B) consolidated proceeding.

Regarding Wileman Bros. & Elliott, Inc. and Kash, Inc.'s 15(B) proceeding, Case No. CV-F-90-473 OWW, the Court having considered the cross-motions for summary judgment and having heard oral arguments on March 13, 1992, the Court on January 27, 1993, issued a Modified Memorandum Opinion and Order Re Cross-Motions for Summary Judgment. For the reasons expressed therein, summary judgment is hereby entered in favor of the Secretary of Agriculture and Plaintiffs Wileman Bros. & Elliott, Inc. and Kash, Inc.'s 15(B) complaint is dismissed with prejudice.

As the 15(B) actions brought by Gerawan Farming, Inc. (Case No. CV-F-91-625 OWW) and Asakawa Farms, et al. (CV-F-91-686 OWW) raise the same issues decided by the Court in the cross-motions for summary judgment in Case No. CV-F-90-473 OWW, judgment is entered in favor of the Secretary of Agriculture in those actions, and the complaints of Gerawan Farming, Inc. and Asakawa Farms, et al. are dismissed with prejudice for the reasons set forth in the Court's Modified Memorandum Opinion and Order re: Cross-Motions for Summary Judgment, issued on January 27, 1993, in Case No. CV-F-90-473 OWW.

Regarding all of the aforementioned assessment collection actions wherein the United States is listed as the only named plaintiff, pursuant to Fed. R. Civ. P. 17, it is ordered that the Nectarine Administrative Committee of Marketing Order 916 and the Control Committee for the Peach and Plum Committees of Marketing Order 917 are hereby added as Plaintiffs in Case Nos. CV-F-88-568 OWW, CV-F-90-088 OWW, CV-F-92-5185 OWW, CV-F-92-5186 OWW, CV-F-92-5187 OWW, CV-F-92-5188 OWW, CV-F-92-5189 OWW, CV-F-92-5190 OWW, CV-F-92-5191 OWW, and CV-F-92-5192 OWW (hereinafter referred to as "the collection actions").

The USA, the Nectarine Administrative Committee and the Control Committee for the Peach and Plum committees moved for summary judgment against Wileman Bros. & Elliott, Inc. and Kash, Inc. in collection actions CV-F-88-568 OWW and CV-F-90-088 OWW, and against Gerawan Farming, Inc. in CV-F-90-088 OWW. However, summary judgment has not been granted in the collection action against Gerawan in CV-F-90-088 OWW, nor sought in the other eight (8) handlers collection actions, i.e. CV-F-92-5185 OWW, CV-F-92-5186 OWW, CV-F-92-5187 OWW, CV-F-92-5188 OWW, CV-F-92-5189 OWW, CV-F-92-5190 OWW, CV-F-92-5191 OWW and CV-F-92-5192 OWW.

With respect to that portion of the government's assessment collection complaints wherein USA seeks injunctive relief, i.e. CV-F-88-568 OWW and CV-F-90-088 OWW, all such injunction requests were withdrawn by the United States.

It is ordered that judgment for the United States, the Nectarine Administrative Committee and the Control Committee shall issue in the above-referenced collection actions as to the principal sum prayed for. The 10% surcharge, sought pursuant to 28 U.S.C. § 3011, where prayed for in the government's collection complaints, has been withdrawn by the United States.

The assessment monies, presently held in trust accounts maintained by the handlers' counsel, The Law Firm of Thomas E. Campagne, shall be transferred to, and held in trust by, the Registry of the Court until the affirmative defenses to the collection actions are adjudicated to finality via appeal of the 15(B) proceeding in CV-F-90-473 OWW. Therefore, the execution of the below stated monetary judgments are stayed pending any/all appeals through the Ninth Circuit and the U.S. Supreme Court. Should the handlers prevail in total or in part with respect to the 15(B) proceedings these judgments may be modified and/or set

aside prior to the ultimate distribution of the funds, as determined by the Court.

Judgment in the following amounts is hereby entered against each below listed handler with respect to each individual handler's assessment obligation for the specified harvest seasons:

	1987/88	1989	1990	1991	1992	Total
Wileman Bros. & Elliott, Inc.	196,375.63	134,022.15	111,269.97	21,019.77	31,753.90	494,441.42
Kash, Inc.	137,939.73	78,855.12	105,446.00	51,873.22	90,432.54	464,546.61
Gerawan Farming, Inc.		645,391.79	532,593.10	343,755.57	456,958.88	1,978,699.34
George Huebert Farms			9,910.59	802.95	3,637.78	14,351.32
Wilmer Huebert Farms			9,647.07	316.47		9,963.54
Kobashi Farms			10,312.65	5,513.26	7,131.59	22,957.50
Kobashi Farms, Inc.			15,099.50	8,582.41	13,318.30	37,000.21
Mihara Farms			6,590.97	1,788.52		8,379.49
Nagao Farms			5,325.86			5,325.86
Nilmeier Farms			6,034.77	3,782.84		9,817.61
Phillips Farms			41,541.74	5,786.09	10,361.08	57,688.91
Grand Total:						\$3,103,171.81

Pursuant to stipulation of the parties, the prevailing party in the 15(B) litigation shall be entitled to all interest accrued in the trust accounts to date and all interest actually accrued on the assessment monies maintained in trust accounts upon release of the assessments following all appeals of the 15(B) proceedings. As stipulated, the prevailing parties shall not be entitled to any pre- and/or post-judgment interest other than that actually earned by the trust fund accounts.

The handlers' counsel shall deposit from its attorney-client trust fund accounts all principal sums and actual interest earned on said principal sums with the Registry of the Court. Said trust transfer to the Registry of the Court shall occur within seven (7) business days of the entry of these Orders and Judgment. Within fifteen (15) business days of said entry, the trustee of those accounts, The Law Firm of Thomas E. Campagne, a Professional Corporation, shall file with the Court and counsel of record an

accounting of the trust funds transferred to the Registry of the Court, including the principal and the actual interest earned at the time of transfer. Such account shall specify the dates on which such principal amounts were deposited in the attorney-client trust accounts. The Law Firm of Thomas E. Campagne is only responsible for depositing in the Registry of the Court the principal sums (and interest actually earned thereon) provided by each handler for deposit into the attorney-client trust fund accounts. Any discrepancy between the judgment entered and the principal maintained in the attorney-client trust accounts, as to each handler, if any, is the responsibility of the specific handler. Any such additional amounts shall be deposited by the handler in the Registry of the Court within fifteen (15) business days of entry of these Orders and Judgment. Pursuant to stipulation of the parties, all principal sums and actual interest earned shall remain in the Registry of the Court until final judgment is entered following all appeals.

It is further ordered that Defendants Wileman Bros. & Elliott, Inc., Kash, Inc., Gerawan Farming, Inc., George Huebert Farms, Wilmer Huebert Farms, Kobashi Farms, Kobashi Farms, Inc., Mihara Farms, Nagao Farms, Nilmeier Farms and Phillips Farms, shall deposit all assessments attributable to their 1993 peaches and nectarines with the Registry of the Court on or before the date such assessments would otherwise be paid to the Nectarine Administrative Committee (nectarines) and the Control Committee (peaches). In the event that the Ninth Circuit has not decided Defendants' appeal before the 1994 harvest season, all assessment attributable to the 1994 harvest and future harvest seasons shall be deposited with the Registry of the Court on or before the date such assessments would otherwise be paid to the Nectarine Administrative Committee (nectarines) and the Control Committee (peaches)], said monies to remain in trust in the

Registry of the Court until such time as final judgment on these consolidated 15(B) and assessment actions is entered following any/all appeals to the Ninth Circuit and the U.S. Supreme Court. The United States, the Nectarine Administrative Committee and the Control Committee shall seek leave of Court to amend this judgment to include such later seasons without the necessity of filing a new complaint.

Regarding Case Nos. CV-F-91-318 OWW and CV-F-91-319 OWW, said actions are dismissed without prejudice.

Regarding Case No. CV-F-88-392 OWW, said case is dismissed without prejudice.

Dated: September 10, 1993

OLIVER W. WANGER, JUDGE
UNITED STATES DISTRICT
COURT

Presented By:

The Law Firm Of Thomas E. Campagne
A Professional Corporation

By
Thomas E. Campagne

Approved as to Form:

Robert M. Twiss
U.S. Attorney

By
Catherine E. Basham
Special Assistant U.S. Attorney

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-90-473-OWW

CONSOLIDATED WITH
CV-F-88-568-OWW
CV-F-87-392-OWW
CV-F-90-088-OWW
CV-F-91-318-OWW
CV-F-91-319-OWW

WILEMAN BROS. & ELLIOTT, INC.; AND KASH, INC.,
Plaintiffs

v.

EDWARD MADIGAN, SECRETARY OF AGRICULTURE,
Defendant

ORDER AFTER HEARING

The cross-motions for summary judgment of plaintiffs Wileman Bros. and Elliott, Inc., and Kash, Inc. and defendant Edward Madigan, Secretary of Agriculture, came on regularly for hearing on March 13, 1992: The Court having considered all the pleadings and oral argument presented,

IT IS ORDERED that the plaintiffs' motion for summary judgment is denied;

IT IS FURTHER ORDERED that the defendant's motion for summary judgment is granted;

IT IS FURTHER ORDERED, as the parties have an apparent dispute over the amount of assessments which

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should be remitted to the Secretary of Agriculture, the defendant shall file a brief within ten (10) days stating the amount of assessments owed by plaintiffs. Defendant shall provide documentation which establishes the amount owed as to each type of fruit for each harvest season in question and an explanation of the method of calculation of assessments for each season.

Plaintiffs' response shall be filed no later than five (5) days from date of service of defendant's brief.

SO ORDERED.

DATED: February 2, 1993.

Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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APPENDIX G

UNITED STATES
DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. F&V 916-3

AMA Docket No. F&V 917-4

Decision and Order

IN RE:

WILEMAN BROS. & ELLIOTT, INC.,
A CALIFORNIA CORPORATION,

AND

KASH, INC.,
A CALIFORNIA CORPORATION, *PETITIONERS*

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Preliminary Statement

This proceeding (*Wileman II*) was instituted by Petitions filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (the "Act"), as amended (7 U.S.C. § 608c(15)(A)), relating to the Federal Marketing Orders Regulating the Handling of Nectarines Grown in California (7 C.F.R. Part 916) and Fresh Pears, Plums, and Peaches Grown in California (7 C.F.R. Part 917).¹ Petitioners complain as to the assessments imposed against them involving nectarines, plums and peaches, as to the maturity and size regulations, and as to the Department's practice and procedure involving § 8c(15)(A) proceedings. A Decision and Order was filed July 9, 1990, in a similar proceeding involving the identical parties and a number of the identical issues (*In re Wileman Bros. & Elliott, Inc. (Wileman I)*, 49 Agric. Dec. 705 (1990), *appeal docketed*, No. CV F 90-473 EDP (E.D. Cal. July 27, 1990) (referred to as *Wileman I*)). *Wileman I* and *Wileman II* were consolidated by the Judicial Officer's Order of April 6, 1990, but separated by his Order of September 18, 1991.

On May 29, 1991, Administrative Law Judge Dorothea A. Baker (ALJ) filed an Initial Decision and Order in which she agreed with petitioners' arguments, and held (Initial Decision at 369):

The Petitioners are to be relieved of the Order obligations of which they complained in their Petition and Amended Petition. The amount of such monetary relief is to be determined at a subsequent date.

On July 31, 1991, respondent appealed to the Judicial Officer, to whom final administrative authority to decide

¹See generally *Vetne, Federal Marketing Order Programs*, in 1 Davidson, *Agricultural Law*, §§ 2.01-.15, 2.46-.58 (1981 and 1989 Cum. Supp.).

the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 235).² On August 9, 1991, the case was referred to the Judicial Officer for decision.³

Based on a careful examination of the record, including those portions which I regard as not a proper part of the record (see §§ III, IV, *infra*), I find no merit in petitioners' contentions and, therefore, I am dismissing the Petitions. *The Findings of Fact are the same as those made by the ALJ, with a few minor editorial changes, and with omissions shown by dots and additions included within brackets.* I have omitted many findings which I regard as irrelevant or not supported by the record, but I have included many other findings which I regard as irrelevant, but supported by the record. Specifically, I am in agreement with the attachment to respondent's appeal brief as to the ALJ's findings, but I have included many "irrelevant" findings which respondent would omit.

²The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

³Previously, the Judicial Officer had spent considerable time studying the record in *Wileman II*, primarily during the period when he was preparing to issue a Recommended Decision without having the ALJ first decide the case, in an effort to expedite the matter. See *In re Wileman Bros. & Elliott, Inc.*, 49 Agric. Dec. 102 (Apr. 6, 1990) (Order Consolidating Proceedings and Denying Motion to Recuse, and directing ALJ to issue expedited Recommended Decision); Order filed July 10, 1990 (unpublished, stating that Judicial Officer will issue Recommended Decision, rather than the ALJ); 49 Agric. Dec. 835 (Aug. 21, 1990) (Further Notice as to Issuance of Recommended Decision in *Wileman II*, directing the ALJ to issue the Recommended Decision promptly).

Findings of Fact

1. Petitioner Wileman Bros. & Elliott, Inc., is a California corporation incorporated on May 10, 1948, and has a principal place of business located at 40232 Road 128, Cutler, California. Its mailing address is P.O. Box 309, Cutler, California 93647.

2. Petitioner Kash, Inc., is a California corporation, incorporated on May 28, 1968, and has a principal place of business located at Parlier, California. Its mailing address is P.O. Box 310, Parlier, California 93648.

3. Petitioner Wileman Bros. & Elliott, Inc., hereinafter, for convenience purposes sometimes referred to as Petitioner Elliott, and Petitioner Kash, Inc., hereinafter sometimes referred to as Petitioner Kash, are both growers and handlers of Plums and Nectarines. Petitioners handle their own varieties of Plums and Nectarines as well as that of outside growers' varieties of Plums and Nectarines.

4. Petitioner Kash, Inc., is also both a grower and a handler of Peaches.

5. Petitioner Elliott is the only commercial grower and handler of Tom Grand Nectarines. Petitioner Elliott is one of two growers of Ebony Plums and one of two handlers of Ebony Plums, and grows and handles a significantly greater volume of Ebony Plums than the one other grower of Ebony Plums.

6. Petitioner Elliott, as a corporation, has been a handler of Nectarines and Plums since 1948. Petitioner Kash, Inc., as a corporation, has been a handler of Nectarines, Plums, and Peaches since 1968.

7. Petitioners, Wileman Bros. & Elliott, Inc., and Kash, Inc., subsequent to the granting of a Motion to Consolidate their separate 15(A) Petitions, had their grievances heard in a hearing conducted during February-March of 1988 [(*Wileman I*)]. Said hearing was presided over by Dorothea A. Baker, Administrative Law Judge, United States

Department of Agriculture, in case No. AMA Docket Nos. F&V 916-1, 917-2, 916-2 and 917-3. Said (15)(A) Petition hearing encompassed certain issues regarding the 1980 through 1987 harvest seasons for Nectarines and Plums. That proceeding raised a substantial number of issues relating to various provisions of the Nectarine and Plum Marketing Orders. The hearing involved the admission of substantial evidence through oral testimony, the admission of hundreds of exhibits, and factual evidence which was admitted through judicial/official, and administrative notice being taken by the Administrative Law Judge. The Initial Decision rendered by the Administrative Law Judge on May 19, 1989, was reversed in substantial respect by the Department's Judicial Officer on July 9, 1990, wherein he found that the Petitioners were not entitled to any relief and dismissed their Petitions.

8. On or about May 4, 1988, the Nectarine Administrative Committee recommended the adoption of an 18 cents per carton assessment against each container of Nectarines packed by [handlers, including] Petitioners. Of that 18 cents, only (approximately) 5 cents was for inspection of those cartons of Nectarines, and over 10 cents was assessed against each container for "Market Development," which included: field staff activities; retail advertising incentives; trade communications; retail projects; point of sales material; publicity; educational activities; food service activities; T.V. and radio production; T.V. advertising; radio advertising; outdoor advertising; Canadian promotions; production research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Nectarine Administrative Committee in May 1988 was approximately One Million Seven Hundred Sixty-one Thousand Eight Hundred Eighty-six Dollars (\$1,761,886.00).

9. From 1980 through the present harvest season, over half of the assessments, imposed by the Nectarine

Administrative Committee, have been used for "Market Development."

10. On or about May 4, 1988, the Plum Administrative Committee recommended the adoption of a 19 cents per carton assessment against each container of Plums packed by [handlers, including] Petitioners. Of that 19 cents, only (approximately) 6 cents was for inspection of those cartons of Plums and approximately 10 cents was assessed against each container for "Market Development," which included: field staff activities; retail advertising incentives; trade communications; retail projects; point of sales materials; publicity; educational activities; food service activities; T.V. and radio production; T.V. advertising; radio advertising; outdoor advertising; Canadian promotions; promotion research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Plum Administrative Committee in May 1988 was approximately One Million Eight Hundred Thirty-one Thousand Four Hundred Fifty-nine Dollars (\$1,831,459.00). From 1980 through the present harvest season, over half of the aforementioned assessments have been used for "Market Development."

11. On or about May 4, 1988, the Peach Administrative Committee recommended the adoption of an 18 cents per carton assessment against each container of Peaches packed by [handlers, including] Petitioner, Kash, Inc. Of that 18 cents, only (approximately) 6 cents was for inspection of Peaches and approximately 9 cents was assessed against each container for "Market Development," which included: field staff activities; retail advertising incentives; trade communications; retail projects; point of sales material; publicity; educational activities; food service activities; T.V. and radio production; T.V. advertising; radio advertising; outdoor advertising; Canadian promotions; promotion research; merchandising research; promotion expense; Hispanic promotion;

and miscellaneous. The total budget adopted by the Peach Administrative Committee in May 1988 was approximately One Million Two Hundred Twenty-five Thousand Four Hundred Thirty-five Dollars (\$1,225,435.00). Regarding said Peach assessments, from 1980 through the present harvest season, over half of the assessments paid by Petitioner Kash, Inc., have been used for "Market Development."

12. Approximately five to six cents per container is currently being assessed against Petitioners to provide for inspection services (performed by the Shipping Point Inspection), to inspect fruit.

13. Any monies expended by Petitioners for promotion of their specific brand of fruit receives no *pro rata* credits toward the amount of advertising assessments levied against Petitioners.

14. California's tree fruit handlers, subject to Marketing Orders 916 and 917, are the only tree fruit handlers subject to advertising assessments. Other State's handlers are not required to advertise under Federal Marketing Orders.

15. On April 8, 1988, the Secretary of Agriculture issued proposed rules with respect to Plum sizes, maturity, and requests for variances, which proposed rules sought to define the term "well-matured" (53 Federal Register 11,669).

16. On April 18, 1988, the Secretary of Agriculture issued proposed rules with respect to Nectarine and Peach sizes, maturity, and requests for variances, which proposed rules sought to define the term "well-matured" (53 Federal Register 12,690, regarding Nectarines); (53 Federal Register 12,694, regarding Peaches).

17. With respect to the Peach, Plum and Nectarine proposed rules described in the immediately preceding two stipulations (Paragraphs 15 and 16), a fifteen-day comment period was provided [for peaches and nectarines, and a seventeen-day comment period was provided for] Plums, for which a seven-day extension was granted.

18. Said proposed rules, with respect to Peaches, Plums and Nectarines, were issued four months after the respective Peach, Plum and Nectarine Committees met in December 1987.

19. No documents [are relied on by Respondent to] support Respondent's position that "color chips" objectively, rationally, and reasonably evaluate and test the actual internal maturity of fruit, *other than the rulemaking record produced in this proceeding*. (Contained in Exhibit Nos. 31, 32 and 33, and all subparts thereto.)

20. ...

21. The following documents do not exist (*other than to the extent they may be in the rulemaking record*) produced in this proceeding:

(1) No documents exist regarding the Secretary's consideration, if any, during the 1980 harvest season through the 1987 harvest season, of *other possible testing devices*, other than "color chips," for measuring the internal maturity of Peaches, Plums and/or Nectarines; and

(2) No documents exist other than the rulemaking record showing that the "color chips" selected for each particular variety of Peaches, Plums and Nectarines, were objectively and rationally tested and evaluated to judge the internal maturity of that particular variety of fruit.

22. [In addition to] the aforesaid rulemaking record, identified as Joint Exhibits 31 and 32, the *Respondent relies upon [the experience and expertise of the personnel who administered the Orders] to support each and every particular "color chip"* which was designated and selected by Respondent for each variety of Plum, for each variety of Nectarine, and for each variety of Peach during the 1988 and 1989 harvest seasons.

23. Other than what is contained in Joint Exhibits 31 and 32, there are no documents, studies or reports regarding the Secretary's consideration of any other testing devices, other than "color chips," to test the internal maturity of Peaches, Plums and Nectarines, for the 1988 and 1989 harvest seasons.

24. The rulemaking record (Exhibits 31, 32, and 33, and all subparts thereto) does not include "color chips," in the physical sense....

25-28. ...

29. The following request was made: the rulemaking record upon which Respondent relies to support its position that advertising assessments have satisfied the requirements of the Administrative Procedure Act from 1980 through the present with regard to Peaches, Plums and Nectarines. The stipulated response to this request was that *Joint Exhibit 33 is the entire rulemaking record with respect to advertising for the harvest seasons 1980 through 1987*. The Respondent reserved the right to reference the 1971 formal rulemaking procedure which occurred when the Peach, Plum and Nectarine Marketing Orders were amended on or about 1971, after the Act was amended on or about 1965.

30. A stipulated response was made to the request for those documents relating to the extent, if any, the Secretary of Agriculture provided a "substantial basis and purpose statement" as required by the Administrative Procedure Act, regarding the *assessment rates from 1980 through the present with regard to the advertising assessments applicable to Peaches, Plums and Nectarines*. The stipulated response was: The Secretary relies upon Joint Exhibits 31, 32 and 33.

31. The Respondent admits that the Secretary's imposition of "final rules" regarding assessments for Peaches, Plums and Nectarines for the years 1980 through 1987 was not preceded by "proposed rules" allowing for a thirty-day notice and comment period.

32. Respondent admits that the "proposed rules" issued in 1988 regarding Peach, Plum and Nectarine assessment rates did not provide for a thirty-day notice and comment [period].

33. Joint Exhibits 31, 32 and 33 are the only documents, and constitute the entire rulemaking record, regarding expenses and advertising assessments for Peaches, Plums and Nectarines commencing with the 1980 harvest season through the present. (Tr. 737). With respect to that acknowledgment, the Respondent reserved the right to reference the rulemaking records.

34. The Respondent denied the assertion that the rulemaking record (Joint Exhibits 31, 32 and 33 and all subparts thereto) failed to establish that the Secretary of Agriculture ever engaged in notice and comment as to whether or not to advertise or *in what manner to advertise*. Production of the Joint Exhibits 31, 32, and 33, and their subparts, constitutes the sole basis for the Respondent's response to the effect that the Secretary abided by the Administrative Procedure Act, with the Respondent reserving the right to explain the documents contained therein by referencing the "formal" rulemaking record of 1971 when the Peach, Plum and Nectarine Marketing Orders were amended....

35. The Respondent admitted the following stipulation, with the exception noted below. The admission is:

Respondent admits that, from the 1980 season through and including the present, the Secretary of Agriculture has never provided any notice and comment and given no statement in the Federal Register whatsoever, with respect to *how much of the assessments for peaches, plums and nectarines were earmarked to be utilized for advertising, promotion and production research*. (Emphasis added).

The Respondent admitted the above except as regards the language contained within the proposed and final rules for the 1988 and 1989 seasons. (Tr. 743).

36. The Respondent admits the following statement, with reservation to the Respondent, of the right to reference the formal rulemaking record of 1971. The admitted statement is as follows:

Respondent admits that, from the 1980 season through the present, with respect to peaches, plums and nectarines, the Secretary of Agriculture has never published in the Federal Register any statement with regard to his determination that advertising is beneficial to the handler or that generic advertising is beneficial to the handler and/or beneficial to the grower, other than the Secretary making the following statement—"It is found that the expenses and rates of assessment, as hereinafter provided, will tend to effectuate the declared policy of the Act"—***.

37. The Respondent admits the following statement reserving unto the Respondent the right to explain said admissions with respect to the year 1988 and 1989 harvest seasons and to the mention in Respondent's post-hearing brief that this was a publication in 1988 and 1989 that gave notice, although not specifically with respect to those items. The Respondent reserved the right to argue that the notice that was provided would "somehow have allowed for that type of comment." The admission of the Respondent is to the following:

From the 1980 season through the present, the Secretary of Agriculture has never published in the Federal Register any notice and comment opportunity regarding how the

generic advertising program for peaches, plums, and nectarines should be assessed, i.e., on a per carton basis versus a per acre basis.

....
38. The Respondent relies solely upon Joint Exhibits 31, 32 and 33 [and the formal rulemaking records] to support its denial of the following:

That an assessment based on a per carton basis rather than per acre, discriminates against some varieties of fruit which produce more cartons per acre at a lower F.O.B. price compared to those other varieties which produce fewer cartons per acre at a higher F.O.B. price.

39-40. ...

41. Joint Exhibits 31 and 32 constitute the entire rulemaking record upon which Respondent bases its contention that the regulation of Nectarine and Peach sizes was appropriate for the 1988 and 1989 harvest seasons.

42-44....

45. The *entire budget approval documentation*, as to Peaches, Plums, and Nectarines, is set forth and stipulated into evidence as being incorporated within Exhibit 297, and all its subparts.

46. Joint Exhibit 33, and its subparts, contain the proposed assessments (including expense, advertising and all other assessments) which the Nectarine Committee, for the harvest seasons 1980 through 1989 provided to the Secretary of Agriculture for his approval [, except as previously submitted in *Wileman I*].

47. Joint Exhibit 33, and its subparts, contain the proposed assessments (including expense, advertising and

all other assessments) which the Plum Committee, for the harvest seasons 1980 through 1989, provided to the Secretary of Agriculture for his approval [, except as previously submitted in *Wileman I*].

48. Joint Exhibit 33, and its subparts, contain the proposed assessments (including expense, advertising and all other assessments) which the Peach Committee, for the harvest seasons 1980 through 1989, provided to the Secretary of Agriculture for his approval.

49. Joint Exhibits 31, 32, and 33, and all their subparts, contain all Minutes of the Nectarine Administrative Committee meetings from 1980 through 1989 [, except as previously submitted in *Wileman I*].

50. Joint Exhibits 31, 32, and 33, and all their subparts, contain all Minutes of the Plum Commodity Committee meetings from 1980 through 1989, [, except as previously submitted in *Wileman I*].

51. Joint Exhibits 31, 32, and 33, and all their subparts, contain all Minutes of the Peach Commodity Committee meetings from 1980 through 1989.

52. The Respondent admits with respect to Peaches, Plums and Nectarines, that no other State in the United States of America, other than California, has an advertising assessment program under a Federal Marketing Order.

53. The Respondent admits that Peach, Plum and Nectarine growers in the State of Georgia do not have a United States Department of Agriculture/Agricultural Marketing Service advertising assessment Program.

54. The Respondent admits that the Peach, Plum and Nectarine growers in the State of Colorado do not have a United States Department of Agriculture/Agricultural Marketing Service Program.

55. ...

56. Respondent could not produce the "pink slips" of all non-personally owned automobiles driven by California Tree Fruit Agreement employees while "on duty" from

1980 through the present, because no such documents exist, because the California Tree Fruit Agreement, and the Commodity Committees, do not hold any pink slips nor any other title documents with respect to automobiles driven by the California Tree Fruit Agreement, since such titles have always been held by the Tree Fruit Reserve.

57. Respondent admits that the Peach Commodity Committee, the Plum Commodity Committee and the Nectarine Administrative Committee, acting through the California Tree Fruit Agreement, rent most of their furniture and equipment from the Tree Fruit Reserve, a California private, not-for-profit corporation.

58-59. ...

60. Exhibit 302 (radio 1988-1989) and Exhibit 303 (scripts used throughout the U.S. 1986, 1987) are the scripts used on all California Tree Fruit Agreement—"California Summer Fruits" advertising promotions on radio and television stations throughout the United States when such advertising occurred during 1988 and 1989.... See also Exhibits 301 and 301(A) p. 8, 301(B) p. 9, 301(C) p. 10, 301(D) p. 11, as to script.

61. Respondent's response to the last paragraph, Paragraph No. 60, and Exhibits 301, 302, and 303, constitute the advertising scripts (i.e. the words used during all advertisements, with respect to advertisements) paid for by either the Peach, Plum and/or Nectarine Committees or with respect to advertisements for which any of those Committees contributed any funds whatsoever for all advertisements conducted during the harvest seasons 1980 through and including 1989.

62-64. ...

65. Respondent relies on the 1965 and 1971 formal rulemaking records and Exhibit Nos. 31, 32, and 33, and all subparts thereto, as furnishing the basis in support of Respondent's contention that the Secretary of Agriculture has considered, or not, the problems encountered by an

East Coast consumer differentiating or distinguishing between a Georgia or Colorado Peach (which is not subject to United States Department of Agriculture/Agricultural Marketing Service advertising assessments) from that of a generically advertised California Peach; and, as such, the aforesaid data constitute the entire rulemaking records and Departmental documents, if any, with respect to studies and analyses of the [alleged] discrimination that California Peach, Plum and Nectarine handlers suffer by paying for a nation-wide advertising program that benefits growers and handlers in other states who are not so assessed.

66. The Respondent admits that on or about April 18, 1988, the Secretary of Agriculture issued Proposed Rules with respect to the proposed regulation of Nectarine and Peach sizes, maturity determinations, color chip procedures, and variances from maturity determinations. (See 53 Federal Register 12,690, regarding Nectarines; and see 53 Federal Register 12,694, regarding Peaches.) A fifteen-day comment period was provided. Respondent now contends that a "good cause" exception to the thirty-day effective date existed, but there was no good cause exception regarding the comment period because the Administrative Procedure Act "has no requirement of a particular 30-day comment period." Respondent relies on Exhibits 31, 32, and 33.

67. Respondent relies on Exhibit 31, and its subparts, as being the full text of any and all reports and studies considered, and the entire rulemaking record, with respect to the regulation of Nectarine size, the maturity standard, the designation of color chips, and the color chip variance procedures for the Interim Final Rules of May 27, 1988.

68. With respect to the May 27, 1988, Interim Final Rules issued regarding Peaches, Plums and Nectarines, Exhibit 31 constitutes any and all rulemaking documents.

69. Exhibit 31 contains the report of Ervin D. Thuerk as relied upon by the Secretary of Agriculture in the May, 1988, Interim Rules for Peaches, Plums and Nectarines.

70. Between the time of the proposed rule issued in April, 1988, and the Interim Final Rule issued in May of 1988, the Federal-State Inspection Service sent a letter to the Secretary of Agriculture/Agricultural Marketing Service regarding the Federal-State Inspection Service's comments to the proposed rulemaking. That letter is contained in Exhibit 31.

71. Regarding the May, 1988 Interim Rules, Exhibit 31 constitutes the entire rulemaking record and any and all other Department of Agriculture documents and communications involving the Secretary's regulation of Plum size, and the regulation of Nectarine and Peach sizes.

72. Respondent admits, regarding the May, 1988 Interim Rules for Peach, Plum and Nectarine maturity, color chips, and size regulation, that the Secretary did not allow 30 days after publication in the Federal Register before implementing the change, but instead claimed a "good cause" exception. Exhibit 31 constitutes any and all rulemaking records and other documents upon which the Secretary of Agriculture may rely for a "good cause" exception to a 30-day notice.

73. Regarding the April and May, 1988 Federal Registers with respect to Peaches, Plums, and Nectarines, Exhibit 31 constitutes all the rulemaking records.

74. Respondent denies that the current (15)(A) proceeding does not provide Petitioners with adequate and timely relief with respect to assessments.

75. The Respondent admits that there are no documents evidencing either a written lease or a rental agreement between California Tree Fruit Agreement and the owner/landlord, which is Tree Fruit Reserve for the building which California Tree Fruit Agreement uses as its headquarters, located at 701 Fulton Avenue, Sacramento, California. However, Respondent refers to the Management Services Minutes of various meetings which show rental amounts being charged.

76. No documents exist evidencing trademarks, registrations, copyrights, etc., for the "ripening bowl" sold and/or marketed by the California Tree Fruit Agreement.

77. Premised upon Respondent's assertions of *pending investigation*, Respondent did not adduce "all written reports of Shipping Point Inspection Inspectors regarding alleged violations of the California Tree Fruit Agreement color chip maturity requirements by Kash, Inc., during the month of June, 1989."

78. Premised upon Respondent's assertion of *pending ongoing investigations*, the Respondent produced some, but did not adduce "all notes or reports of interviews with Shipping Point Inspection Inspectors conducted by Gary Van Sickle, California Tree Fruit Agreement field agent, relating to alleged California Tree Fruit Agreement 'color chip' maturity violations at Kash, Inc., in June, 1989."

79. Respondent admits that no documents exist, such as receipts, invoices, and vouchers relating to the purchase by Gary Van Sickle of a refrigerator and couch to be placed in the California Tree Fruit Agreement office in Reedley.

80. No documents exist, such as rental agreements, between the California Tree Fruit Agreement and the Tree Fruit Reserve relating to the rental of the refrigerator and couch by the California Tree Fruit Agreement from the Tree Fruit Reserve during the calendar year 1989.

81. Respondent admits that no documents exist, including, but not limited, to expense sheets, vouchers, cancelled checks, etc., relating to any and all expenses paid by the California Tree Fruit Agreement with regard to Mr. Jonathan Field's and/or Karen Jackson's (or any other California Tree Fruit Agreement personnel) attendances at the Tree Fruit Reserve corporate meetings (meals, travel, hotel rooms, etc.).

82. With respect to the Tree Fruit Reserve's activities, the Respondent knows of no other documents in existence, other than those adduced and stipulated to at the oral hearing.

83. No documents exist which show notices, issued to the tree fruit industry, announcing the "open and public" Management Services meetings prior to the Commodity Committee meetings each season, for every year from 1980 through the present.

The foregoing Findings of Fact consist, for the most part, of stipulations and/or stipulated responses, and vast amounts of documentary evidence which were stipulated into the record.

In addition to the facts derived from the consolidation with this proceeding of *Wileman/Kash I* by the Judicial Officer, the aforesaid stipulations, stipulated responses, testimony and Exhibits, and the record as a whole, supports the following Findings of Fact numbered consecutively from Finding 83. ... [I]n *Wileman/Kash I* the Judicial Officer regarded many like findings as "irrelevant or based on improper legal conclusions," and, the Respondent's position is that such facts are beyond the scope of this proceeding....

84. The administration, regulatory interpretations, regulatory implementation, actions, or non-actions of the Committee members and/or the Secretary, through his subordinates, have a *direct, substantial, and ascertainable economic impact upon Petitioners*.

85. In 1937, Congress enacted a revised Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq.* The Agricultural Marketing Agreement Act, in its declaration of policy, conferred upon the Secretary of Agriculture the authority to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce, to establish and maintain parity prices for farmers, to protect the interest of the consumer, to establish and maintain production research (added in 1947), marketing research, maintain standards of quality, maturity and grading, as well as establishing inspection requirements, to establish and maintain such marketing conditions

as will provide, in the interests of producers and consumers, an orderly flow of commodities to the market through its normal marketing season (added in 1954), and to avoid unreasonable fluctuations in supplies and prices. (Title 7 U.S.C. § 602). Additionally, Congress specifically conferred upon the Secretary the power to "establish and maintain such production research, marketing research, and development projects *** as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest." 7 U.S.C. § 602(3).

To achieve that goal, the Agricultural Marketing Agreement Act permits the Secretary of Agriculture to issue Marketing Orders and Agreements applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product. (Title 7 U.S.C. § 60[8]c). Section 608c of 7 U.S.C. directs the Secretary of Agriculture to issue Marketing Orders after notice and a hearing conducted whereby any interested party is given the opportunity to testify and after the Secretary finds that the order's terms "will tend to effectuate the declared policy of the Act." 7 U.S.C. § 608c(4). Marketing Orders 916 and 917 (7 C.F.R. §§ 916 and 917) could not become effective until the respective Orders had been approved by two-thirds of the affected producers. 7 U.S.C. §§ 608c(8), (9). Amendments to Marketing Orders are promulgated in the same manner. 7 U.S.C. § 608c(17).

In 1954, Congress found that there was a need to provide for yet "greater stability in the products of agriculture." H.R. Rep. No. 1927, 83d Cong., 2d Sess. 1, *reprinted in* 1954 U.S. Code Cong. & Admin. News 3399. Congress concluded that the remedy should include a program "to protect the income of the farmers while comprehending the interests, needs and security of all segments of the economy and of all our people." *Id.*, *reprinted in* 1954 U.S. Code Cong. & Admin. News 3403.

Congress therefore adopted a bill which implemented a means to "encourage the expansion of markets and consumption at home and abroad." *Id.*

Toward that end, Congress amended the Agricultural Marketing Agreement Act authorizing the Secretary of Agriculture to promulgate Marketing Orders "[e]stablishing or providing for the establishment of marketing research and development projects designed to assist, improve or promote the marketing, distribution, and consumption of any such commodity or product, *the expense of such projects to be paid from funds collected pursuant to the marketing order.*" (Emphasis added). Agricultural Act of 1954, Pub. L. 83-690, § 401, 68 Stat. 906, 907 (1954), *codified at* 7 U.S.C. § 608c(6)(I). Authority to conduct "production research" and development projects, designed to "assist, improve or promote ... efficient production," was added in 1970. Pub. L. 91-292, 84 Stat. 333, June 25, 1970. *Authority for projects providing "for any form of marketing promotion including paid advertising"* for a specified commodity (cherries) was added in 1962. Pub. L. 87-703, 76 Stat. 632, Sept. 27, 1962. Plums and Nectarines were included in this category in 1965. Pub. L. 89-330, 79 Stat. 1270, November 8, 1965. California-grown Peaches (and *only* California-grown Peaches) were included in this category in 1971. Pub. L. 92-120, 85 Stat. 340, August 13, 1971. In making such amendments, Congress granted the Secretary of Agriculture permission and discretion to impose, if he deemed it proper, "any form of marketing promotion including paid advertising for Nectarines and Plums." (Petitioners' Exhibit AB, No. 18). At that time it was advised that the Department had not had any experience in the operation of an advertising program under Marketing Agreements and Orders. Such authority was deemed proper if advertising were to benefit the growers and meet the objectives of the Act and that the inclusion of the stated commodities

"would serve in providing experience now lacking in the [advertising] operation of Federal" Marketing Agreements and Orders.

86. When the Secretary promulgated the Nectarine Marketing Order in 1958, he made the following findings as to the Nectarine Administrative Committee, the agency that works with the Secretary in administering the order locally (23 Fed. Reg. 3007, 3010-12 (1958)):

(b) It is desirable to establish an agency to administer the order locally under and pursuant to the act, as an aid to the Secretary in carrying out the declared policy of the act. The term "Nectarine Administrative Committee" is a proper identification of the agency and reflects the character thereof. It should be composed of 8 members. The members and alternates should be growers, or employees of growers.... Some growers of nectarines are corporations. These corporations and some of the larger individual growers have employees who are in complete charge of growing and marketing nectarines. Such employees would be qualified from the standpoint of knowledge and personal experience for service on the committee, and it would not be in the interest of the industry to deny them the opportunity to be nominated and to serve on the committee.... (23 Fed. Reg. 3010 (1958))

....

The committee should be given those specific powers which are set forth in section 8c(7)(C) of the Act. Such powers are necessary to enable an administrative agency of this character to function.

The committee's duties, as set forth in the order, are necessary for the discharge of its responsibilities. These duties are generally similar to those specified for administrative agencies under other programs of this character. It is intended that any activities undertaken by the members of the committee will be confined to those which reasonably are necessary for the committee to carry out its responsibilities as prescribed in the program. It should be recognized that these specified duties are not necessarily all inclusive, and that it may develop that there are other duties which the committee may need to perform. (23 Fed. Reg. 3011-12 (1958))

87. On April 5 and 6, 1965, a hearing was held in Fresno, California, pursuant to a notice published in 30 Fed. Reg. 3542 (March 17, 1965). Among the purposes was whether to add a new provision to Marketing Order 917 authorizing marketing research and development projects. A recommended decision was published at 30 Fed. Reg. 13,063 (October 14, 1965) which recommended adding such a provision. As a result thereof the Secretary determined that the proposed amendment would "tend to effectuate the declared policy of the Act." 30 Fed. Reg. 15,990 (December 23, 1965). This was subsequently ratified by referendum whereby at least two-thirds of the producers, who also produced at least two-thirds of the volume of Plums and Peaches produced in the production area, indicated that they favored the adoption of the aforesaid amendment to the Order. 30 Fed. Reg. 15,990, 15,991 (December 23, 1965). Thus, section 917.39 (7 C.F.R. § 917.39) was adopted which stated:

The committees, with the approval of the Secretary, may establish or provide for the

establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of fruit. The expense of such projects shall be paid from funds collected pursuant to § 917.37. (30 Fed. Reg. 15,990, 15,995)

Formal rulemaking conducted in 1971, resulted in amending section 917 to include authority for "production research" for Peaches and "production research" and "paid advertising" for Plums. (36 Fed. Reg. 5614 (March 25, 1971)) Formal rulemaking conducted in 1976 resulted in amending section 917.39 to include authority for paid advertising for Peaches. (41 Fed. Reg. 14,375 (April 5, 1976)) Thus, section 917.39 (7 C.F.R. § 917.39) was amended to read as it does today:

The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of fruit. Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid from funds collected pursuant to § 917.37. (41 Fed. Reg. 14375, 14382)

88. The Secretary concluded at 41 Fed. Reg. 14,375, 14,376-77 (April 5, 1976) that:

The record shows ... a wide consensus among the peach ... industr[y] that promotional activities have been beneficial in increasing demand and should be continued

.... The evidence indicates that provisions for paid advertising activities for peaches and pears and vesting authority therefor in the Peach and Pear Commodity Committees would place the peach and pear industries in a better position to advance the provisions of the Act and the Order Spot radio or TV commercials in the principal markets during peak movement periods have proved to be successful. It has been found in many fresh promotional programs that spot announcements, particularly when developed with a "dealer tag" at the end of each spot have considerable influence in triggering retail promotions. The previous success of advertising efforts referred to here are in regards to advertising conducted under State Marketing Orders. *See*, 41 Fed. Reg. 14,376 (April 5, 1976).

89. Thus, the basic authority of the Secretary to implement the promotional programs, including advertising, were published at 36 Fed. Reg. 14,381 (August 5, 1971) (Plums), 41 Fed. Reg. 14,375 (Peaches) and 31 Fed. Reg. 6371 (May 19, 1966) (Nectarines).

90-93. ...

94. Petitioners, Wileman Bros. & Elliott, Inc., and Kash, Inc. (sometimes referred to as "Wileman/Kash"), are regulated pursuant to the Nectarine, Plum and Peach Marketing Orders (7 C.F.R. § 916.1, *et seq.* (Nectarines), and 917.1, *et seq.* (Plums and Peaches)).

95. The Secretary of Agriculture, pursuant to Title 7 U.S.C. § 610b, is authorized to establish Committees and associations of producers "for the more effective administration of functions vested in [the Secretary] by this chapter" (Committees are "agencies," pursuant to 7 U.S.C. § 608c(7)(C)).

96. Thus, the Secretary's decisions to implement the promotional programs, published at 36 Fed. Reg. 14,381 (August 5, 1971) (Plums), 41 Fed. Reg. 14,375 (Peaches) and 31 Fed. Reg. 6371, 31 Fed. Reg. 8176, 8177 (1966) (Nectarines), were the Secretary's decisions on the record evidence presented at the formal rulemaking hearings cited therein.

97. Wileman/Kash are required to pay assessments pursuant to Marketing Orders 7 C.F.R. §§ 916.1, *et seq.* (Nectarines) and 7 C.F.R. §§ 917.1, *et seq.* (Plums and Peaches). The assessment rates are ... recommended by the Nectarine Administrative Committee for Nectarines and by the Control Committee of the California Tree Fruit Agreement for Plums and Peaches. These Committees are expected to determine the rates by dividing anticipated expenses by estimated shipments of the particular commodity. The Committees are organized on a fiscal year basis which begins on March 1 of each year (7 C.F.R. § 916.7 and § 917.9). The Committees are required to develop, and submit to the Secretary for approval, a budget of their anticipated expenses for each fiscal year (7 C.F.R. § 916.31(c) and § 917.35(f)). Each particular budget is expected to be discussed and established at Committee meetings generally held in May and then forwarded to the Secretary of Agriculture for review and adoption....

....

98. On or about May 5, 1988, the Nectarine Administrative Committee met and recommended an 18-cents per carton assessment against each 25-pound net weight container of Nectarines packed by each handler. The Nectarine Administrative Committee adopted a budget of \$3,123,908 for the 1988 season, of which \$867,000 was allocated for inspection (\$.05 per carton), \$89,153 for research projects, approximately \$298,869 for salaries, employee benefits, travel, business meals, equipment, supplies, insurance, utilities, postage, paper envelopes,

special enforcement activity, credit insurance, etc. Other expenses included rent for their offices, telephones and other miscellaneous audit expenses amounting to approximately \$67,000. However, more than half of the Nectarine budget was to be directed to market development.

99. The Nectarine Administrative Committee approved a 1988 Nectarine Market Development Budget of \$1,801,886, which included: \$858,146 for television advertising; \$306,390 for radio advertising; \$114,750 for retail advertising incentives, plus another \$112,000 for field staff activities relating to the same; \$80,000 for Canadian advertising; \$27,200 for trade communications; \$22,500 for retail projects; \$35,600 for point of sale materials; \$59,100 for publicity, education activities; \$32,500 for food service activities; \$22,500 for promotion expense; \$6,950 for Hispanic promotion; and \$13,250 for advertising research. This combined total amounted to approximately \$.10 per 25-pound net weight container towards the "generic" advertising budget.

100. On or about May 4, 1988, the Plum Commodity Committee met and recommended a 19-cents per container assessment against each 28-pound net weight carton of Plums packed by each handler. The Control Committee adopted a budget for the Plum Commodity Committee of \$3,510,878 for the 1988 season, of which \$1,085,960 was allocated for inspection (\$.06 per carton), \$80,052 for research projects, approximately \$373,407 for salaries, employee benefits, travel, auto operation, equipment supplies, insurance, utilities, postage, paper, envelopes, special enforcement activity, credit insurance, etc. The other Committee expenses included rent for their offices, telephones and other miscellaneous audit expenses amounting to approximately \$87,350. However, more than half of the Plum budget was to be directed to market development.

101. The Plum Committee approved the Plum Market Development Budget of \$1,971,459, which included:

\$850,719 to television advertising; \$306,390 for radio advertising; \$189,750 for retail advertising incentives; \$112,000 for field staff activities relating to the same; \$27,200 for trade communications; \$22,500 for retail projects; \$35,600 for point of sale materials; \$59,100 publicity, education activities; \$32,500 for food service activities; \$22,500 for promotion expense; and \$6,950 for Hispanic promotion. This combined total amounted to approximately \$.10 per 28-pound net weight container towards the "generic" advertising budget.

102. On or about May 4, 1988, the Peach Commodity Committee met and recommended an 18-cents per carton assessment against each container of Peaches packed by each handler. The Control Committee adopted a budget for the Peach Commodity Committee of \$2,562,089 for the 1988 season, only \$896,000 of which was for inspection (\$.06 per carton), \$55,402 for research projects, and approximately \$330,352 for salaries, employee benefits, travel, auto operation, equipment supplies, insurance, utilities, postage, papers, envelopes, special enforcement activity, credit insurance, etc. Other Committee expenses included rent for their offices, telephones and other miscellaneous audit expenses amounting to approximately \$52,350. However, more than half of the Peach budget was to be directed to market development.

103. The Peach Commodity Committee approved the Peach Market Development Budget of \$1,280,435, which included: \$456,135 to television advertising; \$220,000 for radio advertising; \$98,000 for retail advertising incentives; \$96,000 for field staff activities relating to the same; \$80,000 for Canadian advertising; \$27,200 for trade communications; \$22,500 for retail projects; \$25,300 for point of sale materials; \$59,100 for publicity, education activities; \$32,500 for food service activities; \$22,500 for promotional expense; \$6,950 for Hispanic promotion; and \$13,250 for advertising research. This combined total

amounted to approximately \$.09 per container towards the "generic" advertising budget.

104. The term "Market Development," as used by the Committees, includes field staff activities, retail advertising incentives, trade communications, retail projects, point of sale materials, publicity, education activities, food service activities, TV and radio production, television and radio advertising, outdoor advertising, Canadian promotion, promotion research, merchandising research, promotion expense, Hispanic promotion and miscellaneous related expenses.

105.

106. Subsequent to the filing of a Petition in a prior 7 U.S.C. § 608c(15)(A) proceeding (AMA Docket Nos. 916-1, 916-2, 917-2, 917-3 [(Wileman I)]), the Secretary of Agriculture, on April 8, 1988, issued ... a proposed rule.... This proposed rule [related] to Plums ... (53 Fed. Reg. 11,669).... This proposed rule provided that interested persons could file comments through *April 25, 1988*. Subsequently, the time period for filing written comments on the proposed rule was extended to May 2, 1988 (53 Fed. Reg. 13,413; Petitioners' "A.B." No. 3).

107. On April 18, 1988, the Secretary issued proposed rules (virtually identical to those above-mentioned relating to Plums) with respect to ... Nectarines and Peaches ... (53 Fed. Reg. 12,687 (Nectarines); 53 Fed. Reg. 12,691 (Peaches).... The proposed rule provided that interested persons could file comments through May 3, 1988. In his proposed rule for Nectarines, the Secretary [stated]:

A comment period of less than 30 days is deemed appropriate for this proposal. The harvest and shipment of the 1988 nectarine crop is expected to *start April 25, 1988*, and growers and handlers should be given as much notice as possible of any changes, if adopted to permit the industry to plan

accordingly. Moreover, the Department already has received letters in opposition to the proposed nectarine size changes indicating the industry is aware of the Committee's recommendation. (53 Fed. Reg. 12690).⁴

108. On May 27, 1988, the Secretary issued Interim Final Rules ... (53 Fed. Reg. 19,218 (Plums); 53 Fed. Reg. 19,226 (Nectarines); 53 Fed. Reg. 19,234 (Peaches))....

109. Wileman/Kash, through their attorney, submitted comments in opposition to the proposed rule modifications regarding Plums, Nectarines and Peaches. Subsequent to the issuance of the Interim Final Rules, Wileman/Kash, through their attorney, submitted comments in opposition to the Interim Final Rules as published.

110. Consequently, on or about June 3, 1988, Wileman/Kash filed the present 7 U.S.C. § 608c(15)(A) Petition to modify, terminate or to be granted an exemption from various provisions of the Nectarine, Plum and Peach Marketing Orders and any obligations imposed in connection therewith that are not in accordance with law.

111. In conjunction with the filing of the 7 U.S.C. § 608c(15)(A) Petition, Wileman/Kash filed an Application for Interim Relief, pursuant to the Rules of Practice Governing Administrative Petition Proceedings, Title 7 C.F.R. § 900.70.

...The Judicial Officer, on July 8, 1988, signed an order denying Wileman/Kash's Application for Interim Relief. Wileman/Kash, on or about July 29, 1988, filed a Motion for Reconsideration of the Order Denying Interim Relief, which Motion was denied on August 3, 1988.

112. On June 16, 1988, for the first time this decade, the Secretary issued a proposed rule regarding the estimated assessment rates. This rule was published in the Federal

⁴The explanation given by the Secretary ... read identically, with respect to Plums and Peaches, as the above-cited statement regarding Nectarines.

Register (53 Fed. Reg. 23,243) on June 21, 1988 (Petitioners' "A.B." No. 9). The proposed rule provided that interested persons could file comments through July 1, 1988. On July 19, 1988, the Secretary issued a final rule with respect to the assessment rates (53 Fed. Reg. 27,151; Petitioners' "A.B." No. 10). In his final rules the Secretary [stated]:

The budgets are formulated and discussed in public meetings. Thus all directly affected persons have an opportunity to participate and provide input....

Approval of the expenses, assessment rates, and operating reserves should be expedited because the committees need to have sufficient funds to pay their expenses which are incurred on a continuous basis. In addition, handlers are aware of this action which was recommended by the committees at public meetings. Therefore, the Secretary also finds that good cause exists for not postponing the effective date of this action until 30 days after publication in the Federal Register. (53 Fed. Reg. 27,152).

The Secretary further stated:

While this section will impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be significantly offset by the benefits derived from the operation of the marketing orders. Therefore, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial

number of small entities. (53 Fed. Reg. 23,244, 27,152).

113-122. ...

123. The Tree Fruit Reserve was incorporated in 1957, as a non-profit California corporation, which obtained tax exempt status from the Internal Revenue Service as a 501(c)(6) organization....

124-179. ...

Conclusions

I. Burden of Proof and Scope of Review.⁵

The fact that petitioners have the burden of proof in this proceeding, and that this is not a proceeding to "second guess" the Secretary's policy judgments, is set forth in many decisions, e.g., *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1633, 1701-02 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975) *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. Dec. 17, 1976), which states:

It is well settled that the burden of proof in an 8c(15)(A) review proceeding rests with the petitioner. Petitioner in this proceeding has the burden of proving that the challenged Order provisions and obligations imposed upon it were "not in accordance with law" (7 U.S.C. 608c(15)(A)). See *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-317 (C.A. 3), certiorari denied, 394 U.S.

⁵This section is identical to § I in *Wileman I.*

929; *Boonville Farms Cooperative, Inc. v. Freeman*, 358 F.2d 681, 682 (C.A. 2); *United States v. Mills*, 315 F.2d 828, 836, 838 (C.A. 4), certiorari denied, 374 U.S. 832, 375 U.S. 819; *Windham Creamery, Inc. v. Freeman*, 230 F. Supp., 632, 635-636 (D.N.J.), affirmed, 350 F.2d 978 (C.A. 3), certiorari denied, 382 U.S. 979; *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo.), affirmed, 157 F.2d 87 (C.A. 8), certiorari denied, 329 U.S. 788; *Wawa Dairy Farms v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa.), affirmed, 149 F.2d 860, 862-863 (C.A. 3); *In re Clyde Lisonbee*, 31 Agriculture Decisions 952, 961 (1972); *In re Fitchett Brothers, Inc.*, 31 Agriculture Decisions 1552, 1571 (1972).

The inquiry here does not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations issued pursuant to the Act. See *In re Independent Milk Producer-Distributors' Assoc.*, 20 Agriculture Decisions 1, 18 (1961); *In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms*, 16 Agriculture Decisions 1209, 1220 (1957), affirmed, Southern Dist. Miss., January 5, 1959. See, also, *Pacific States Co. v. White*, 296 U.S. 176, 182.

The responsibility for selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative competence. *American Power Co. v. S.E.C.*, 329 U.S. 90, 112; *Secretary of Agriculture v. Central Roig Co.*, 338 U.S. 604, 610-614.

Without a showing that the action of the Secretary was arbitrary, his action is presumed to be valid. *Benson v. Schofield*, 236 F.2d 719, 722 (C.A.D.C.), certiorari denied, 352 U.S. 976; *Reed v. Franke*, 297 F.2d 17, 25-26 (C.A. 4). Mere assertions of illegality are not sufficient to have an order provision or administrative decision declared illegal. *In re College Club Dairy, Inc.*, 15 Agriculture Decisions 367, 373 (1956).

There is a presumption of regularity with respect to the official acts of public officers and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation*, 272 U.S. 1, 14-15. Accord: [*Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953);] *Reines v. Woods*, 192 F.2d 83, 85 (Emerg. C.A.); *National Labor Relations Board v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (C.A. 5); *Woods v. Tate*, 171 F.2d 511, 513 (C.A. 5); *Pasadena Research Laboratories v. United States*, 169 F.2d 375, 381 (C.A. 9), certiorari denied, 335 U.S. 853; *Laughlin v. Cummings*, 105 F.2d 71, 73 (C.A.D.C.). Specifically, administrative orders and regulations are presumed to be based on facts justifying the specific exercise of the delegated authority. *United States v. Rock Royal Co-op.*, 307 U.S. 533, 567-568 (a case under the Act involved herein); *Thompson v. Consolidated Gas Co.*, 300 U.S. 55, 69; *Pacific States Co. v. White*, 296 U.S. 176, 185-186.

The scope of review is set forth in § 10(e) of the Administrative Procedure Act as follows (5 U.S.C. § 706):

§ 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

....

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.

The "narrow" scope of review under the arbitrary and capricious standard (just quoted (5 U.S.C. § 706(2)(A))) is set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), as follows:

Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

The Court further stated in *Bowman Transp., Inc. v. Ark.-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974):

But we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the "arbitrary and capricious" test does not require more.

The "narrow" scope of review under § 706(2)(A), i.e., "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and the fact that it "forbids the court's substituting its judgment for that of the agency," is explained in *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-37 (D.C. Cir. 1975) (en banc) (footnotes omitted), *cert. denied*, 426 U.S. 941 (1976), as follows:

This standard of review is a highly deferential one. It presumes agency action to be valid.... Moreover, it forbids the court's substituting its judgment for that of the agency, ... and requires affirmance if a rational basis exists for the agency's decision.⁷³ ...

This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time-consuming) ritual. Rather, the reviewing court must assure itself that the agency decision was "based on a consideration of the relevant factors ***."⁷⁴ Moreover, it must engage in a "substantial inquiry" into the facts, one that is "searching and careful." *Citizens to Preserve Overton Park v. Volpe*, *supra*, 401 U.S. at 415, 416, 91 S.Ct. at 823, 824, 28 L.Ed.2d at 152, 153. This is particularly true in highly technical cases such as this one.

A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.

Greater Boston Television Corp. v. FCC, 143 U.S. App. D.C. 383, 392, 444 F.2d 841, 850 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 2233, 29 L.Ed.2d 701 (1971)....

There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve

itself in even the most complex evidentiary matters; rather, the two indicia of arbitrary and capricious review stand in careful balance. The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. The more technical the case, the more intensive must be the court's effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly preform its appellate function. But that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise.... The immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors..... It is settled that we must affirm decisions with which we disagree so long as this test is met.⁷⁶ ...

Thus, after our careful study of the record, we must take a step back from the agency decision. We must look at the decision not

as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.⁷⁷ "Although [our] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park v. Volpe*, *supra*, 401 U.S. at 416, 91 S.Ct. at 824, 28 L.Ed.2d at 153. We must affirm unless the agency decision is arbitrary or capricious.⁷⁸

The "narrow" scope of review under the "arbitrary and capricious" standard, under which "a court is not to substitute its judgment for that of the agency," with examples of when a court should reverse an agency, is set forth in *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), as follows:

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, *supra*, at 285; *Citizens to Preserve*

Overton Park v. Volpe, supra, at 416. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

In *In re Schepp's Dairy, Inc.*, 35 Agric. Dec. 1477 (1976), *aff'd*, No. 76-1984 (D.D.C. Aug. 15, 1977), *aff'd sub nom. Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11 (D.C. Cir. 1979), it is explained that it is for the Secretary in his rulemaking capacity to make policy judgments based upon conflicting testimony and conflicting considerations, and that even though other regulatory alternatives might have been more persuasively reasonable, that is not enough to set aside, as illegal, the regulatory alternative selected by the Secretary. Specifically, it is stated (35 Agric. Dec. at 1493, 1495, 1497-98):

Section 8c(4) requires not only that order provisions be based upon record evidence, but that they also tend to effectuate the declared policy of the Act. Petitioner's argument ignores the discretionary power conferred upon the Secretary with respect to such finding. As noted earlier, there was extensive testimony at the hearing relating to various approaches and considerations to be taken in determining the appropriate location adjustment. The fact that the Secretary chose one regulatory alternative over another cannot logically give rise to cries of illegality.

Lewes Dairy, supra [401 F.2d 308 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969)], at page 319.

....

While the Secretary's finding as to the effectuation of the policy of the Act must be based on the evidence introduced at the hearing, there is no compulsion that the Secretary find that a proposal will tend to effectuate the statutory policy even though supported by evidence.

....

In order to successfully challenge the decision of the Secretary, petitioner cannot merely show that, on the balance, its position is supported by evidence in the record, or vaguely allege that the Secretary's decision is unsupported in the record. Petitioner has the substantial burden to overcome a strong presumption of the existence of facts which support the administrative determination. *Lewes Dairy, Inc., supra*, pages 315-316. The Act gives the Secretary broad discretionary powers to effectuate its purposes. The existence of regulatory alternatives, even those which might be more persuasively reasonable, is not cognizable on review, *Lewes, supra*, pages 317, 319.

This proceeding does not afford petitioner a forum to review questions of policy, desirability, or effectiveness of Order provisions, *In re Sunny Hill Farms Dairy Co.*, 26 A.D. 201, 217 [*aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972)].⁶ It is not sufficient for petitioner to show that the record may contain evidence supporting its positions. On the contrary, petitioner must establish clearly that the record cannot sustain the conclusion reached by the Secretary.

II. The Act Limits the Scope of Inquiry in This Proceeding to the Matters Raised in the Petitions Filed by Petitioners, and Does Not Permit an Award of Monetary Damages.⁷

Before considering the substantive issues raised in this proceeding, it is important to recognize two limitations applicable to proceedings under § 8c(15)(A) of the Act (7 U.S.C. § 608c(15)(A)). First, the ALJ and the Judicial Officer can only rule on matters raised in the Petitions filed by petitioners. Second, the Act does not permit an award of monetary damages.

⁶*Sunny Hill* cites (26 Agric. Dec. at 217):

See, e.g., *United States v. Howeth M. Mills, et al.*, *supra* [315 F.2d 828, 838 (4th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963)]; *In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms*, 16 A.D. 1209, 1220 (1957), *aff'd*, S.D. Miss., Jan. 5, 1959; *In re Clover Leaf Dairy Company*, 15 A.D. 339 (1956), *aff'd*, N.D. Ind., Sept. 10, 1958. Cf. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 1982 (1935).

⁷This section is identical to § II in *Wileman I*, except that § II(B) of *Wileman I* (the Act does not permit review of discretionary determinations as to a particular lot of fruit) is omitted, as irrelevant, and the *Farm Fresh* history has been updated.

A. The Act Limits the Scope of Inquiry in a § 8c(15)(A) Proceeding to the Matters Raised in the Petitions Filed by Petitioners.

Section 8c(15)(A) of the Act provides (7 U.S.C. § 608c(15)(A) (emphasis added)):

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

Under the plain terms of the Act, the Secretary's authority is limited to ruling "upon the prayer of such petition" (7 U.S.C. § 608c(15)(A)). This principle was recently stated in *In re Farm Fresh, Inc.*, 49 Agric. Dec. 23, 79-80 (1990), *aff'd on other grounds*, CIV-90-688 T (W.D. Okla. June 24, 1991), as follows:

In addition to disagreeing with the ALJ on the merits of the Notice of Hearing issue, I disagree with the ALJ on procedural

grounds. That is, I believe that it was inappropriate for the ALJ to hold that the Notice of Hearing (and therefore the amendatory order) was invalid on the basis of a sentence in the Notice of Hearing not relied upon by the petitioner. It should be noted that this is not the typical proceeding brought before the ALJs whereby the Department is the complainant, and the ALJ might appropriately note *sua sponte* a ground of *defense* not noticed by the respondent's counsel. Rather, a § 8c(15)(A) proceeding is instituted by a private party, who is responsible for framing the issues. Under § 8c(15)(A) of the Act (7 U.S.C. § 608c(15)(A)), only a handler may file "a written petition" challenging an order, or any provision thereof, after which the handler shall be given opportunity for a hearing "upon such petition, in accordance with regulations made by the Secretary," and with a ruling made "upon the prayer of such petition. . . ." Neither the statute nor the Rules of Practice authorize an ALJ or the Judicial Officer to challenge an order or a provision thereof upon a basis not raised by the handler. The Rules of Practice require the petition to specifically state the "grounds" for the challenge (7 C.F.R. § 900.52(b)(4)), limit the evidentiary record to matters relevant and material to those grounds (7 C.F.R. § 900.60(d)), and require the ALJ to base his decision on that record (7 C.F.R. § 900.64(c)).

Even though the petitioner contested the adequacy of the Notice of Hearing in its

petition, petitioner did not rely on the ground relied upon by the ALJ in holding that the Notice of Hearing was inadequate. Accordingly, I believe that it was error for the ALJ to raise *sua sponte* the issue as to whether the sentence limiting the receipt of evidence "to the economic and marketing conditions which relate to the location adjustment provisions of the proposed merged and expanded Southwest Plains marketing area" precluded the receipt of evidence on the issue as to whether Lincoln County should be placed in Zone I.

The Judicial Officer has suggested, by way of dicta, that in a *disciplinary* proceeding instituted by the Department, it might be appropriate to permit an amendment to the complaint at the conclusion of the hearing to conform to the proof. *See In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1896 n.22, 1902-03 (1984). But that practice would not be appropriate in a § 8c(15)(A) proceeding such as this, in view of the express statutory language discussed above, and the industry-wide effect of the decision in a § 8c(15)(A) proceeding.

B. The Act Does Not Authorize the Award of Monetary Damages.

Under the plain terms of the Act, a handler's Petition under § 8c(15)(A) of the Act is limited to "stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law *and praying for a modification thereof or to be exempted therefrom*," and the Secretary is limited to ruling "upon the prayer of such petition" (7 U.S.C. § 608c(15)(A) (emphasis added)). There is no authorization in the Act, the Marketing Orders, or the Rules of Practice for consequential damages (as distinguished from a return of monies paid) to be awarded in

§ 8c(15)(A) proceedings. In over 50 years of proceedings under this Act, consequential damages have never been awarded. Petitioners and the ALJ attempt to distinguish fruit and vegetable orders from milk orders by contending that the latter orders only involve monies paid, and never consequential injury. This allegation is incorrect. For example, a milk supply plant might well suffer only consequential damages from a pooling provision that required an unlawfully high percentage of its milk to be delivered to distributing plants. Nonetheless, no case has ever been decided under milk orders or fruit and vegetable orders which would allow for consequential damages.

There have, of course, been some milk cases in which, as a result of a determination that an obligation to pay money imposed on a milk handler by a Market Administrator was unlawful, refunds have been made to the handler. See, e.g., *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 59 (1985), *aff'd on other grounds*, No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd*, 857 F.2d 1065 (6th Cir. 1988), *reprinted in* 47 Agric. Dec. 1377 (1988). But even "where a handler has been awarded money in a § 8c(15)(A) proceeding, interest [i.e., consequential damage] has never been awarded." *Id.* at 60.

Furthermore, even though an obligation unlawfully imposed on a milk handler might permit a return of the money unlawfully exacted from the handler, the general practice in this Department is first to give the Secretary the opportunity, in his rulemaking capacity, to correct the error, retroactively. As stated in *In re Farm Fresh, Inc.*, 49 Agric. Dec. 23, 99-101 (1990), *aff'd on other grounds*, CIV-90-688 T (W.D. Okla. June 24, 1991):

Since I am dismissing the petition, it is unnecessary for me to rule on what relief would have been appropriate if the petition were not dismissed. However, if the petition

were not dismissed, I would have remanded the proceeding for the Secretary to determine the appropriate remedy in his legislative capacity, for the reasons set forth in Respondent's Appeal Petition at 36-69, attached as Appendix B, and Respondent's Reply Brief filed Oct. 11, 1988, at 5-7, attached as Appendix C. (These excerpts from respondent's briefs will not be published in Agriculture Decisions, since it is not necessary for me to decide this issue.)

As stated in *In re Baker & Sons, Dairy, Inc.*, 48 Agric. Dec. [818, 865-66 (1989)], *appeal docketed sub nom. Meadow Gold Dairies, Inc. v. Yeutter*, No. 89-543-JJF (D. Del. Oct. 10, 1989):

VI. *If the Secretary's Temporary Emergency Rulemaking Action Were Found Unlawful, the Proper Course Would Be to Remand the Matter to the Secretary for Lawful Action.*

If the Secretary's temporary, emergency rulemaking action were held to be unlawful, the proper course would be to remand the proceeding to the Secretary to determine in his legislative capacity the appropriate action to be taken, which might or might not result in any payment to petitioners. See *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 57-62 (1985), *aff'd on other grounds*, No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd*, 857 F.2d 1065 (6th Cir. 1988);⁸ *In re*

⁸In *Defiance*, the Judicial Officer recognized that some courts had awarded monetary relief to some handlers, but the Judicial Officer did not adopt that policy as the proper Departmental policy.

Borden, Inc., 37 Agric. Dec. 987, 997-1000 (1978), *remanded*, 38 Agric. Dec. 1061 (1979),⁹ *dismissed per settlement agreement*, 40 Agric. Dec. 1711 (1979); *In re Babcock Dairy Co. of Ohio*, 35 Agric. Dec. 431, 444-46 (1976), *remanded sub nom. American Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252, 1261-62 (D.C. Cir. 1980) (remanding case to the Secretary to issue new provisions supportable on the record or to hold a new hearing on the issue, at the Secretary's discretion, while granting petitioner prospective relief in the interim).

In some cases, courts have remanded proceedings for further administrative consideration. See, e.g., *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 619-23 (1944) (remand is the proper course where part of a rule is deemed invalid, so that the Administrator can retrospectively act as he would have done if he had limited himself to statutory authority); *American Dairy of Evansville, Inc. v. Bergland*, *supra*; *Rodway v. USDA*, 514 F.2d 809, 817-18 (D.C. Cir. 1975) (rule invalidated and proceeding remanded to the Secretary for a new rulemaking proceeding in compliance with the APA, with invalidated regulation to remain in effect in interim).

⁹In *In re Borden, Inc.*, 38 Agric. Dec. 1061 (1979) (remand order), the Judicial Officer remanded the proceeding to the ALJ to determine the damages [i.e., the return of money paid by the handler]. But that remand order does not reflect the Department's customary practice, since the remand order related to two related proceedings, one of which was controlled by a court decision holding that Borden was entitled to recover overpayments from the producer-settlement fund. *Borden, Inc. v. Butz*, 544 F.2d 312, 319-20 (7th Cir. 1976).

In other cases, courts have refused to give refunds to prevailing parties, notwithstanding the illegality of administrative action. See e.g., *Blair v. Freeman*, 370 F.2d 229, 239-40 (D.C. Cir. 1968) (where "nearby differential" was held invalid, equitable considerations precluded refund to prevailing parties). See, also *Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 99 (1962) (where regulation held invalid, Court left open question as to whether Secretary could retrospectively apply new regulation to impounded funds); *accord United States v. Morgan*, 307 U.S. 183, 185-98 (1939).

In *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 57-59 (1985), *aff'd on other grounds*, No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd*, 857 F.2d 1065 (6th Cir. 1988), *reprinted in* 47 Agric. Dec. 1377 (1988), referred to in the preceding quotation, it is stated:

III. *If the Secretary's Temporary Rulemaking Action Were Found Unlawful, the Proper Course Would Be to Remand the Matter to the Secretary for Lawful Action.*

After concluding that it was unlawful for the Secretary to refuse to adopt petitioner's proposal, the ALJ ruled (Initial Decision at 28):

The result of the Secretary's action was that petitioner was required to pay 40 cents per hundredweight more for producer milk than its competitors marketing other Class III

products. The proper remedy in such circumstances is for the Market Administrator of Order 33 to reimburse petitioner the amount of this overcharge.

In the first place, petitioner was not required to pay more for milk than its competitors making evaporated milk or any of the other 14 products remaining in Class III. Only handlers making butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) benefited from the temporary price reduction. All handlers of the 15 products remaining in Class III, including other handlers making evaporated milk, continued to pay the same basic formula price previously set by a valid rulemaking proceeding.

But even if the Secretary's rulemaking action were held to be unlawful, the proper course would be to remand the proceeding to the Secretary to determine in his legislative capacity the appropriate action to be taken, which might or might not result in any payment to petitioner.

If, for example, the Secretary's temporary rulemaking action were held unlawful because the Secretary failed to explain in his rulemaking decision that he was actually reclassifying milk used to produce butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in a new Class III(A), priced 40¢ less than the basic formula price applicable to Class III, the

obvious remedy would be for the Secretary to amend his findings and conclusions, which would eliminate the illegality.

If, on the other hand, it were held (i) that substantial evidence does not support putting butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in the temporary, new Class III(A), or (ii) that it is unlawful to include butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in the temporary, new Class III(A) without also including evaporated milk, the Secretary might (a) want to hold a new hearing to determine *nunc pro tunc* what temporary action should have been taken (which could take anyone of numerous forms), (b) acquiesce in the determination of illegality and annul the temporary rulemaking action as to all handlers, or (c) include evaporated milk (and perhaps other products) in the temporary, new Class III(A). There would be no basis for binding the Secretary to take only one action, viz., include evaporated milk, but none of the other 14 products that would remain in Class III, in the new Class III(A).

Where it has been administratively determined that the Secretary's rulemaking action is unlawful, it has been the practice in this Department for more than 40 years to remand the proceeding to the Secretary, rather than for the ALJs or the Judicial Officer to take corrective rulemaking action. See, e.g., *In re Borden, Inc.*, 37 Agric. Dec. 987, 997-1000 (1978), *remanded*, 38 Agric. Dec. 1061 (1979), *dismissed per settlement*

agreement, 40 Agric. Dec. 1711 (1979); *In re The Babcock Dairy Co. of Ohio*, 35 Agric. Dec. 431, 444-46 (1976), remanded sub nom. *American Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252, 1261-62 (D.C. Cir. 1980) (remanding case to the Secretary to issue new provisions supportable on the record or to hold a new hearing on the issue, at the Secretary's discretion, while granting petitioner prospective relief in the interim).

Even during the period prior to 1980, when the delegation of authority to the Judicial Officer included authority to perform "any regulatory function" (7 C.F.R. § 2.35 (1979)), which is not now in the Judicial Officer's delegation of authority (7 C.F.R. § 2.35 (1984)), in actual practice, the Judicial Officer always refrained from exercising any rulemaking function. *Flavin*, "The Functions of the Judicial Officer, USDA," in 26 Geo. Wash. L. Rev. 277, 278 n. 9 (1958) (written by the Department's Judicial Officer from 1942 to 1972).

In similar situations, courts also frequently remand proceedings for further administrative consideration. See, e.g., *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 619-23 (1944) (remand is the proper course where part of a rule is deemed invalid, so that the Administrator can retrospectively act as he would have done if he had limited himself to statutory authority); *American Dairy of Evansville, Inc. v. Bergland*, supra; *Rodway v. USDA*, 514 F.2d 809, 817-18 (D.C. Cir. 1975) (rule invalidated and proceeding remanded to the Secretary for a

new rulemaking proceeding in compliance with the APA, with invalidated regulation to remain in effect in interim).

In other cases, courts have refused to give refunds to prevailing parties, notwithstanding the illegality of administrative action. See, e.g., *Blair v. Freeman*, 370 F.2d 229, 239-40 (D.C. Cir. 1968) (where "nearby differential" was held invalid, equitable considerations precluded refund to prevailing parties). See, also, *Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 99 (1962) (where regulation held invalid, Court left open question as to whether Secretary could retrospectively apply new regulation to impounded funds); accord *United States v. Morgan*, 307 U.S. 182, 185-98 (1939).

Courts have, however, awarded relief to prevailing parties in some cases distinguishable from the present case. In *Fairmont Foods Co. v. Hardin*, 442 F.2d 762 (D.C. Cir. 1971), a handler challenged the 1965 promulgation of a higher Class I price applicable to its plant location and requested a refund of the difference between the pre-1965 price and the higher price it had been forced to pay between 1965 and 1968 as a result of the amendment. *Id.* at 766 n. 16. The court set aside the amendment because the rulemaking record did not contain substantial evidence to support it. *Id.* at 767. The court concluded that the plaintiff was entitled to recover the "overpayments which it made pursuant to this invalid Order." *Id.* at 773.

In *Fairmont Foods*, the court held that the handler should only have paid the price set

by the valid Order provision which preceded the invalid amendment, and that the "overpayments" should be returned to the handler. In the present case, however, the price petitioner paid for milk in June and July 1983 was the same price it had been paying which had been set by a valid Order provision not even challenged in this proceeding. There is no prior, valid price to revert to, as in *Fairmont Foods*, because the prior, valid price is the one which petitioner paid in this case.

Similarly, in *Borden, Inc. v. Butz*, 544 F.2d 312, 319-20 (7th Cir. 1976), and *Abbotts Dairies Division of Fairmont Foods, Inc. v. Butz*, 584 F.2d 12, 16-21 (3d Cir. 1978), handlers challenged order amendments which raised the Class I price for their milk above the level at which it had been previously set. The courts found insufficient evidence for the amendments, and, therefore, held that they were invalid. The handlers' recoveries were based on the fact that they had paid a price set by invalid Order provisions. But, as stated above, here petitioner's price for milk was set by a prior, valid Order provision. Accordingly, those cases are not analogous to the situation here.

In the present case, if the Secretary's temporary, rulemaking action were held unlawful, I would adhere to the Department's settled practice for over 40 years, and remand the proceeding to the Secretary for further legislative consideration. That action is particularly appropriate here in view of the numerous, reasonable options available

to the Secretary, if his original, temporary action were held invalid.

Similarly, in *In re Sequoia Orange Co.*, 47 Agric. Dec. 2, 191 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *printed in* 48 Agric. Dec. 1 (1989), *appeal docketed*, No. 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990), it is stated:

Finally, even if petitioners had properly made a case as to the omission of alternative views (which they did not), and I believed such an omission to be legal error (which I do not), rather than hold invalid those weekly volume regulations where petitioners proved their case, in this respect, I would have remanded the matter to the Division Director to make a determination at the present time as to whether the additional information would have altered the regulation for the week in question. *See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 619-23 (1944); *In re Oak Tree Farm Dairy, Inc.*, 38 Agric. Dec. 113, 165-66 (1979) (decision on remand), *aff'd*, 544 F. Supp. 1351 (E.D.N.Y. 1982).

However, irrespective of whether the Secretary should be permitted to correct an error retroactively, where error has been found in a § 8c(15)(A) proceeding, an award of monetary damages (as distinguished from a return of money already paid) is not permitted by the Act.

III. The Lawfulness of an Order or Provision Thereof or Regulation Issued Thereunder Must Be Determined Only Upon the Basis of the Evidence Before the Secretary in the Formal or Informal Rulemaking Records, and Not by Evidence Received at a § 8c(15)(A) Proceeding.

It is well settled that the lawfulness of Marketing Order or a provision thereof or a regulation issued thereunder must be judged by the facts contained in the formal or informal hearing record, rather than by facts petitioners would seek to introduce at a § 8c(15)(A) hearing. See *Dairymen's League Coop. Ass'n v. Brannan*, 173 F.2d 57, 66 (2d Cir.), cert. denied, 338 U.S. 825 (1949); *Beatrice Creamery Co. v. Anderson*, 75 F. Supp. 363, 367 (D. Kan. 1947); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 228 (E.D. Mo. 1945), aff'd, 157 F.2d 87 (8th Cir.), cert. denied, 329 U.S. 788 (1946); *In re Sequoia Orange Co.*, 41 Agric. Dec. 1511, 1521-23 (1982), order transferring case, No. 82-2510 (D.D.C. June 14, 1983), aff'd on other grounds, No. CV F 83-269 (E.D. Cal. Dec. 21, 1983), As stated in *In re Leonberg*, 32 Agric. Dec. 763, 792 (1973):

It is well established that when the lawfulness of the Order itself or a provision thereof is attacked, the Act affords no trial *de novo* by way of the 8c(15)(A) petition. *The Order must stand or fall upon the basis of the evidence before the Secretary adduced during the promulgation proceedings*, and additional evidence is not relevant or admissible in the 8c(15)(A) proceeding. "To allow evidence [in the 8c(15)(A) proceeding not presented in the promulgation proceeding] would be to reopen, rather than to judge, the promulgation proceeding." *United*

States v. Mills, 315 F.2d 829, 836 (C.A. 4), certiorari denied, 374 U.S. 832. Accord: *Dairymen's League Cooperative Ass'n v. Brannan*, 173 F.2d 57, 66 (C.A. 2), certiorari denied, 338 U.S. 825; *In re Terrace Park Dairy*, 12 Agriculture Decisions 1383, 1396-1397 (1953); *Sprague Dairy Co. v. Anderson*, 6 Agriculture Decisions 729 (N.D. Ill.). See, also, *Acme Fast Freight, Inc. v. United States*, 154 F. Supp. 239, 241 (S.D.N.Y.).⁸

This exclusionary rule is necessary to maintain the integrity of the regulatory program. The promulgation of an Order or an amendment thereto is formal rulemaking subject to section 7 of the Administrative Procedure Act (5 U.S.C. § 556), which provides that no rule shall be issued except as "supported by and in accordance with the reliable, probative, and substantial evidence." Section 8c(4) of the Agricultural Marketing Agreement Act (7 U.S.C. 608c(4)) requires that in issuing an Order the Secretary shall find upon the evidence introduced at the promulgation hearing that issuance of the Order will tend to effectuate the declared policy of the Act. The administrative process would be seriously disrupted if the Secretary based his determination to issue an Order upon the evidence

⁸*Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315-19 (1968), cert. denied, 394 U.S. 929 (1969), is not to the contrary. In that case, the relevant "record" was the record of the evidence adduced at the § 8c(15)(A) proceeding, rather than the evidence adduced at the formal rulemaking hearing, but that was because the issue was whether the challenged Order provisions, as applied to the particular handler challenging the Order, created an illegal trade barrier, which is expressly prohibited by the Act (401 F.2d at 310-20).

before him, while the validity of his determination was later judged upon different evidence. Therefore, any new, relevant evidence bearing upon the validity of the Order must be presented first to the Secretary in his legislative, and not in his judicial capacity.

Petitioners must confine their challenges to the rulemaking record before the Secretary at the time of the rulemaking, "not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1972). "With respect to factual contentions, the (15)(A) process can only test the validity of the Order by the facts contained in the promulgation hearing record—which are not challenged by petitioners. Hence petitioners seek relief in the wrong forum." *In re Sequoia Orange Co.*, 47 Agric. Dec. 2, 99 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *printed in* 48 Agric. Dec. 1 (1989), *appeal docketed*, No. 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990). Furthermore, it must be presumed (until proven contrary) that substantial evidence in the promulgation hearing record supports all of the provisions of an Order. See *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 567-68 (1939); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 184-85 (1935); *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934). If that evidence is faulty, or if circumstances have changed so that the Order no longer produces equitable results, the remedy is through the amendatory or termination process—not through a § 8c(15)(A) proceeding.

In the present case, petitioners did not introduce into evidence the formal rulemaking records supporting the Order provisions at issue here. Nonetheless, they challenged the Order provisions on the basis of evidence

erroneously received at the § 8c(15)(A) hearing. That cannot lawfully be done. Similarly, although the informal rulemaking records underlying particular regulations were properly received in evidence, petitioners challenged the regulations on the basis of additional evidence improperly received at the § 8c(15)(A) hearing. That, too, was improper. As shown below, the ALJ's reliance on such § 8c(15)(A) "evidence" was error.

IV. *Res Judicata* (Claim Preclusion and Issue Preclusion) Requires Dismissal of Some of Petitioners' Claims.

A. Petitioners' Allegations Regarding Assessment Regulations and Their Attendant Budget Approvals for Marketing Orders 916 and 917 for 1984-1987 Must Be Dismissed Under the Doctrine of *Res Judicata* (Claim Preclusion).

The Decision in *Wileman I* specifically rejected petitioners' claims that the assessment regulations for 1984-1987 under Marketing Orders 916 and 917, and their attendant budget approvals, were not in accordance with law (*Wileman I*, 49 Agric. Dec. at 783-96, slip op. at 76-88). The Decision in *Wileman I* states that the petitioners prayed for a return of assessments only for the years 1984 through 1987, and, therefore, that no other years were relevant (49 Agric. Dec. at 783 n.13, slip op. at 76 n.13). In the present proceeding, petitioners seek to relitigate the legality of the assessment regulations and their attendant budget approvals for 1980-1987 (Amended Petition, ¶¶ 11, 13, 14, 17, 18, 19, 31, 32, 33, possibly 34-38, 53, 54, 62(M), 62(N) and 62(O)).⁹ Such relitigation as to 1984-1987 is barred by the doctrine of *res judicata* (claim preclusion).

⁹Some of these paragraphs also involve allegations as to 1988 and subsequent years, and some involve allegations barred by the doctrine of claim preclusion (see § IV(B), *infra*).

In recent years, the courts have increasingly used the term *res judicata* to encompass two separate legal doctrines, each of which is applicable to some of petitioners' allegations. In *Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc.*, 575 F.2d 530, 535-36 (5th Cir. 1978), the court explained these legal principles as follows:

The rules of *res judicata*, as the term is sometimes sweepingly used, actually comprise two doctrines concerning the preclusive effect of a prior adjudication. The first such doctrine is "claim preclusion," or true *res judicata*. It treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." *Sea Land Services, Inc. v. Gaudet*, 1974, 414 U.S. 573, 578-79, 94 S.Ct. 806, 39 L.Ed.2d 9, 17-18. *See also* discussion in Restatement Second of Judgments, p. 1 and § 47 (Tent. Draft No. 1, 1973). When the plaintiff obtains a judgment in his favor, his claim "merges" in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a "bar." *Angel v. Bullington*, 1947, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832. *Cf. Cleckner v. Republic Van and Storage Co.*, 5 Cir. 1977, 556 F.2d 766. *See also* discussion in Restatement Second of Judgments, p. 1 and § 48 (Tent. Draft No. 1, 1973). Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all

issues relevant to the same claim between the same parties, whether or not raised at trial. *Garner v. Giarrusso*, 5 Cir. 1978, 571 F.2d 1330 (1978); *International Assoc. of Machinists & Aerospace Workers, v. Nix*, 5 Cir. 1975, 512 F.2d 125, 131; *Blanchard v. St. Paul Fire and Marine Ins. Co.*, 5 Cir. 1965, 341 F.2d 351, 359. *See also* Restatement Second of Judgments, §§ 47(b) and 48 comment a (Tent. Draft No. 1, 1973). The aim of claim preclusion is thus to avoid multiple suits on identical entitlements or obligations between the same parties, accompanied, as they would be, by the redetermination of identical issues of duty and breach.

The second doctrine, collateral estoppel or "issue preclusion," recognizes that suits addressed to particular claims may present issues relevant to suits on other claims. [Footnote omitted.] In order to effectuate the public policy in favor of minimizing redundant litigation, issue preclusion bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties. *Harris v. Washington*, 1971, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212. *See also* Restatement of Judgments, § 68 and Restatement Second of Judgments, § 45(c) (Tent. Draft No. 1, 1973). It is insufficient for the invocation of issue preclusion that some question of fact or law in a later suit was relevant to a prior adjudication between the parties; the contested issue must have been litigated and necessary to the judgment earlier rendered. [Footnote omitted.]

With regard to the question of relitigation the legality of the 1984-1987 assessment regulations and their attendant budget approvals, the relevant doctrine is claim preclusion (a/k/a merger and bar; true *res judicata*). Under the doctrine of claim preclusion, the Supreme Court has consistently held that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (emphasis added). See also *Cromwell v. County of Sac.*, 94 U.S. 351, 352 (1876). This doctrine is applicable where the issues in the two legal actions involve the same "transaction" or "series of transactions" (*Restatement (Second) of Judgments* § 24), or the same factual "occurrence" (*National Benefit Fund for Hosp. and Health Care Employees v. Presbyterian Hosp.*, 448 F. Supp. 136, 138 (S.D.N.Y. 1978)), or the "same disputed facts" (*Lambert v. Conrad*, 536 F.2d 1183, 1186 (7th Cir. 1976)), or where "the facts underlying . . . [the] claims are identical" (*In re A. Musto Co. v. Satran*, 477 F. Supp. 1172, 1176 (D. Mass. 1979)). The doctrine of claim preclusion is not obviated merely because, in the second legal action, the plaintiff seeks to assert a different legal theory (*Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir. 1977), *cert. denied*, 434 U.S. 903 (1977)), or seeks a new remedy (*Restatement (Second) of Judgments* § 25). Thus, the fact that there is a final¹⁰ decision on the merits¹¹ regarding the same factual situation requires that the *res judicata* (claim preclusion) doctrine be applied, and

¹⁰ A decision is considered final for *res judicata* purposes even though an appeal is pending in a higher court. *Sherman v. Jacobson*, 247 F. Supp. 261, 268 (S.D.N.Y. 1965).

¹¹ For *res judicata* purposes, even a previous holding that a court lacks subject matter jurisdiction is considered as a decision on the merits, since this is not a curable defect. *Stewart Securities Corp. v. Guaranty Trust Co.*, 597 F.2d 240, 240-43 (10th Cir. 1979).

that a party be prohibited from relitigating that situation on any legal theory in a new proceeding.

These same petitioners litigated the same basic factual situation (i.e., the 1984-1987 assessment regulations and their attendant budget approvals under Marketing Orders 916 and 917) on the basis of several different legal theories in *Wileman I*. The Decision in *Wileman I* decided that claim on the merits. It now matters not that *Wileman I* is on appeal, or even which party prevailed on that claim (since either merger or bar would occur), or that petitioners have added some new legal theories in the current petition. The only salient point is that there is a final judgment at the Department level regarding those years. Thus, those years cannot be relitigated in the instant proceeding. Furthermore, although petitioners' claims in *Wileman I* as to the 1984-1987 assessment regulations and budget approvals under Marketing Orders 916 and 917 included only nectarines and plums, petitioners are not allowed to split their cause of action under Marketing Order 917 for 1984-1987 to now attack the assessments and budget approvals for peaches for 1984-1987. See *Restatement (Second) of Judgments* §§ 24-26.

B. Various Other Allegations of the Amended Petition Must Be Dismissed Under the Doctrine of *Res Judicata* (Issue Preclusion).

The second *res judicata* doctrine (a/k/a issue preclusion; collateral estoppel) prohibits the petitioners herein from relitigating certain legal issues with regard to the maturity regulations, and the assessment regulations and their attendant budget approvals, in that said legal issues were fully litigated in *Wileman I*. As noted above, the parties in *Wileman I* are identical to the parties here, and it is irrelevant for *res judicata* purposes that the Decision and Order in *Wileman I* is on appeal.

The only pertinent point is that the legal theory in the current proceeding is the same, and there has been no change in the factual circumstances which would impact on the legal theory.¹² Hence, a variety of claims, which have already been litigated, cannot herein be relitigated for 1980-1983, and 1988 and future years, since there have been no factual changes material to these claims. See *Thistlethwaite v. City of New York*, 497 F.2d 339, 340-43 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974).

As stated in § IV(A), *supra*, *res judicata* (claim preclusion) applies to the issues involving assessment regulations and the attendant budget approvals for 1984 through 1987. In addition, *res judicata* (issue preclusion) applies with respect to the other years, 1980 through 1983, and 1988 and later years, with respect to the issue as to whether the Secretary's approval of the Committees' budget are subject to the rulemaking requirements of the APA. See *Wileman I* (49 Agric. Dec. at 783-96, slip op. at 76-88), discussed in § XI(C)(2), *infra*.

However, other assessments issues, which respondent contends are subject to *res judicata* (claim preclusion), were not decided in *Wileman I* and, therefore, claim preclusion is inapplicable. Specifically, Respondent's Appeal Petition renews the arguments made in respondent's Motion to Dismiss filed October 4, 1989 (Respondent's Appeal Petition at 3). In respondent's Motion to Dismiss filed October 4, 1989, at 8, respondent argues that claim preclusion applies to petitioners' constitutional arguments relating to assessments, viz, that the assessments violate petitioners' rights under the First Amendment and the equal protection guarantees provided by the Fifth Amendment, and that the assessments constitute an unconstitutional tax without proper delegation. It was held in

¹²A change in the factual circumstances refers to an actual change in the factual circumstances which has occurred *since* the earlier proceeding, not merely to new evidence in the second proceeding as to the identical factual situation that was involved in the first proceeding.

Wileman I that the constitutional issues raised by petitioners in their briefs had not been raised in their Petitions and, therefore, that the constitutional issues were not properly raised in *Wileman I* (*Wileman I*, 49 Agric. Dec. at 783 n.13 slip op. at 76 n.13). Accordingly, *res judicata* (issue preclusion) is not applicable to these constitutional issues.

Similarly, respondent's argument, that *res judicata* (issue preclusion) applies to petitioners' claim that the assessment regulations cannot be applied to the whole fiscal year because they were retroactively issued (Amended Petition at ¶ 17), is not well taken since "retroactivity [was] not directly raised in *Wileman I*." *In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23, 165, slip op. at 162 (1991), *appeal docketed*, No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991), quoted in § XII(D), *infra*. For the same reason, respondent's contention, that *res judicata* (issue preclusion) applies to the issue as to whether assessments can properly fund CTFA, is without merit because it was held in *Wileman I* that the issue was not properly in the case because it was not raised in the Amended Petition (*Wileman I*, 49 Agric. Dec. at 795, slip op. at 87-88). Accordingly, *res judicata* (issue preclusion) does not apply.

With regard to the maturity and size regulations for 1988 and future years, the petitioners seek to raise a legal issue as to whether there is constitutional or statutory authority for the Secretary to delegate to the Committees and subcommittees certain functions regarding changes and variances in particular color standards (Amended Petition, ¶¶ 5, 6, 44(m), 50, 52, 62(E)). The basic question of constitutional and statutory authority for such delegation was litigated and determined in *Wileman I* (49 Agric. Dec.

at 812-29, slip op. at 105-22). Hence, this issue must be dismissed under *res judicata* (issue preclusion).¹³

Similarly, *res judicata* (issue preclusion) applies to numerous other maturity issues relating to the use of color chips and other tests to determine maturity, what occurred during the 1980 through 1987 seasons, and whether the use of color chips and other tests is arbitrary and capricious, since these issues were decided in *Wileman I* (49 Agric. Dec. at 796-831, slip op. at 88-124). See § XIV, *infra*.

However, I disagree with respondent's argument (Motion to Dismiss at 10) that *res judicata* (issue preclusion) applies to whether the Secretary can ever enact regulations which limit the grade, size, and maturity of fruit which may be handled, since that issue was not directly decided in *Wileman I*.

Finally, I disagree with respondent's argument (Motion to Dismiss at 10-11) that *res judicata* (issue preclusion) applies to petitioners' argument that the rules of practice and interim-relief policy fail to provide adequate and timely relief. Since I held that petitioners were not entitled to any relief in *Wileman I*, I did not address the issue, just as I am not addressing it here, for the same reason.

V. The Promotional Programs Under Marketing Orders 916 and 917 Present No Impingement on Petitioners' First Amendment Rights.

Petitioners assert that the effect of the promotional programs conducted under Marketing Orders 916 and 917 is to compel petitioners to engage in "forced advertising," which amounts to forced speech and forced association in violation of the First Amendment. Petitioners' argument is

¹³The issue of the legality of how such delegation was accomplished is ripe for consideration in the present proceeding since the delegation has been accomplished for 1988 and the future in regulations, which was issued in 1988, and have not been litigated previously.

summarized by the ALJ as follows (Initial Decision at 196-97).

Summarized, their position is that the Agricultural Marketing Agreement Act permits the Secretary to collect assessments from handlers regulated under a Marketing Order for purposes of any form of advertising (7 U.S.C. § 608(6)(I)). The Secretary, adopting the preferences of the Nectarine, Plum and Peach Committees, through the California Tree Fruit Agreement, has opted for the use of "generic" rather than brand name specific advertising. Wileman/Kash assert that to compel them to provide financial support for the advancement of any economic, ideologic and/or commercial beliefs, particularly those with which they disagree, violates their Constitutional right of freedom of speech and association, both as individuals and in the commercial setting.

Although the ALJ did not decide the First Amendment issue (since she held in petitioners' favor on non-constitutional issues), she believed that petitioners' First Amendment rights were violated (Initial Decision at 306-60), and stated that "if Petitioners were not to succeed in their non-constitutional arguments, I would rule in their favor on their First Amendment rights" (Initial Decision at 360).

In my view, the promotional programs in question do not infringe upon any First Amendment rights of petitioners. The programs neither compel nor prevent petitioners from speaking, advertising or expressing themselves in any way. The programs merely allow for generic commercial advertising, as approved by the Secretary and

authorized by Congress, to be conducted to benefit growers and handlers of California peaches, plums and nectarines. The programs, in fact, conduct commercial advertising designed *only* to encourage the purchase of California peaches, plums and nectarines, which petitioners produce and handle. The programs fall well within the power of Congress to regulate under the Commerce Clause, and present no danger of "forced speech" or "forced association."

Petitioners cite no speech or activity with political, philosophical, or ideological content that is undertaken with the assessment funds. Indeed, petitioners cite nothing in the content of the advertising done under the Orders which may be claimed to be ideologically offensive. Petitioners challenge only the effectiveness of the advertising conducted under the programs, as compared to the effectiveness of their own advertising. However, the effectiveness of a handler's private advertising is not relevant to a determination of the constitutionality of the AMAA, or of the promotional programs authorized by Marketing Orders 916 and 917.

It is not our function to determine policy. Policy questions as to the wisdom or effectiveness of a program are solely in the hand of Congress. See *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 234 (1956). Congress conducted hearings to determine whether such a program would be in the interest of producers, handlers and the general public. Congress delegated authority to the Secretary of Agriculture to further determine on the basis of formal rulemaking hearings whether the promotional programs would effectuate the declared policy of the Act as it pertains to California peaches, plums, and nectarines. Congressional hearings and formal rulemaking hearings conducted by the Secretary provide the appropriate forum for taking evidence as to the wisdom of the Act and Order provisions. "With respect to factual contentions, the

(15)(A) process can only test the validity of the Order by the facts contained in the promulgation hearing record—which are not challenged by petitioners. Hence petitioners seek relief in the wrong forum." *In re Sequoia Orange Co.*, 47 Agric. Dec. 2, 99 (1988), *aff'd in part and demanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *printed in* 48 Agric. Dec. 1 (1989), *appeal docketed*, No. 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990). See § III, *supra*. If petitioners feel that the program is ineffective, their appropriate avenue of redress is an appeal to Congress or request for formal rulemaking to the United States Department of Agriculture.

In any event, the Supreme Court of the United States has denied review of the decision of the United States Court of Appeals for the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990), which found the identical challenges to those raised by petitioners here to be without merit. Thus, petitioners' challenges to the Marketing Orders under the First Amendment are without merit.

A. Petitioners' "Forced Speech" Claim Has No Basis in Law or Fact.

1. The "Forced Speech" Doctrine Is Inapplicable to Commercial Speech.

Although the Supreme Court of the United States has extended First Amendment protection to commercial speech in order to ensure that the public is not denied the free dissemination of commercial information, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766-70 (1976), the Court has never recognized a right to refrain from engaging in commercial speech. Nothing in the AMAA, the Orders or

the regulations prevents the dissemination of commercial speech. Thus, petitioners' claim is without merit.

In *Virginia State Bd. of Pharmacy*, the Court struck down a statute which prohibited pharmacists from advertising their prices for prescription drugs, holding that the statute kept "the public in ignorance of the entirely lawful terms that competing pharmacists are offering." 425 U.S. at 770. In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980), the Court also invalidated a regulation that completely banned promotional advertising by an electric utility, citing the vital interest of keeping "open the channels of communication," citing *Virginia State Bd. of Pharmacy*, 425 U.S. at 770. Indeed, the application of the First Amendment by the Supreme Court to commercial speech has been based on society's "strong interest in the free flow of commercial information." *Friedman v. Rogers*, 440 U.S. 1, 8-9 (1978). As stated by the Court in *Zauderer v. Office of Disciplinary Counsel*, 471, U.S. 626, 651 (1985), "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides. . . ." Thus, the Supreme Court has extended First Amendment rights to commercial speech only in cases in which a statute or regulation *prohibits* commercial speech. The Supreme Court has never recognized the existence of a right to refrain from commercial speech. Therefore, the facts of this case simply do not raise a colorable First Amendment claim.

Under the AMAA, the Orders, and the regulations, the petitioners are entirely free to advertise on their own. In fact, the AMAA expressly bans regulations restricting the advertising of regulated commodities in § 8c(10) (7 U.S.C. § 608c(10)):

No order shall be issued under this chapter prohibiting, regulating, or restricting the

advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity, or product covered by such marketing agreement.

Petitioners presented evidence that they advertise their own peaches, plums and nectarines under their brand name labels through labels and stickers attached to fruit and fruit containers (Ex. 316, 317, 318, 320), promotional displays in stores (Ex. 319), posters (Ex. 321) and advertising brochures (Ex. 341). Thus, the AMAA, the Orders, and regulations do nothing to prevent petitioners from disseminating information about their product to consumers. This removes the present case from the First Amendment protection extended to commercial speech by the Supreme Court. Petitioners' claim that they would have more money to spend on their own advertising, if they did not have to pay their pro rata share of the Orders' advertising programs, does not rise to the status of a *Federal prohibition* against their own advertising, which would give rise to a First Amendment issue.

2. The Promotional Programs Conducted Under Marketing Orders 916 and 917 Do Not Require the Petitioners to Speak or Engage in Expressive Conduct of Any Kind.

As discussed above (§ V(A)(1)), petitioners have no First Amendment right to refrain from engaging in commercial speech. Nonetheless, assuming, *arguendo*, that petitioners could establish such a right, their claim would fail. Petitioners simply have not been forced to speak by the challenged Orders.

No provision of the AMAA, Orders or regulations forces petitioners to engage in speech. The AMAA allows the

Secretary to approve commercial speech undertaken by the respective Committees under the Orders, funded by assessments collected under those Orders. While petitioners are required to pay their share of assessments, petitioners are not forced to speak themselves. They are not forced to place signs on their property, or to place labels on their fruit or their containers. None of the promotional activities of the Marketing Order programs associates petitioners with the advertisements. Nor do the programs involve content of an ideological nature.

As such, the promotional programs under the Marketing Orders fall wholly outside the "forced speech" doctrine, as defined by the Supreme Court. The cases in which the Supreme Court has found that statutes impermissibly "force speech" implicate interests which are not "of the same order" as those presented here. *Zauderer*, 471 U.S. at 651. In *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), the Court struck down a New Hampshire statute's requirement that each automobile license plate carry the slogan "Live Free or Die" because it required the Maynards to "use their private property as a 'mobile billboard' for the State's ideological message." Petitioners here are not required to display, wear, or include any of the Committee advertising on their person or property in any way. Further, *Wooley* involved ideological speech with which the Maynards disagreed. The "speech" conducted under the Marketing Orders' promotional programs is purely commercial (See Ex. 298, 301-303).

In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court struck down a statute which required public school students to recite the Pledge of Allegiance to the American flag. Again, that statute forced the complainants to do the speaking, and it was speech of an obviously ideological content. The AMAA, the Orders and the regulations require no such activity on the part of petitioners.

Petitioners have alleged no activities supported by assessment funds which would constitute ideological activity with which petitioners disagree. Petitioners cite no instances of political or ideological expenditures undertaken with assessment funds. As can be seen by an examination of the advertising conducted under the Order, the only expenditures of advertising assessments taking place are for generic commercial advertising. Television commercials show children eating California fruit (Ex. 301). Posters display fresh California peaches, plums and nectarines (Ex. 256, 259). Radio commercials speak of the upcoming availability of California peaches, plums and nectarines (Ex. 302, 303). These expenditures are on purely commercial speech. Indeed, Mr. Jonathan Field, manager of the California Tree Fruit Agreement, the employee hired by the Committees to carry out administrative duties under the Order, created various charts to detail just how every dollar of assessment money spent on advertising is used. See Ex. 348-353. As demonstrated through the budget material provided to the Secretary by the Committees (Ex. 297(A)-(KK)), the representative samples of the radio and TV scripts (Ex. 301-303), the charts detailing advertising expenditures (Ex. 348-353), and the testimony of Mr. Field, assessment funds are spent only on commercial advertising promoting the California fruit regulated under the Orders. No assessment funds are spent on political or ideological activity.

What petitioners disagree with is the effectiveness of generic advertising. It is their opinion that generic advertising does not work. As a matter of policy, they feel that the money they pay for such generic advertising is not being well-spent. Although such notions may be appropriate considerations for a rulemaking hearing (*Secretary of Agric. v. Central Roig Ref. Co.*, 338 U.S. 604, 610-14 (1950)), they do not make for a First Amendment claim.

In *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986), the Court ruled that a public utility could

not be forced to disseminate messages of consumer groups with which it disagreed. *Pacific Gas* differs from the present case in several crucial respects. The order by the Public Utility Commission in *Pacific Gas* required the utility company itself to disseminate the information in its own billing envelopes. The regulation in *Pacific Gas*, unlike the regulations of Marketing Orders 916 and 917, forced the company to use its own property to disseminate the information. Furthermore, the information that the company was forced to disseminate contained a discussion of matters of public concern affecting core First Amendment values, and "access is awarded only to those who disagree with appellant's views and who are hostile to appellant's interests." *Id.* at 14. Two of the acknowledged purposes of the access order were to "offer the public a greater variety of views in appellant's billing envelope, and to assist groups . . . that challenge appellant in the Commission's ratemaking proceedings in raising funds." *Id.* at 12-13. Thus, the distinctly content-driven nature of the Commission's order, according to the Court, could force the utility company to disseminate messages that might "urge appellant's customers to vote for a particular slate of legislative candidates, or to argue in favor of legislation that could seriously affect the utility business." *Id.* at 15. The AMAA and the Marketing Orders allow for generic advertising only. 7 U.S.C. § 608c(6)(I). No messages of ideological, political, or philosophical content are allowed to be, or have ever been, disseminated with the use of assessment funds.

Pacific Gas thus illuminates the meritlessness of petitioners' claim. The only "speech" conducted or allowed under the Orders is commercial speech encouraging consumers to eat California peaches, plums, and nectarines, which are products that the petitioners are in business to sell.

Petitioners cite *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032

(1988), in support of their First Amendment claim. However, that case is similarly distinguishable. In *Century Communications*, the court struck down "must carry" rules promulgated by the FCC that required cable operators to transmit "local" over-the-air television broadcast signals for a period of 5 years. These signals informed viewers of their opportunity to watch "free television" through the use of a converter device. Thus, like the utility company in *Pacific Gas*, the cable operators were required to disseminate with the use of their private property a message that was in direct contradiction to their interests.

In addition, the court in *Century Communications*, in reaching its decision that the "must carry" regulation violates the First Amendment, applied a test which more recent Supreme Court holdings indicate does not apply to commercial speech. The court in *Century Communications* struck down the rules for applying the test set out in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), in which the Supreme Court held that, to withstand First Amendment scrutiny, a regulation incidentally burdening speech and not aimed at the suppression of free expression must advance a substantial governmental interest and must be no more restrictive than necessary to accomplish that end. *See Century Communications*, 835 F.2d at 298-303. However, the Supreme Court in *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989), specifically ruled that government regulation of commercial speech is not to be scrutinized under the "least-restrictive-means" test. *See also Ward v. Rock Against Racism*, 491 U.S. 781, 796-802 (1989). In *Fox*, the Court held (492 U.S. at 477):

Our jurisprudence has emphasized that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First

Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978). The ample scope of regulatory authority suggested by such statements would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State.

In determining the appropriate test for government regulation which impinges on commercial speech, the Court stated in *Fox* (492 U.S. at 480):

In sum, while we have insisted that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful." *Shapiro [v. Kentucky Bar Assn.]*, 486 U.S., at 478 [1988], quoting *Zauderer*, 471 U.S. at 646, we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," *Posadas [de Puerto Rico Assoc. v. Tourism Company of Puerto Rico]*, 478 U.S. at 341—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest being served," *In*

re R.M.J., supra, [455 U.S., at 203 (1982)]; that employs not necessarily the least restrictive means but, as we have put it in other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

The Court in *Fox* elaborated on the reduced standard of review the Court was applying as compared to non-commercial speech (492 U.S. at 480-81):

By declining to impose, in addition, a least-restrictive-means requirement, we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) "traditionally subject to governmental regulation," *Ohralik v. Ohio State Bar Assn.*, 436 U.S. at 455-45. . . . "To require a party of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Id.* at 456.

Thus, in light of *Fox*, petitioners' reliance on cases such as *Century Communications*, which apply a "least-restrictive-means" test to government regulation of commercial speech, is inappropriate.

As discussed above, no impingement of petitioners' speech occurs as a result of the promotional programs

conducted under the Orders. Petitioners are not prevented from engaging in speech of any kind, nor are they forced to speak. Nonetheless, the promotional programs manifestly survive scrutiny under the test enunciated in *Fox*: The fit between Congress' ends and the means chosen to accomplish those ends is clearly reasonable.

Congress determined that it is in the interest of the public as well as growers and handlers of agricultural commodities to encourage the consumption of agricultural products. Pursuant thereto, Congress devised a plan to enable the Secretary to implement a program calling for advertisement of those products to be funded by the handlers of those commodities. Thus, the reasonableness of Congress' actions in the area of the promotion of agricultural commodities is readily apparent.

Moreover, the regulation of the agricultural industry has long been held to be constitutionally placed in the hands of Congress and, to the extent delegated to him by Congress, the Secretary of Agriculture. See *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942). Courts reviewing such statutes and regulations must be "loath to second-guess the Government's judgment to that effect." *Fox*, 492 U.S. at 478.

B. Petitioners' "Forced Association" Claim Has No Basis in Law or Fact.

Petitioners rely exclusively on cases involving "union-shop" arrangements to support their "forced association" claim. However, these cases squarely support the position of respondent.

As early as 1956, in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), the Supreme Court upheld a mandatory assessment program over a First Amendment challenge. In *Hanson*, a statute authorizing union representation of railroad employees permitted an "agency

shop" arrangement whereby every employee represented by a union must pay to the union, as a condition of employment, a service charge equal in amount to the union dues. The Court held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Hanson*, 351 U.S. at 238.

In discussing the broad congressional authority enjoyed by Congress to regulate interstate commerce, the Court stated that "the power of Congress to regulate labor relations in interstate industries is . . . well-established. Congress has authority to adopt all appropriate measures to 'facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation.'" *Hanson*, 351 U.S. at 233, citing *Texas & N.O.R. Ry. Clerks*, 281 U.S. 548, 570 (1930). The Court further found that "[i]ndustrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained." *Hanson*, 351 U.S. at 233.

Likewise, Congress has broad authority to regulate agricultural commerce because the "disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and . . . these conditions affect transactions in agricultural commodities with a national public interest and burden and obstruct the normal channels of interstate commerce." 7 U.S.C. § 601.

In holding that the congressional decision to allow union shops to stabilize the work force was an allowable one, the Court in *Hanson* noted that the wisdom of such a decision is left solely to Congress. The Court noted (351 U.S. at 233-34):

Much might be said *pro* and *con* if the policy issue were before us. Powerful arguments have been made here that the long-run interests of labor would be better served by the development of democratic traditions in trade unionism without the coercive element of the union or the closed shop. . . . But the question is one of policy with which the judiciary has no concern. . . . Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises.

It is arguments of policy that petitioners hope will render the AMAA promotional provisions unconstitutional. Petitioners argue that the advertising done under the Orders is not effective and that their money would be better spent on advertising conducted under their own brand name. But these are arguments of policy appropriately made to the Secretary in formal rulemaking hearings or in a request to the Secretary to conduct formal rulemaking. Such arguments are inappropriate in a § 8c(15)(A) proceeding, and do not speak to the legality of the challenged provisions. Such arguments would also be appropriate before Congress when it conducts hearings on the inclusions of such provisions in the AMAA. And, of course, the ultimate voice of the people is the power to vote. As the Supreme Court has stated. "If [Congress] acts unwisely, the electorate can make a change." *Hanson*, 351 U.S. at 234.

The Court relied on the reasoning in *Hanson* to uphold the union shop arrangement in *Abood v. Detroit Bd. of*

Educ., 431 U.S. 209 (1977), insofar as the service charges were used to finance expenditures by the union for collective-bargaining purposes. It was only for those "expenditures for legislative lobbying and in support of political candidates" that stated a cause of action under the First Amendment. *Abood*, 431 U.S. at 215. Similarly, in *International Ass'n of Machinists v. Street*, 367 U.S. 740, 744 (1961), the record contained findings that the union treasury to which all employees were required to contribute had been used "to finance the campaigns of candidates for federal and state offices whom [the plaintiffs] opposed." It was these expenditures that gave rise to the First Amendment action. And in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the parties stipulated that a portion of the assessments were used for ideological purposes. The only question before the Court was whether the procedure for returning the portion of assessments used for ideological expenditures was sufficient. No such quandary is present here, since no assessments are spent on ideological expenditures.

In *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, 466 U.S. 435, 477 (1984), the Court reaffirmed the reasoning of *Hanson* and *Abood* that there is "no constitutional barrier to an agency shop agreement . . . insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent."

Ellis, however, went a step further to define the line between union expenditures, that all employees must help defray, and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters. The Court stated that "the test must be whether

the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Id.* at 448. Under this analyses, the Court found that expenditures for conventions and social activities were appropriately funded through dues collected from all employees. The Court stated (466 U.S. at 448-49):

We have very little trouble in holding that petitioners must help defray the costs of these conventions. Surely if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy. Conventions such as those at issue here are normal events about which Congress was thoroughly informed [footnote omitted] and seem to us to be essential to the union's discharge of its duties as bargaining agent.

The Court additionally held that publications and litigation dealing with collective bargaining issues are appropriate uses of dissenters' dues. *Ellis*, 466 U.S. at 448, 450-53.

Another recent case continues the principles articulated in the *Abood/Ellis* line of cases. In *Keller v. State Bar of California*, 110 S. Ct. 2228, 2236 (1990), the Court found that the California State Bar, an integrated bar to which all those licensed to practice law in California must belong, is "justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* The Court held that "the State Bar may therefore

constitutionally fund activities germane to those goals out of the mandatory dues of all members." *Id.* The Court did hold that the State Bar may not, however, use mandatory dues to "fund activities of an ideological nature which fall outside of those areas of activity." *Id.* The Court noted that the difficult question is to "define the latter class of activities." *Id.* The guiding standard to distinguish such expenditures must be whether the challenged expenditures are "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.*, quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961).

Thus, the allowable expenditures under the promotional programs of Marketing Orders 916 and 917, if analyzed under the union shop cases, must be necessary or reasonable for the purpose of performing the duties defined under the AMAA, the Orders and regulations as Congress envisioned. While noting the difficulty in drawing the line between allowable expenditures furthering the goals of the statutory mandate and impermissible ideological or political expenditures, the Court also noted that the "extreme ends of the spectrum are clear." *Keller*, 110 S. Ct. at 2237. The Court's illustration of the impermissible extreme included expenditures on endorsement of gun control or a nuclear weapons freeze initiative. At the other extreme, the Court notes such permissible expenditures as those on activities related to disciplining members of the bar—activities for which "petitioners have no valid constitutional objection to their compulsory dues being spent." *Id.*¹⁴

¹⁴Another concern of the Court in *Keller* was whether a procedural device was in place to assure that mandatory dues are in fact used for only permissible purposes, and that those who do not wish to fund the political activities of the bar have the opportunity to withhold payment of that portion of their dues, as the Court in *Abood* required. *Keller*, 110 S.Ct. at 2237-38. That is not a concern here since no political activity is undertaken with assessment funds. Such expenditures are not allowed by the Secretary, who approves every budget.

It is just such extremes that are present in the factual scenarios of the *Keller* case and the case before us now. In *Keller*, the mandatory dues were being used to fund such activities as opposition to the federal legislation limiting federal court jurisdiction over abortions, public school prayer and busing. *Keller*, 110 S. Ct. at 2231-32 n.2. In contrast, petitioners here have cited no instances where the assessments collected under the Orders have been used for anything other than the promotion of California fruit. Activities funded under the Orders consist only of the administrative expenses of the Committee, research on peaches, plums, and nectarines and generic commercial advertising promoting the sale of California peaches, plums and nectarines—activities reasonably and necessarily related to the goals of the AMAA and Marketing Orders 916 and 917. No political or ideological activities are undertaken with assessment funds.¹⁵

Thus, as discussed earlier, the promotion of California fruit furthers the government's compelling interest of improving returns to growers and stabilizing the agricultural industry, thereby serving the public interest. See

¹⁵The ALJ refers to the moral objections of Mr. Chang, president of Kash, Inc., to one television advertisement run during the 1986 through 1988 seasons (Initial Decision at 322-23). However, there is no merit to this issue. Mr. Chang testified that the TV commercial (Ex. 301(b)) showed a young girl in a bathing suit who was sexually stimulating. The little girl, who appears to be about 6 years old, and her dog, ran through a lawn springler to a bowl of peaches, picked out one, and began to eat it, while the background jingle played and the background singer sang: "Remember that special feeling called summer? Remember the taste of summer peaches, so cool, juicy and good for you. Summer, summer fruits from California, fresh from the tree, taste them and see!" Mr. Chang admitted that he was not personally sexually stimulated by the commercial, and could not identify anyone who was (Tr. 2963-66, 3173-76, 3327-54). Respondent's witness Jon Field, the Committees' manager, testified that no complaints had ever been received from anyone regarding this commercial (Tr. 4757-58). There is no basis for an "ideological" claim based on this commercial. However, respondent's argument that this issue was not adequately raised in the Amended Petition is not well taken (see Amended Petition, ¶¶ 13, 31-33, 53(a), 54, 62(L), (M)).

United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942). Mandatory assessments are, therefore, justified by the government's interest, and the advertising assessments are used only for the necessary and reasonable expenses of conducting generic, commercial advertising programs. Petitions were unable to show impermissible activity undertaken with assessment funds. Petitioners merely made assertions that the advertising conducted under the Orders has not helped their business, but as stated in *Ellis*, "Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint." *Ellis*, 466 U.S. at 456.

C. Petitioners' First Amendment Claims Have Been Rejected.

The identical challenges to the Beef Research and Promotion Act of 1985 that petitioners have raised here were rejected in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990). That case was an appeal of the summary judgment motion granted to the government by the district court, which rejected the very First Amendment challenges to the Beef Promotion and Research Act of 1985 (Beef Act) (7 U.S.C. § 2901 *et seq.* (1988)) that petitioners have raised here regarding the AMAA and Marketing Orders 916 and 917. In affirming the lower court decision, the court held that congressionally-designed programs that authorize commercial advertising to promote a commodity in interstate commerce in order to encourage the consumption of that commodity are in the public interest as well as in the interest of those in the industry being promoted, and do not constitute a violation of the First Amendment to the Constitution of the United States (885 F.2d at 1137).

The court found in favor of the government on all challenges to the Beef Act, an Act which is patterned after

the AMAA. The First Amendment challenge in *Frame* was raised as a defense to a civil action brought against Mr. Frame, a producer and handler of beef, who refused to remit his assessments to the Cattlemen's Beef Promotion and Research Board (Cattlemen's Board). Relying primarily on *Abod v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), Mr. Frame, like petitioners here, argued that his rights of free association and free speech under the First Amendment are violated by the operation of the Beef Act. Similarly, Mr. Frame argued that "the Act breaches his constitutional right to refrain from speaking, because it compels him to participate administratively and financially in the promotion of a cause (an advertising campaign 'to strengthen and preserve the position of beef and beef products in the marketplace') and a message (the consumption of beef is 'desirable, healthy, nutritious') with which he disagrees." *Frame*, 885 F.2d at 1129.

The court rejected these claims. The court noted as an initial matter that "'freedom of association' while protecting the rights of citizens to engage in 'expressive' or 'intimate' association, does not protect every form of association." *Id.* at 1131 (citing *City of Dallas v. Stanglin*, 490 U.S. 19, 24-26 (1989)). Therefore, the court found that the aspect of the Beef Act, which imposes the assessments for research purposes, qualifies as neither expressive nor intimate association, and therefore does not implicate Mr. Frame's First Amendment rights. The court did find, however, that the promotional program under the Act implicated Mr. Frame's First Amendment rights.¹⁶

Although *Frame* conceded that the speech at issue was "commercial speech," which the Supreme Court has held

¹⁶In my view, the promotional programs under Marketing Orders 916 and 917 implicated no First Amendment rights of petitioners. The Supreme Court has not recognized a right to refrain from commercially speaking or associating. See § V(A), (B), *supra*. However even if petitioners' First Amendment rights are implicated, there is still no violation of their First Amendment rights, as demonstrated by *Frame*.

receives a lesser degree of First Amendment protection, see *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985), the court applied the "compelling state interest" test set forth in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), because, according to the court, Frame's associational claims triggered a higher level of scrutiny.¹⁷ *Frame*, 885 F.2d at 1134. Applying this test, the court held that the promotional program of the Beef Act was valid under the First Amendment because "the Act was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms." *Id.* at 1134. See *Roberts*, 468 U.S. at 623. As shown immediately below in the following three subsections, the same result is required here.

1. The Government's Interest.

The government's interest in promoting the consumption of California peaches, plums and nectarines is compelling and important. The court stated in *Frame* that "Frame's characterization of the government interest here as 'the interest in advertising beef,' virtually concedes the importance of the interest cast by Congress: preventing further decay of an already deteriorating beef industry" (885 F.2d at 1134). Petitioners here concede that there is a compelling governmental interest in the regulation of the

¹⁷I believe that the test in *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989), provides the appropriate standard of review to apply in this case (see § V(A)(2)). That test requires merely that the government regulation bear a reasonable fit to the government's important interest. However, as shown in the following three subsections, even under the heavy burden of proof applied in *Frame*, the promotional programs under Marketing Orders 916 and 917 easily stand up to constitutional scrutiny. It should also be noted that in the recent case of *Keller v. State Bar of California*, 110 S. Ct. 2228 (1990), discussed above (§ V(B)), the Court applied a *Fox* type test to petitioner's associational claim—not the "compelling interest test" applied by the court in *Frame*.

tree fruit industry, stating (Petitioners' Brief filed May 16, 1990, at 56; and see Petitioners' Brief filed July 5, 1990, at 66-67):

Wileman/Kash do not deny that the government has a compelling interest in regulating the quality of fruit that is disseminated to the American public. Although the mere existence of the AMAA constitute a significant impingement upon First Amendment rights of handlers, that impingement is amply justified by the compelling governmental interest in the regulation of the tree fruit industry to establish and maintain orderly marketing conditions and to insure that minimum standards of quality and maturity are complied with.

Petitioners thereby concede the compelling interest furthered by the general purposes of the AMAA. It is this same interest that led Congress to amend the AMAA to allow for promotional programs to be conducted under Marketing Orders, and that was recognized by the Supreme Court in *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984). "[T]he principal purposes of [the Act] are to raise the price of agricultural products and to establish an orderly system for marketing them." *Id.* at 346. Thus the compelling interests of raising agricultural prices and establishing an orderly marketing system, which have long been recognized, support the plan of Congress and the Orders here: To advertise California peaches, plums and nectarines in an attempt to increase demand, in order to increase prices and provide for orderly marketing conditions.

2. Ideological Neutrality.

The court in *Frame* had no trouble finding that the purposes underlying the Beef program are ideologically

neutral, and the same conclusion must be drawn regarding the California peach, plum and nectarine promotional programs. The court found that the federal government under the Beef program seeks only to "bolster the image of beef solely to increase sales" (*Frame*, 885 F.2d at 1135). This is the very goal of the government under the promotional programs authorized by the AMAA. Petitioners do not cite one instance whereby the promotion conducted under the Marketing Orders constituted the communication of an "official view" or "prescribe[d] orthodoxy." See *Frame*, 885 F.2d at 1135 (citing *Wooley v. Maynard*, 430 U.S. at 716-17). No political or ideological activity has ever been conducted under these Orders. Thus, the advertising programs challenged here are as easily found to be "ideologically neutral," as the court in *Frame* found the Beef program.

3. Degree of Infringement.

The court held in *Frame* that the promotional programs of the type challenged here present slight infringement on First Amendment rights. The court noted that the incursion is especially slight in comparison with the "broad constitutional incursions arising from agency and union shop agreements and countenanced in *Hanson, Street*, and *Abood*" (*Frame*, 885 F.2d at 1136). The court noted that the Cattlemen's Board is authorized only to develop a campaign to promote the product that Mr. Frame is himself in business to sell, whereas the union shop arrangements found to be constitutional allow the unions to engage in activities that necessarily implicate a broad range of ideological, moral, religious and economic and political interests. *Id.* at 1135-36. (E.g., Unions may negotiate a medical plan that authorizes payments for abortions.)

The same is true under the promotional programs under challenge here. The "speech" conducted under the Orders is exclusively designed to promote California peaches,

plums and nectarines, products that petitioners are in business to sell.

Finally, in *Frame* the court expressly rejected Mr. Frame's hollow attempts at proving a "philosophical disagreement" with the promotion under the Act. The court stated (885 F.2d at 1137):

Frame has vaguely claimed that the Cattle-men's Board "promotes a specific point of view, i.e., that the consumption of beef is desirable, healthy, nutritious," and he disagrees with the Board's "message and methods." Frame has failed to characterize his objection to the advertisements in a manner that would allow a reviewing court to reasonably infer a dispute over anything more than mere strategy. *See Abood*, 431 U.S. at 223.

This is the very defect with the complaints of petitioners. Representatives of petitioners, while making the conclusory statement that they had a philosophical difference with the message of the program, never explained that philosophical disagreement. Instead, they merely testified that the program is ineffective. But as previously explained (§ V(B)), Petitioner's may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint." *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, 466 U.S. 435, 456 (1984).

A meritless contention of petitioners that was raised at the oral hearing, but not raised in the Amended Petition, and that may not, therefore, be considered (§ II(A), *supra*), is that the expenditures of a non-profit corporation, the Tree Fruit Reserve, are attributable to the Marketing Orders. Petitioners put forth no evidence that this is a sustainable claim. As discussed below (§ IX), the Committees rent a building and some equipment, at a reasonable

rate as determined by the Secretary in his approval of the budget, from the non-profit corporation, the Tree Fruit Reserve (Ex. 387, 388). What the Tree Fruit Reserve does with that money is not the responsibility of the Marketing Orders, the Committees or the Secretary of Agriculture. What a landlord does with his lessee's money is not under the lessee's control. Thus, whatever expenditures are undertaken by the Tree Fruit Reserve (whether lobbying or non-lobbying expenditures) are not under the control of the Secretary or the Committees under the Orders, and have no bearing on the constitutional claims herein. No assessment money was used for lobbying or ideological activities. Petitioners' claims pertaining to the Tree Fruit Reserve may not be litigated herein, and even if they were to be considered, they are without merit (see § IX, *infra*). Furthermore, as noted by the ALJ (Initial Decision at 200-10, 306-60), they are not part of petitioners' First Amendment claims.

VI. The Promotional Programs Under Marketing Orders 916 and 917 Do Not Violate the Fifth Amendment to the Constitution of the United States.

A. There Is No Due Process Violation.

Petitioners' reliance on the Due Process Clause protection of the Fifth Amendment to support their allegations that the economic regulations at issue here are unconstitutional is an attempt to revive a doctrine which was repudiated by the Supreme Court long ago. No economic regulation has been invalidated on substantive due process grounds since 1937. G. Gunther, *Constitutional Law* 472 (11th ed. 1985). "Indeed opinions from the Court are rare, for most appeals raising substantive due process challenges

are dismissed for want of a substantial federal question....” *Id.* Since the demise of the “*Lochner* Era,”¹⁸ the Court has repeatedly stated its determination to keep “hands off” economic regulations, such as those which regulate agricultural products in interstate commerce. See *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); see also *Olsen v. Nebraska ex rel. Western Reference & Bond Ass’n*, 313 U.S. 236 (1941); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

The modern day due process analysis regarding economic regulation can be summed up by *Williamson v. Lee Optical of Okla., Inc.* 348 U.S. 483, 488 (1955):

It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

The day is gone when this Court uses the Due Process Clause ... to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.

Petitioners’ attempt to revive this doctrine, dead for over 50 years, is rejected.

As stated in *Lee Optical* (348 U.S. at 488), economic regulations need only pass the “rational” relationship test. The Supreme Court used this test to reject claims brought under the Due Process Clause that Marketing Orders

¹⁸From the time of the *Lochner* decision, *Lochner v. New York*, 198 U.S. 45 (1905), to the mid-1930’s, the Court invalidated a considerable number of laws on substantive due process grounds. That time period is commonly referred to as the “*Lochner* Era,” and it represents a since-discredited period of judicial intervention, as discussed in this section.

represent an unconstitutional interference with the liberty and property rights inherent in the ability to contract freely. *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 572-73 (1939). In *Rock Royal*, the Court found that the restrictions of a Marketing Order were reasonably related to the power to regulate commerce, which the Court had found “complete and perfect.” *Id.* at 569. See also *H.P. Hood & Sons, Inc. v. United States*, 307 U.S. 588 (1939). As discussed above (§ V), the promotional programs conducted under these Orders are reasonably related to the legislative objective of promoting the orderly marketing of California peaches, plums and nectarines, thereby increasing returns to producers and stabilizing the agricultural industry, which is in the public interest.

B. There Is No Equal Protection Violation.

Petitioners’ claim that the promotional programs are a violation of the Equal Protection Clause, incorporated under the protections of the Fifth Amendment, is invalid. The use of the Equal Protection Clause to invalidate economic regulation has met with much the same fate as the Due Process Clause. See *Lee Optical*, 348 U.S. at 488-89. (The Court in *Lee Optical* “rejected the equal protection claim even more summarily than the due process one.” G. Gunther, *Constitutional Law* 600 (11th ed. 1985)). As with the due process analysis, it need only be shown that the different treatment within the regulation “bear[s] ‘some rational relationship to a legitimate state purpose’” (*City of Dallas v. Stanglin*, 490 U.S. 19, 23 (1989)). Rational-basis scrutiny is the “most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause.” *Id.* at 26. Under this analysis, petitioners’ claims fail.

As an initial matter, it must be noted that there is *no* differential application of the requirements imposed due to the promotional programs conducted under Marketing

Orders 916 and 917. All handlers regulated under the Orders pay the same per-carton assessment on their fruit. Thus, petitioners could not sustain a claim under the Equal Protection Clause claiming differential treatment of those regulated under the Orders. Petitioners' claim, that the promotional program assessment regulations create a discriminatory class between handlers of peaches, plums and nectarines in California and peach, plum and nectarine handlers in other areas not subject to promotional programs, fails because the regulation is based on a rational relationship to a legitimate government purpose *as determined by Congress*. See *Rock Royal*, 307 U.S. at 572.

Congress determined that it would be in the public interest to permit the Secretary of Agriculture to consider paid advertising programs for *certain specified* commodities (7 U.S.C. § 608c(6)(I)) in marketing areas "limited in their application to the smallest regional production areas ... which the Secretary finds practicable" (7 U.S.C. § 608c(11)(B)). The Secretary may consider, through formal rulemaking hearings, promotional programs for the commodities listed in 7 U.S.C. § 608c(6)(I) *only*. That list includes plums, nectarines and *California-grown* peaches. *Id.* Thus, even if the distinction were irrational, which it is not, such a finding would require a ruling that the Act is unconstitutional, which this agency may not do. *Oestereich v. Selective Serv. Sys., Local Bd. No. 11*, 393 U.S. 233, 242 (1968). In *Frame*, the court held that a rational basis *clearly exists* for choosing the Beef producers to support the Board's activities. Likewise, a rational relationship clearly exists for assessing *California* handlers to advertise *California* fruit.

While the ALJ declined to decide the constitutional issues, nonetheless she expressed her view that the Act is unconstitutional in that it does not apply to all fruits or to all geographic areas. She erroneously categorizes this as a First Amendment issue, rather than a Fifth Amendment

issue (Initial Decision at 311-14, 356, 358; see generally Initial Decision at 306-60).¹⁹ Furthermore, she fails to follow the proper Fifth Amendment test (rational relationship) in favor of a "compelling governmental interest" test, which she then applies back to First Amendment questions. The gist of her conclusion seems to be that the AMAA is unconstitutional since the government did not show that there is a rational reason (or a compelling governmental interest) why the statute and Orders do not cover all fruits and all geographic areas. This theory of the ALJ applies the wrong test, and has the burden of proof reversed. Furthermore, petitioners never challenged the formal rulemaking records for the Order provisions that track the statute. Rather, they only challenge the yearly applications, and, thus, never reach the evidence for the rational reasons or compelling governmental interest behind the statute and the Order provisions. Any Fifth Amendment (Equal Protection Clause) issue would have to be based on the formal rulemaking records upon which the Order provisions authorizing yearly advertising programs are based.

There is clearly a rational relationship between choosing California peach, plum, and nectarine handlers to advertise and the governmental interest of promoting the orderly handling of California peaches, plums and nectarines in the marketplace. The rational relationship test has been used by the Supreme Court before to uphold distinctions made between handlers under the Act. *Rock Royal*, 307 U.S. at 564-65. The classification of handlers regulated under Marketing Orders being limited to a particular geographic area stems from the requirements of the AMAA. The Act

¹⁹ Respondent's argument (Appeal Brief at 40), that this issue *as decided by the ALJ* was not raised in the Amended Petition, is accurate, but not well taken. The Amended Petition correctly raises this issue under the Fifth Amendment (Amended Petition, ¶ 14, 38, 62(N)), and, therefore, the issue, as raised in the Amended Petition, must be addressed on the merits.

requires that Marketing Orders be limited in their application to the smallest region practicable, consistent with effectuating the purposes of the Act, and that Marketing Orders applicable to the same commodity in different regions contain such different terms as are necessary to address these differences. 7 U.S.C. § 608c(11)(B), (C). Regional differences in commodity marketing are rationally related to regional differences in marketing regulation. The Supreme Court has stated (*Schweiker v. Wilson*, 450 U.S. 221, 234-35 (1981) (see also *Matthews v. De Castro*, 429 U.S. 181, 185 (1976)):

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause [and correspondingly the Federal Government does not violate the equal protection component of the Fifth Amendment] [brackets in original] merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequity.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78." *Dandridge v. Williams* 397 U.S. at 485.

... As long as the classificatory scheme chosen by Congress rationally advances a

reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred.

Since the advertising programs further a legitimate governmental interest, and all classifications under the Act are based on a rational relationship to that governmental interest, petitioners' equal protection claim is rejected.

Even if, as suggested by petitioners, the government must show that a "compelling governmental interest" is required to sustain the constitutionality of these programs, the AMAA remains well within constitutional bounds. As discussed above (§ V(C)), the court in *Frame* found that the Beef Act indeed serves a compelling governmental interest to improve the position of Beef producers and handlers in the marketplace. The AMAA likewise serves the compelling interest, conceded by petitioners (see § V(C)(1), *supra*), of stabilizing agricultural markets and increasing prices. The AMAA provision allowing for paid advertising of nectarines, plums, and California peaches (7 U.S.C. § 608c(6)(I)), and the provisions of Marketing Orders 916 and 917 promulgated thereunder, serve a compelling interest, and result in no discriminatory classification in violation of petitioners' equal protection rights.

A similar equal protection argument was rejected in *In re Sequoia Orange Co.*, 50 Agric. Dec. 216, 274-80, slip op. at 64-69 (1991), appeal docketed sub nom. *District One Independent Handlers v. Madigan*, No. CV-F-91-202 REC (E.D. Cal. Apr. 18, 1991), in which it is stated (50 Agric. Dec. at 274, slip op. at 64):

Petitioners argue that the prorate regulations for navel oranges and lemons denied petitioners the equal protection of the laws. However, I agree with the ALJ's rejection of

that argument, as follows (Initial Decision at 31-32):

Equal protection is an implicit requirement of the fifth amendment's due process clause, and the mandates of the fourteenth amendment's equal protection clause [applicable to the States] are applicable to actions of the Federal Government [under the Fifth Amendment, although the two protections are not always co-extensive]. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Equal protection analysis under the fifth amendment is [generally] the same as that used under the fourteenth amendment. *Buckley v. Vallo*, 424 U.S. 1, 93 (1976). Under that analysis, a legislative classification does not violate a person's right to equal protection merely because the classification may be imperfect. A classification is considered valid when it has a "reasonable basis" and it is not offensive to the Constitution simply because the classification "is not made with mathematical certainty or because in practice it results in some inequity." *Lindsley v. Natural Carbonic Gas Co.*,

220 U.S. 61, 78 [(1911)];
Dandridge v. Williams, 397
U.S. 471, 485 (1970).

For the foregoing reasons, petitioners' Equal Protection Clause argument is rejected on the merits.

VII. Congress Has Not Unlawfully Delegated the Power to Tax to the Secretary of Agriculture.

Petitioners contend that the congressional delegation to the Secretary of the authority to promulgate promotional assessment regulations is an unconstitutional delegation of the taxing power. The ALJ found it unnecessary to decide this issue (see Initial Decision at 197-99, 311). In fact, the assessments do not constitute a tax, but are assessed through the lawful delegation of Congress to the Secretary of Agriculture under the Commerce Clause. Further, whether or not the assessments constitute a tax, the delegation falls well within constitutional limitations.

The congressional delegation of authority to the Secretary of Agriculture to promulgate assessment regulations was an exercise of congressional authority under the Commerce Clause. The AMAA states (7 U.S.C. § 608(c)(1)):

Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

This provision reflects the intent of Congress to invoke its Commerce Clause powers. The parties and the court determined this to be the case in *Frame*. "The parties now

agree that in enacting the Beef Promotion Act, Congress presumed that it was exercising its power under the Commerce Clause." *Frame*, 885 F.2d at 1125. As noted by the court, Mr. Frame, "at earlier stages in the litigation ... had argued that the assessments on beef constituted a 'tax,' see *United States v. Frame*, 658 F. Supp. [1476] at 1479 [(1987)], but [Mr. Frame] abandoned that claim on appeal." *Frame*, 885 F.2d at 1125 n.4. The court stated (885 F.2d at 1125):

The Act's finding that "beef and beef products move in interstate and foreign commerce," or "directly burden or affect interstate commerce of beef and beef products," 7 U.S.C. § 2901(a), reflects this intent [to exercise congressional power under the Commerce Clause].

Thus, petitioners have wrongfully attacked the assessment as a tax, and their claims are rejected. However, the delegation to the Secretary, even if it had been under the taxing power, would have been lawful.

The Supreme Court reviewed an unlawful tax challenge in *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989), and found that the Constitution places no stricter requirement on Congress in delegating its authority under the taxing power than it does on congressional authority to delegate under the Commerce Clause, and further found the challenged delegation well within constitutional limits. "Congress may wisely choose to be more circumspect in delegating authority under the Taxing Clause than under other of its enumerated powers, but this is not a heightened degree of prudence required by the Constitution." *Skinner*, *id.* at 223.

The Court in *Skinner* stated that the following standard should be applied (490 U.S. at 218-19):

Earlier this Term, in *Mistretta v. United States*, 488 U.S. [361], we revisited the

nondelegation doctrine and reaffirmed our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could "ascertain whether the will of Congress has been obeyed," no delegation of legislative authority trenching on the principle of separation of powers has occurred.... (It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority....")

In applying the foregoing standard, the Court in *Skinner* noted that enacting the challenged statutory provision, "Congress delimited the scope of the Secretary's discretion with much greater specificity than in delegations that we have upheld in the past." *Id.* at 219.

The Court then listed the limits placed on the Secretary of Transportation by Congress in enacting the provision allowing the Secretary to collect a user fee on users of an oil pipeline. The Secretary may not collect fees from firms not subject to either of the two Pipeline Safety Acts; he may not use the funds for purposes other than administering the two Acts; he may not set fees on a case by case basis, etc. (490 U.S. at 219-20). The Court concluded, "[w]e have no doubt that these multiple restrictions Congress has placed on the Secretary's discretion to assess pipeline safety user fees satisfy the constitutional requirements of the nondelegation doctrine as we have previously articulated them" (490 U.S. at 220).

The limitations on the Secretary of Transportation noted by the Court in *Skinner* are analogous to the limits placed on the Secretary of Agriculture in the AMAA. (Indeed, the court in *Frame* held that it is "plain that the Beef Act," which is modeled after the AMAA, "does not unlawfully

delegate legislative authority to the Secretary.' *Frame*, 885 F.2d at 1128.) The Secretary of Agriculture may not collect assessments from any person not regulated under a Marketing Order (7 U.S.C. § 610(b)(2)(ii)); he may not use promotional funds for anything that does not effectuate the declared policy of Congress under the Act (7 U.S.C. § 602(3)); and he must apply a uniform assessment to all those regulated under a particular Order (7 U.S.C. § 610(b)(2)(ii)). Thus, Congress strictly limited the Secretary of Agriculture's discretion in the use of assessments, just as Congress limited the Secretary's discretion in *Skinner*. Hence the congressional authority delegated to the Secretary of Agriculture was not an unlawful delegation, whether it was under the Taxing or Commerce Clause power.

Petitioners cite *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). These two cases represent a failed doctrine that legislative bodies may not lawfully delegate their power to administrative agencies. See 1 K. Davis, *Administrative Law Treatise* § 3:2, at 150 (2d ed. 1978), *id.*, § 3:8 (1982 Supp.). Petitioners' attempt to roll back the clock to the 1930's is rejected.

A similar attempt to roll back the clock to the 1930's was rejected in *In re Sequoia Orange Co.*, 47 Agric. Dec. 2, 180-85 (1988), *aff'd in part on other grounds and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *printed in* 48 Agric. Dec. 1 (1989), *appeal docketed*, No. 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990), in which it was held that the California-Arizona Navel Orange regulatory program under the AMAA does not involve an unconstitutional delegation of congressional authority, stating (47 Agric. Dec. at 182-85) (the initial portion of the following quoted material, through the paragraph following note 67, is from a portion of the ALJ's decision in *Sequoia* adopted by the Judicial Officer):

The following year, it held in *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940), that Congress may entrust administrative activities to an industry group, without violation of the nondelegation doctrine as expressed in *Carter Coal*, [298 U.S. 238 (1936),] if the industry members function subordinately to a government agency.

The Secretary assigned the executive direction of Marketing Order 907 to an industry committee pursuant to § 8c(7)(C) of the Act (7 U.S.C. § 608c(7)(C)). This provision of the Act generally charges the Secretary, as did the predecessor Act of 1935 (49 Stat. 750, 757, Aug. 24, 1935), to include in a marketing order, terms and conditions for:

"Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

- (i) To administer such order in accordance with its terms and provisions;
- (ii) To make rules and regulations to effectuate the terms and provisions of such order;
- (iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

- (iv) To recommend to the Secretary of Agriculture amendments to such order.

"No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of the title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: *Provided*, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal."

Other than the last sentence, which was added in 1954 (68 Stat. 897, 907, Aug. 28, 1954), [and amended in 1972 (86 Stat. 780 (1972),] the quoted provisions of the Act were basically derived from § 8c(7)(C) of the 1935 Act, which contemplated the use of

industry groups as administering agencies of marketing orders.¹⁹

In contrast to marketing orders for milk, which make provisions for their administration at the hands of a career specialist appointed by the Secretary to whom all functions of administration are delegated, the marketing orders which regulate the handling of various fruits, vegetables, and specialty crops generally assign administrative duties to a committee of industry members, with ministerial functions in turn assigned to an employee manager. Marketing Order 907 is, in this sense, typical of other orders for fruits and vegetables.

Also, as is typical of other orders of this type, Marketing Order 907 authorizes the industry advisory committee to make recommendations to the Secretary, but places ultimate authority in the Secretary to limit and set the quantity of oranges which may be handled in each prorate district during a specified week (7 C.F.R. § 907.52). For this reason the holding of *Carter Coal* is in the main inapposite. As was stated by Justice Douglas in *Sunshine Coal Co. v. Adkins*, 310

¹⁹See H.R. REP. NO. 1241 (1935) at 12; S. REP. NO. 1011 (1935) at 12-13; and Conference Report [H.R. Conf. Rep. No. 1757, 74th Cong., 1st Sess.] (1935) at 22. The Conference Report noted that House Amendment No. 38 to the 1935 Act, to which the Senate receded forbade the selection of cooperative associations to act as agencies to administer orders applicable to milk; and it follows that Congress well understood that industry groups would be selected to administer orders applicable to other commodities.

U.S. 381, 399 (1940): "Nor has Congress delegated its legislative authority to the industry. The members of the ... (industry group) function subordinately to the Commission.... Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid." *See also, Todd & Co. v. SEC*, 557 F.2d 1008, 1012-1013 (3d Cir. 1977); and *First Jersey Securities, Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979) [, *cert. denied*, 444 U.S. 1074 (1980)].⁶⁶

Moreover, constitutional challenges directed against marketing orders because of their administration by self-interested industry members have been specifically denied for the reason that the Secretary has retained ultimate authority. *Chiglaides Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134 (5th Cir. 1973) [, *cert. denied*, 417 U.S. 968 (1974)]; and *Whittenburg v. United States*, 100 F.2d 520, 522-523 (5th Cir. 1939). *See also, Vaughn-Griffin Packing Company v. Freeman*, 294 F. Supp. 458, 467-468 (M.D. Fla. 1968) [, *aff'd*, 423 F.2d 1094 (5th Cir. 1970); *United States v. Western Fruit Growers, Inc.*, 34 F. Supp. 794, 796 (1940) ("The establishment of pro-rates and allotments ... is the act of the Secretary of Agriculture"), *aff'd in part and rev'd in part*, 124 F.2d 381 (9th Cir. 1941)].⁶⁷

⁶⁶ *See also, R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952), *cert. denied*, 344 U.S. 855 (1952).

⁶⁷ Whether NOAC could be authorized to issue volume limitation regulations under 7 U.S.C. § 608c(7)(C)(ii), as long as the Secretary retained ultimate authority by means of a provision such as 7 C.F.R. § 907.81, need not be decided here. It is provided in 7 C.F.R. § 907.81:

§ 907.81. *Right of the Secretary.*

The members of the committee (including successors and alternates), and any agents, employees, or representatives thereof, shall be subject to removal or suspension by the Secretary at any time. Each and every regulation, decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void, except as to acts done in reliance thereon or in compliance therewith prior to such disapproval by the Secretary. If the committee, for any reason, fails to perform its duties or exercise its powers under this part, the Secretary may designate another agency to perform such duties and exercise such powers.

Accordingly, the various arguments advanced by petitioners under the nondelegation doctrine have no application except as they serve to emphasize the importance of the Secretary's independent exercise of his retained, decisional powers.

Legislative standards far less specific than those contained in the present Act have been held to state a sufficiently definite standard for administrative action. *See Lichter v. United States*, 334 U.S. 742, 785-86 (1948) ("excessive profits"); *American Power & Light Co. v. SEC*, 329 U.S. 90, 104-06 (1946) ("unduly or unnecessarily complicate the structure" of a corporation, or "unfairly or inequitably distribute voting power"); *Bowles v. Willingham*, 321 U.S. 503, 514-16 (1944) ("generally

fair and equitable [rents that] will effectuate the purposes" of the Act); *Yakus v. United States*, 321 U.S. 414, 422-27 (1944) ("fair and equitable" prices that will tend to effectuate the purposes of the Act); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600-01 (1944) ("just and reasonable" rates); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216, 225-26 (1943) ("public interest, convenience, are necessity"); *United States v. Ragen*, 314 U.S. 513, 523-24 (1942) ("reasonable" allowance for salaries or compensation for services); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397-98 (1940) ("fair return" on the "fair value" of property); *FTC v. R.F. Keppel & Brothers, Inc.*, 291 U.S. 304, 311-19 (1934) ("unfair methods of competition"); *Tagg Brothers & Moorhead v. United States*, 280 U.S. 420, 431 (1930) ("just and reasonable" rates); *Levy Leasing Co. v. Siegel*, 258 U.S. 242, 243, 248-50 (1922) ("fair and reasonable" rent); *United States v. Donahue Brothers, Inc.*, 59 F.2d 1019, 1023 (8th Cir. 1932) ("unfair, unjustly discriminatory, or deceptive practice or device").

For the foregoing reasons, there is no basis for petitioners' contention that the California-Arizona Navel Orange Regulatory Program involves an unconstitutional delegation of congressional authority.

Simply, in *In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23, 95-97, slip op. at 88-91 (1991), *appeal docketed*, No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991), it is held that assessment provisions under the AMAA do not involve an unconstitutional exercise of the taxing power.

VIII. There Has Been No Violation of the Sunshine Act, the Brown Act, or the Federal Advisory Committee Act.

Petitioners contend that the Marketing Order Committees failed to comply with the Sunshine Act, the Brown Act,

and the Federal Advisory Committee Act (FACA) (Petitioners' Brief filed July 5, 1990, at 233-45) in that the color chip designations for each season were determined at closed Tree Fruit Reserve meetings (*id.* at 239). Petitioners concede, however, that the Sunshine Act does not apply to the Marketing Order Committees (*id.* at 233-34). And petitioners have not appealed from the ALJ's refusal to apply the state statute (the Brown Act) regarding meetings (Initial Decision at 187).

The ALJ held, however, that the committees violated FACA (Initial Decision at 186-95). I disagree, for the reasons stated in dicta in *Wileman I*, 49 Agric. Dec. at 833-34, slip op. at 127-28, as follows:

Petitioners contend that the Committees and Maturity Subcommittees failed to comply with the Federal Advisory Committee Act, which requires that committee meetings be open to the public, with timely notice published in the Federal Register (Act of Oct. 6, 1972, Pub. L. No. 92-463, 86 Stat. 770 (1972), as amended, *reprinted in* 5 U.S.C. app. at 1175 (1988)). However, no issue was raised in the petition or amended petition as to the Federal Advisory Committee Act and, therefore, the issue cannot be considered in this proceeding (§ II(A)). [The issue is raised in the Amended Petition in *Wileman II*.] But even if the issue could be raised, that statute applies to advisory committees—not to committees with operational responsibilities. The role of the committees under the Agricultural marketing Agreement Act of 1937 and the Marketing Orders is primarily to administer the Orders

on a daily basis. This includes crop estimation; monitoring seasonal production; contracting and interacting with inspection personnel; developing, reviewing and contracting for research and advertising; extensive recordkeeping and gathering and disseminating statistical material, etc. Their function in making recommendations to the Secretary is clearly something secondary that is incidental to and inseparable from their operational functions. It is for this reason that the administrative committees under Federal Marketing Orders are not subject to the Federal Advisory Committee Act.

The Federal Advisory Committee Act (FACA) was enacted in order to terminate unnecessary or duplicative advisory committees and to provide for uniform standards and procedures governing the establishment, operation, administration and duration of advisory committees. Neither the FACA, nor its legislative history, indicates that the Marketing Order Committees are within its ambit. Section 3 of the FACA defines "advisory committee" to include committees established or utilized "in the interest of obtaining advice or recommendations...." The House Report on this legislation states that the term "advisory committee ... does not include committees or commissions which have operational responsibilities. Only those committees established for the purpose of obtaining advice are within the bill's definition." H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3491, 3494. Similarly, the Senate Report on the FACA states

that committees whose duties were primarily operational "would not fall under the ambit of the bill, but would continue to be regulated under the relevant laws...." S. Rep. No. 1098, 92d Cong., 2d Sess 8 (1972). Hence, neither the language of the FACA, nor the legislative intent underlying the FACA, contemplates coverage under the statute of a committee whose primary function is the administration of a program such as a commodity Marketing Order.

The ALJ states that decisions concerning fruit maturity were made at joint Management Services and Tree Fruit Reserve meetings (Initial Decision at 192a), which were clandestine and which did not advise the Secretary of their positions (Initial Decision at 193-94). However, although FACA is not applicable, the fact is that such meetings were open to the public (Initial Decision at 190-91), and were at times attended by a petitioner's representatives (Ex. 108, 122). The other petitioner has been a member of the Tree Fruit Reserve since 1957 (Ex. 342), and had access to such meetings. The minutes of the Management Services Committee all note that a representative of the Secretary was in attendance to report to the Secretary (e.g., Ex. 132-160, *inter alia*, AMS employees Blackburn, Muck, Kimmel, Olson, and OGC employee Andrews; see also Tr. 2705). In addition, the minutes were sent to the Secretary and were available to the public.

Furthermore, a review of the minutes shows no maturity decisions being made by the Tree Fruit Reserve, as stated by the ALJ (Initial Decision at 186-95). Over the objections of respondent, petitioners subpoenaed and introduced into evidence thousands of pages of Tree Fruit Reserve meeting minutes and documents from 1957 until present (Ex. 34-204, 249(A)-(N), 261, 272-296). But petitioners and the ALJ fail to cite any instance where the

maturity requirements for the season were determined at a Tree Fruit Reserve meeting.²⁰

IX. The Relationship Between the Tree Fruit Reserve and the Marketing Orders Is in Accordance With Law.

In various sections of her Initial Decision, the ALJ agrees with petitioners' attack on the Tree Fruit Reserve and its relationship to the Marketing Orders. However, there is no jurisdiction to consider this matter since the Tree Fruit Reserve is not mentioned in the Amended Petition (§ II(A), *supra*).

In an attempt to explain why the Tree Fruit Reserve was not mentioned in the *Wileman I* proceeding (or in the Petition and Amended Petition herein) and, thus, avoid the legal principles of *res judicata* and the jurisdictional issue referred to in § II(A), *supra*, petitioners assert that they *never even heard of the existence of the Tree Fruit Reserve* until the late summer or fall of 1989. Yet, petitioner Wileman Bros. & Elliott, Inc., has been a member of the Tree Fruit Reserve since 1957 (Ex. 342) and has transferred funds to the Tree Fruit Reserve a number of times (Ex. 343-345). Counsel for both petitioners have also admitted that they received a set of Tree Fruit Reserve minutes from respondent well before the *Wileman I* hearing (Tr. 4933-35; Ex. 399). Tree Fruit Reserve minutes indicate that representatives of petitioner Kash, Inc., attended Tree Fruit Reserve meetings (Ex. 108, p. 2, 122, p. 2). While petitioner Kash, Inc., denies such attendance, it is admitted that a principal of Kash, Inc., signed sheets which contained, *inter alia*, the typed heading "Tree Fruit

²⁰Petitioners do not cite any evidence in this respect. The ALJ cites only Exhibits 141 and 142 (Initial Decision at 193-94). However, these are meetings of the Marketing Orders' Management Services Committee, at which there were some discussions regarding maturity, but no final decisions, and which were attended by representatives of the Secretary.

Reserve" (Ex. 108, 122) and attended a Committee meeting where the Tree Fruit Reserve was discussed (Ex. 107). Thus, even if lack of knowledge of the Tree Fruit Reserve would permit petitioners to insert the issue into this proceeding (which is not the case), there is no support for their claim of lack of knowledge.

Although matters relating to the Tree Fruit Reserve are not properly at issue in *Wileman II*,²¹ petitioners, over the objections of respondent, introduced numerous exhibits (e.g., Ex. 34-204, 249(A)-(N), 261, 272-296) and questioned witnesses at great length regarding the workings of the Tree Fruit Reserve. The apparent purpose of petitioners was to show that the Tree Fruit Reserve stole assessment money from the Marketing Orders and, hence, petitioners should not be required to pay their assessments.

However, there is no support for the view that a handler need not pay lawfully levied assessments even if there were some misfeasance by those responsible for administering or spending such funds. When taxpayer funds are illegally spent or lost through misfeasance or incompetency by the Defense Department or the Interior Department, every taxpayer does not suddenly get a refund, or receive a dispensation from paying taxes. There is no reason why petitioners' position should be any different. In any event, however, the facts do not support petitioners' claim.

Significantly, it is undisputed that the Tree Fruit Reserve received only \$77,522 from the Marketing Orders in the year ending February 28, 1989 (Ex. 204, pp. 3, 7). The amount in prior years was much smaller (Ex. 176-203). This is less than 1% of the assessments under the

²¹Since the Tree Fruit Reserve issue was not raised in the Amended Petition, we have no jurisdiction to consider it here (§ II(A)). In addition, the principles of *res judicata* are applicable to some assessment issues and maturity issues (§ IV).

Marketing Orders (Ex. 255(C), (D) (E)).²² Therefore, even if all such funds were found to have been stolen or illegally spent, they would at most justify a less than 1% reduction in petitioners' assessment bills, even if petitioners were entitled to a reduction because of mis-spent funds (which is not true).

In their post-hearing brief, petitioners not only argue that the Tree Fruit Reserve stole assessment money from the Marketing Orders, but, also, argue that maturity requirements for each season were decided at Tree Fruit Reserve meetings. Petitioners argue that the Marketing Order Committees violated the Federal Advisory Committee Act and were subject to antitrust liability (Petitioners' Brief filed July 5, 1990, at 176-222, 233-45). The ALJ agreed (Initial Decision at 186-95, 258-83). However, as shown in §§ VIII and X, the Marketing Order Committees are not within the scope of the Federal Advisory Committee Act, and this is not a proper proceeding in which to determine whether the Committees and their members are exempt from antitrust liability.

Even if the activities of the Tree Fruit Reserve were properly at issue here, the record shows that the relationship between the Tree Fruit Reserve and the activities under the Marketing Orders was in accordance with law. It is undisputed that the Tree Fruit Reserve was incorporated in 1957, but existed well back into the 1930's or 1940's. For a number of years, the Marketing Orders were not allowed to carry over funds from season to season. Therefore, in order to allow for operational stability, the Tree Fruit Reserve lent money to the Committees whenever necessary. The Department for many years also had a policy which forbade Marketing Order Committees from owning property, especially real property. Tree Fruit Reserve has, thus, owned real property,

²² Actually, the percentage is even smaller, since the \$77,522 in payments includes funds from the federal pear portion of Order 917 and from the State pear order, neither of which is at issue herein.

automobiles, and office equipment and furniture, which were leased to the Committees (Tr. 4780-81). *The Tree Fruit Reserve has on its own also engaged in activities which the Committees are unauthorized to do (e.g., lobbying Congress regarding import legislation). Petitioners admit there is nothing illegal about this private corporation engaging in any of these activities.*

It is also undisputed that many, at least, of the officers and members of the Board of Directors of the Tree Fruit Reserve are members of one or more of the Marketing Order Committees. Because of this fact, Tree Fruit Reserve meetings have been held in conjunction with Committee meetings and, for a period of years, joint minutes were kept (Ex. 149-163). Again, there is no reason why Committee members may not legally participate as members or officers of the Tree Fruit Reserve or any other private corporation.

The ALJ at one point states that the Tree Fruit Reserve was established to thwart the Marketing Order limitations (Initial Decision at 260), *but later she concedes that it was formed to benefit the industry* (id. at 261a), and then states that it became warped some time later. She concludes, without cited legal authority or factual support, that the Tree Fruit Reserve is the unlawful "alter ego" of the Marketing Order Committees (Initial Decision at 135, 161, 173, 182, 185, 190, 209, 260, 269, 303, 311).²³ The AMAA and the Marketing Orders authorize and require that the Committee members be active grower and handler businessmen in the tree fruit industry, rather than government employees. Hence, those Committee members

²³ It might be noted that the ALJ does cite seemingly contradictory statements by an outside accountant as to whether the Tree Fruit Reserve should be considered "affiliated" or a "related party" for some accounting or tax purposes (Initial Decision at 202-05). But that outside accountant was not qualified to comment on the relationship between the Secretary's Marketing Order Committees and the Tree Fruit Reserve, with respect to the issues involved here, or to comment on the legality of that relationship.

must necessarily attend to running their own businesses, without such activity being considered as a conflict of interest. There is no reason why such committee members might not also be active in the Tree Fruit Reserve, the Chamber of Commerce, a political party, or any trade association that takes part in activities that are beyond the authority of a Marketing Order Committee. There is no support for the view that such participation is illegal. As noted above, the AMAA clearly has no prohibition on such conduct. Nonetheless, the ALJ concludes that virtually every activity of the Marketing Order Committees was unlawful, because of the existence of the Tree Fruit Reserve (Initial Decision at 200-01, 205-10; see also *id.* at 161, 173, 182, 185, 190, 260, 269, 303, 311).

Based on the undisputed facts noted above, petitioners and the ALJ condemn the Tree Fruit Reserve and its relationship with the Committees. Certainly the petitioners, the Committees and the Secretary are free to debate the desirability of this relationship between the Committees and the Tree Fruit Reserve, and to debate whether or not any changes in the procedures would be advantageous. But the only question in a § 8c(15)(A) proceeding is whether the relationship is "in accordance with law." Certainly, the program statute contains no prohibition on any of these activities, and the petitioners and the ALJ cite no authority to the contrary.

Since there is nothing illegal per se in the relationship between the Tree Fruit Reserve and the Committees, petitioners and the ALJ make unsupported allegations of wrongdoing in the conduct of that relationship. With regard to the claim that maturity requirements for the coming season were decided at Tree Fruit Reserve meetings, petitioners introduced no testimony or documentary evidence, nor did the ALJ note any. The record contains numerous Tree Fruit Reserve minutes (Ex. 34-169), but petitioners and the ALJ have not cited any

instance therein where the maturity requirements were decided.

The rest of the claims of wrongdoing are dependent on a factual determination that the Tree Fruit Reserve was stealing money from the Marketing Orders, i.e., that the Tree Fruit Reserve was receiving money from the Marketing Orders without providing goods and services of commensurate value (Petitioners' Brief filed July 5, 1990, at 177). This was allegedly accomplished through the rental by the Tree Fruit Reserve to the Marketing Orders of office space in Sacramento, automobiles, and office equipment and furniture, and through the transfer by the Committees to the Tree Fruit Reserve of profits from ripening bowls (*id.* at 176-86). However, the record does not support petitioners' claims.

The building in question was constructed many years ago by the Tree Fruit Reserve. The seed money for this organization came from the voluntary contributions of individual handlers. Rather than personally keep and use the refunds to which they were entitled under the Marketing Orders, various handlers chose to instruct the staff of the Marketing Orders to send the refund amount directly to a private group, the Tree Fruit Reserve. The documentary evidence in this proceeding shows that this was a voluntary decision by each individual handler (Ex. 343-346). In no manner did the Marketing Order Committees or their staff exercise any decisionmaking as to where a refund should be paid. They merely followed the directions of the individual handlers. One of the petitioners, for example, at some times chose to keep the refund (Ex. 346), and at other times chose to give it to the Tree Fruit Reserve (Ex. 343-345). There is no support for petitioners' claim that the Committees and their staff chose to give the refunds to the Tree Fruit Reserve.

With regard to more recent transfers of funds to the Tree Fruit Reserve, the documentary evidence shows that all of

the funds are in the nature of rent for the Sacramento office, automobiles, or office equipment and furniture (Ex. 203-204). In total they constitute less than 1% of the budget of the Marketing Order Committees. Even if all such payments were found to be unauthorized and reprehensible, they still would be of such minor impact on the Marketing Orders' budgets that they could not justify petitioners' failure to pay their assessments. However, the record shows that all such payments were made for sufficient consideration.

The rent since 1989 has equaled the prevailing office rental prices in that area of Sacramento (Tr. 4712, 4716-17; Ex. 204, 387, 388). Even at this price, the office rental can be considered a bargain since the building is unique in that it is the work of a renowned architect and enjoys extra parking and fine, established landscaped grounds (Tr. 4715-17). Prior to 1989, the building rental was much lower (\$17,250 to \$30,000), with the Marketing Orders and their handlers benefiting from a rental rate that was effectively subsidized by the Tree Fruit Reserve (Tr. 4711, 4778-79; Ex. 196-203). In short, the only record evidence is that the rent paid for the Sacramento building was at, or, more often, below, the fair market value.

It cannot be reasonably disputed that the Committees and their staff need office space in order to function. It is a matter of record that the Department would not allow Marketing Order Committees to own real property (Tr. 4780-81). In the instant case, the rent paid was always at or below the market rate. Hence, no handler money was "stolen" by the Tree Fruit Reserve by means of office rent.

Petitioners and the ALJ seek to explore how the Tree Fruit Reserve spends its income, and the details of the Tree Fruit Reserve's mortgage on the building. However, what the landlord did with the rent money, or whether the landlord still has a mortgage on the property, is irrelevant,

regardless of whether the landlord is the Tree Fruit Reserve or some banking institution. The questions of wrongdoing by the Committees end with the answer that the Committees got fair market value or better consideration for their payments.

The ALJ repeats petitioners' allegations that the building should somehow belong to the Marketing Orders, and that it was paid for with handler assessments (Initial Decision at 261a-263). The fact is, as stated above, the building was started with individual contributions by handlers to the Tree Fruit Reserve, and the mortgage was paid off by the Tree Fruit Reserve from the discount rents charged to the Marketing Orders. Whether the Tree Fruit Reserve changed its mind about offering free or discount rent to the Marketing Order Committees, or what the Tree Fruit Reserve did with its rent collection, is irrelevant. The building rightly belongs to the Tree Fruit Reserve, and the Committees have paid either fair market value or discount rent for many years. Hence, there is no evidence of theft of Marketing Order Committee funds or illegal action by the Secretary or his Committees.

Under the ALJ's theory, if government employees properly performed their official duties and chose to invest their salary in a gambling casino, an abortion clinic or a religious crusade, the Department of Agriculture would be acting in an illegal or unauthorized manner if it were aware of the employees' investments and still continued to employ and pay the employees, since the Department could not directly invest in those activities. Such a position is not supportable.

All of the automobiles used by the Committees' staff were paid for by the Tree Fruit Reserve, which leased them back to the Committees (Tr. 4686-88). Several witnesses testified (Tr. 4668, 4687, 4266-69), and offered documentary evidence (Ex. 379, 362), that the automobiles were purchased after painstaking procedures to ensure that

the lowest price was obtained. Furthermore, the cars purchased were obviously not extravagant luxury cars (Ex. 379, 362). The yearly rental rate by Tree Fruit Reserve was simply determined: net cost of car minus the salvage value, with the difference divided by three. After three years, no further rent was charged for the car (Tr. 4688-89). What the Committees effectively have is a three-year car loan that is interest free. Furthermore, the salvage value is deducted from the principal at the beginning, so the Committees do not have to wait 3 or more years to get the benefit of the salvage value. It is an arrangement that is to the overwhelming benefit of the Committees. Thus, rather than any money being "stolen" from the Committees, the Committees are being subsidized by the Tree Fruit Reserve by means of the car rentals. The ALJ, without elucidation, finds such benefits "illusory" (Initial Decision at 263). I disagree.

The only other direct transfer of funds to the Tree Fruit Reserve is a small fixed amount of rent for the use of all office equipment and furniture owned by the Tree Fruit Reserve (Ex. 196-204). This rental fee has been \$3,000 per year until the past few years, when it was raised to \$3,500 per year (Tr. 4778-79; Ex. 196-204). There is no evidence that this rental fee is in any manner excessive.

The undisputed evidence in the record indicates that the Marketing Order Committees consistently have received more than the fair market value in necessary goods and services from the Tree Fruit Reserve for their rental payments. Rather than assessment money being stolen, the

Order handlers have received fair value, or more, for their money.²⁴

Petitioners and the ALJ also contend that assessment money was indirectly stolen from the Marketing Orders in that the *ripening bowl business was taken over by the Tree Fruit Reserve*, and employees of the Committees performed services for the Tree Fruit Reserve (Initial Decision at 265-68, 237-74). These charges also lack merit.

The documentary evidence establishes that during the early to mid 1980's, revenue to the Marketing Order Committees from the sale of ripening bowls was on a steady decline (Ex. 156, attachments). Furthermore, while budget documents indicated a net profit from these sales, the figures were illusory in that they did not reflect the enormous amount of staff time devoted to handling correspondence and to filling the numerous small orders (Tr. 4706-09). In fact, the sale of ripening bowls produced little or no profit for the Committees (Tr. 4708-09), and the Department advised that such sales should not be conducted on a profit-making basis (Tr. 4706). Therefore, in 1986, the Committees discontinued the sale of ripening bowls (Tr. 4705; Ex. 158, p. 2). Due to some subsequent demand, in 1988-89 the Tree Fruit Reserve undertook to sell ripening bowls (Tr. 4705-06) on a limited basis with 2,500 bowl minimum orders (Tr. 4903). The inventory of ripening bowls owned by the Committees was purchased by the Tree Fruit Reserve (Tr. 4709-10; Ex. 386). In 1988-89, the Tree Fruit Reserve earned \$3,648 (\$43,070 income minus \$39,422 expense) on the sale of ripening bowls (Ex. 204, p. 3). It is unclear whether the \$3,648 was

²⁴The ALJ suggests (Initial Decision at 263-65) that an expensive computer, bought with Marketing Order money, was transferred to the Tree Fruit Reserve at salvage value after only one year. However, this is not true. All that occurred was that there was Committee discussion that such a transfer would happen if the same policy were used as was applicable to old typewriters. To this day, however, no transfer has occurred, and the computer is owned by the Committees and not the Tree Fruit Reserve (Tr. 4781).

all profit, or was partly reduced by unspecified administrative costs.

The ALJ's discussion of the ripening bowls ignores the facts. She merely states that the ripening bowls were once very profitable, without addressing the point that any such past profitability, even if true, was no longer existent when the Committees decided to sell the ripening bowls. The ALJ further states that the transfer of the bowls to the Tree Fruit Reserve was not documented, thus overlooking the check receipt (Ex. 386) and uncontradicted testimony (Tr. 4705-06, 4709-10, 4903) cited above. Finally, the ALJ asserts that the "ripening bowl income for the first year after its re-introduction exceeded One Hundred Twenty-Five Thousand Dollars (\$125,000.00) prior to expenses" (Initial Decision at 268). In truth, the document relied upon is a year-in-advance estimate that in 1989-1990, the gross income from the bowls would be \$125,000 (Ex. 167, p. 5). The ALJ fails to mention that the same page of Exhibit 167 estimates ripening bowl expenses for the same year to be \$112,500. Thus, there is a projected net profit for 1989-1990 of \$12,500. Furthermore, in the first year (1988-1989), the actual profit was \$3,648, as cited above (Ex. 204, p. 3).

In summary, the evidence shows that the Marketing Order Committees were not allowed to, and did not, make a profit on ripening bowls, and expended an unacceptable amount of staff time on this activity. Such sales were voluntarily discontinued and, years later, all remaining inventory was sold to the Tree Fruit Reserve. Thus, no assessments were "stolen" by the Tree Fruit Reserve with regard to the ripening bowl matter. Furthermore, the current income over acquisition expenses, even if considered to be all profit, is so minute (\$3,648) compared to these tens of million dollar Committee budgets as to have no practical effect on any handlers.

With regard to administrative and management services provided by Committee employees to the Tree Fruit

Reserve, for many years such services constituted just a "very minimal" amount of time (Tr. 4779). All Marketing Order employee salaries and benefits are paid for by the Committees, and not the Tree Fruit Reserve (Tr. 4702-05; Ex. 385). In view of the large subsidy traditionally given to the Marketing Order Committees by the Tree Fruit Reserve (i.e., low building rent until 1989, low automobile lease price, low furniture and equipment rental price), there was deemed to be no need for a separately stated accounting and billing to the Tree Fruit Reserve to reflect these "very minimal" number of hours of employee services (Tr. 4778-79). However, in 1989, the building rent went to a more commercial rate, the Tree Fruit Reserve became more active, and the Department expressed a desired for more business-like arrangements (Tr. 4778; Ex. 204). Therefore, a reimbursement agreement was signed (Ex. 30(C)), which provides that the Tree Fruit Reserve pays the Committees \$1,250 per quarter for managerial-administrative services. There is no evidence to dispute the fact that this agreement adequately reimburses the Committees for these costs.

In summary, any employee services provided by the Committees to the Tree Fruit Reserve have either been adequately reimbursed, or have been more than offset by enormous lease and rental price breaks. Here, again, no handler assessments have been stolen. The record herein is devoid of any evidence of dishonesty by the Marketing Order Committees or the Tree Fruit Reserve in their dealings. There is no statutory impediment to the relationship between the Marketing Order Committees and the Tree Fruit Reserve. As far as the record herein shows, at all times, dealing between these organizations have been honest, with the Marketing Order Committees receiving more than a fair return for their money and services. All common expenses in the relationship, such as insurance, have been scrupulously divided out to the proper

organization (Tr. 4782-83). Thus, there is no basis to petitioners' attacks on the relationship between the Tree Fruit Reserve and the Marketing Order Committees.

X. Whether the Marketing Order Committees' Members Are Immune From Antitrust Liability Is Not a Proper Issue Here.

In their brief before the ALJ, petitioners argued that the Committee members were in violation of the antitrust laws of the United States in connection with their activities in recommending and applying the maturity requirements under the Act (Petitioners' Brief filed May 16, 1990, at 88-102; Petitioners' Brief filed July 5, 1990, at 176-222). The ALJ agreed (Initial Decision at 258-83). However, this issue is not cognizable here.

First, whether the Committees' members are immune from the antitrust laws in connection with their activities involved here is far beyond the scope of the jurisdiction in 7 U.S.C. § 608c(15)(A). See *In re Allen*, 5 Agric. Dec. 734, 737-38 (1946); *In re Brucer Dairy*, 3 Agric. Dec. 247, 252 (1944).

Second, such a challenge is not contained in the Amended Petition herein and, hence, is beyond the scope of this proceeding (§ II(A), *supra*). Accordingly, I express no opinion on this issue.

However, it should be noted that if such arguments were appropriate here (which is not the case), they would necessarily be limited to the 1988 and 1989 seasons, since the legality of the maturity regulations for prior years was expressly dealt with or waived in the *Wileman I* proceeding.

XI. The Secretary's Decisionmaking Regarding the Establishment of Promotional Programs Under Marketing Orders 916 and 917 Was in Accordance With Law, and the Formal Rulemaking Records, Which Provide the Basis for the Promotional Programs, Are Unchallenged in This Proceeding.

In their Amended Petition, petitioners fail to challenge the sufficiency of the formal rulemaking proceedings which provide the legal basis for the promotional programs under these Marketing Orders. Rather, petitioners base their challenge to the advertising programs on the regulations implementing the assessment rates for each season. Petitioners cite numerous cases stating basic administrative law principles, but do not apply those principles to the rulemaking records that they must challenge in order to sustain their allegations. (See Petitioners' Brief filed July 5, 1990, at 16-24.) Instead, petitioners' challenge is based solely on an attack of the Federal Register notices implementing the assessment rates for the individual harvest seasons, with only passing mention and incorrect citation in their post-hearing brief to the formal rulemaking proceedings that implemented the promotional programs. (See Petitioners' Brief filed July 5, 1990, at 22). This is the only attempted citation to the formal rulemaking records by petitioners. No mention of the formal rulemaking records is included in their Amended Petition.

As shown below (§ XI(A)), Congress amended the AMAA to allow for paid promotional advertising programs to be conducted under Marketing Orders 916 and 917 to serve a compelling government interest in accordance with

its authority under the Commerce Clause.²⁵ The Secretary then conducted formal rulemaking proceedings to determine whether implementation of such programs would tend to effectuate the declared policy of the Act. Based on substantial record evidence adduced at the formal rulemaking hearings held in accordance with 5 U.S.C. §§ 556 and 557, the Secretary implemented amendments to the Orders calling for such programs.

A review of the statutory background of the AMAA, specifically the provision allowing for the Secretary of Agriculture to promulgate Marketing Orders that include promotional programs for agricultural commodities, reveals that Congress carefully devised a plan to effectuate a substantial governmental interest pertaining to an area of the economy long left in the regulatory hands of Congress (§ XI(A)). Additionally, a review of the promulgation of the Marketing Order provisions allowing for the promotion of California peaches, plums and nectarines, as well as the provisions enabling the Secretary to promulgate the budgets which fund such promotion, demonstrates that the Secretary, in following the dictates of Congress, conducted formal rulemaking hearings, unchallenged in this proceeding, in order to determine the desirability and the means of conducting promotional programs under Marketing Orders 916 and 917 (§ XI(B)). There is no basis to petitioners'

²⁵The constitutionality of Marketing Order regulation under the AMAA has been analyzed and upheld against various constitutional challenges throughout the years. The Supreme Court has held that the AMAA is a "constitutional exercise of the commerce power." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942). The Court held in *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 577 (1939), that the provisions requiring approval of Marketing Orders by referendum are not an unconstitutional delegation of authority. See also *Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985 (9th Cir. 1938) (AMAA provides proper standards for the Secretary's administrative power in making an order); *Edwards v. United States*, 91 F.2d 767 (9th Cir. 1937) (referendum provisions are not unconstitutional for delegation of legislative authority to growers and handlers).

(§ XI(C)) or the ALJ's (§ XI(D)) challenges to the promotional programs.

A. Statutory Provisions.

Congress enacted the AMAA in 1937 in order to stabilize market conditions and ameliorate the harsh economic conditions that can result from alternating shortages and surpluses. Congress declared that "the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest. . . ." 7 U.S.C. § 601. Congress declared its policy to allow the Secretary of Agriculture to "establish and maintain such orderly marketing conditions for [specified agricultural commodities, including fruits] . . . as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4). Congress specifically conferred upon the Secretary the power to "establish and maintain such production research, marketing research, and development projects . . . as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest." 7 U.S.C. § 602(3).

The principal means developed by Congress to effectuate these goals is the promulgation of Marketing Agreements and Orders as set out in 7 U.S.C. § 608c. That section directs the Secretary of Agriculture to issue Marketing Orders after notice and a hearing conducted whereby any interested party is given the opportunity to testify, and after the Secretary finds that the Order's terms "will tend

to effectuate the declared policy" of the Act. 7 U.S.C. § 608c(4). Marketing Orders may not become effective until they have been approved by two-thirds of the affected producers. 7 U.S.C. §§ 608c(8), (9). Amendments to Marketing Orders are promulgated in the same manner. 7 U.S.C. § 608c(17).

In 1954, Congress found that there was a need to provide for yet "greater stability in the products of agriculture." H.R. Rep. No. 1927, 83d Cong., 2d Sess. 1, reprinted in 1954 U.S. Code Cong. & Admin. News 3399. Congress concluded that the remedy should include a program "to protect the income of the farmers while comprehending the interests, needs and security of all segments of the economy and of all our people." *Id.*, reprinted at 1954 U.S. Code Cong. & Admin. News 3403. Congress therefore adopted a bill which would implement a means to "encourage the expansion of markets and consumption at home and abroad." *Id.*

Toward that end, Congress amended the AMAA authorizing the Secretary of Agriculture to promulgate Marketing Orders "establishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order." Agricultural Act of 1954, Pub. L. No. 83-690, § 401, 68 Stat. 906 (1954), codified at 7 U.S.C. § 608c(6)(I). Authority to conduct "production research" and development projects designed to "assist, improve, or promote" efficient production, was added in 1970. Pub. L. No. 91-292, 84 Stat. 333 (1970). Authority for projects providing "for any form of marketing promotion including paid advertising" for a specified commodity (cherries) was added in 1962. Pub. L. No. 87-703, § 403, 76 Stat. 632 (1962). Plums and nectarines were included in this

category in 1965. Pub. L. No. 89-330, 79 Stat. 1270 (1965). *California-grown* peaches were included in this category in 1971. Pub. L. No. 92-120, 85 Stat. 340 (1971).²⁶

B. Marketing Order Provisions Authorizing Advertising Programs Under Marketing Orders 916 and 917, Promulgated on the Basis of Unchallenged Rulemaking Records.

After Congress amended the AMAA to authorize provisions for research and promotion programs, the Secretary conducted formal rulemaking hearings to determine whether such programs would "tend to effectuate the declared policy" of the Act, as provided by 7 U.S.C. §§ 608c(4), (17). On April 5-6, 1965, a hearing was held in Fresno, California, pursuant to a notice published at 30 Fed. Reg. 3542 (1965). The notice invited interested persons to testify, *inter alia*, on a proposal to add a new provision to Marketing Order 917 authorizing marketing research and development projects. A Recommended Decision was published at 30 Fed. Reg. 13,063 (1965), which recommended adding such a provision and invited written exceptions to be submitted. On the basis of the formal hearing record, unchallenged in this proceeding, the Secretary determined that the amendment would "tend to effectuate the declared policy of the act." 30 Fed. Reg. 14,321, 14,322 (1965); 30 Fed. Reg. 15,990 (1965). A referendum was conducted whereby at least two-thirds of the producers, who also produced at least two-thirds of the volume of plums and peaches produced in the production area, favored the adoption of the amendments to the Order. 30 Fed. Reg. 15,990, 15,991 (1965). Thus, § 917.39 (7 C.F.R. § 917.39 (1966)) was adopted, which stated:

²⁶The Secretary has no statutory authority to provide for "marketing promotion including paid advertising" in Marketing Orders for peaches grown in any State other than California. 7 U.S.C. § 608c(6)(I).

The committees, with the approval of the Secretary, may establish or provide for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of fruit. The expense of such projects shall be paid from funds collected pursuant to § 917.37.

Formal rulemaking conducted in 1971, unchallenged in this proceeding, resulted in amending § 917.39 to include authority for "production research" for peaches and "production research" and "paid advertising" for plums. 36 Fed. Reg. 4056 (1971); 36 Fed. Reg. 5614 (1971); 36 Fed. Reg. 7510 (1971); 36 Fed. Reg. 8735 (1971); 36 Fed. Reg. 11,737 (1971); 36 Fed. Reg. 14,381, 14,382 (1971). Formal rulemaking conducted in 1976 resulted in amending § 917.39 to include authority for paid advertising for peaches. 41 Fed. Reg. 14,375 (1976); 41 Fed. Reg. 17,528 (1976). Thus § 917.39 (7 C.F.R. § 917.39) was amended to read as it does today:

The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of fruit. Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid from funds collected pursuant to § 917.37.

Based on the formal rulemaking record unchallenged in this proceeding, the Secretary concluded in his 1971

Recommended Decision as to plum (36 Fed. Reg. 8735, 8736-37 (1971)):

[I]t is proposed to add authority in the order for the committees to establish production research projects in addition to marketing research and development projects. Such projects which are designed to assist, improve, or promote the marketing, distribution, and consumption, or efficient production of plums and pears may involve substantial expenditures. In addition, with respect to plums, authority would be added for the Plum Commodity Committee to engage in any form of promotion including paid advertising. It is highly desirable that the recommendations with respect to any such projects, as well as recommendations on regulations under the sections previously cited, have a high degree of support by the respective committee and the industry. It is therefore concluded that the order should be amended, as hereinafter set forth, to require an affirmative vote by the Plum and Peach Commodity Committees for the approval of actions and recommendations pursuant to the specified sections as indicated.

....

The plum industry has supported advertising and promotional activities for plums under a State marketing order since 1966. The evidence indicates that economies could be effected and it would otherwise be advantageous to the industry if such activities were carried out under the order. The

order currently is managed under a management sharing arrangement in conjunction with seven other marketing programs. The sharing of overhead costs among these programs reduces the costs of operation for each program. The evidence indicates that provision for paid advertising activities for plums, and vesting authority therefore in the Plum Commodity Committee, would place the plum industry in a better position to advance the interests of growers and this would tend to effectuate provisions of the act and the order. Therefore, the order should be amended as hereinafter set forth to authorize any form of marketing promotion for plums, including paid advertising.

....

The record shows that the consensus of the industry is that promotional activities for plums have been beneficial in increasing demand and should be continued. Plums compete for shelf space and retail promotion with many processed and fresh fruits, many of which are now nationally advertised and promoted. In competing for this space and attention plums should benefit from a promotional program which offers the retailer an attractive quality product which the industry helps sell with an advertising and promotional campaign. The following promotional and advertising techniques together with the relative advantages were cited as examples of techniques which may be employed under the authorization: Publicity education is a good technique to use when

promotional funds are limited, particularly if a major portion of the program is directed to newspaper food pages. Food page publicity which makes available serving suggestions, product information, stories and recipes, many of them illustrated by appetizing photographs, often will be given newspaper editorial space which, if evaluated at advertising rates, is worth many times the fee paid the publicity agency. Women look to the food pages of newspapers and magazines, radio and TV programs, and to local extension home economists and utility company personnel for guidance in meal planning. They readily accept suggestions from these sources as reliable and acceptable information. The expanded authority for promotion, including paid advertising, would enable the committee to supply plum information and publicity materials to food news editors and similar persons for appropriate distribution. It is recognized, however, that publicity education activities do have a disadvantage in that one cannot control the message. Since editorial space cannot be bought, one cannot dictate an editor's handling of a story. This disadvantage is more than offset, however, by the fact that good publicity education brings the greatest return for the dollar expended.

The second promotional and advertising technique is merchandising. The development and distribution of attractive point-of-sale material and other merchandising aids are promotional devices used by many fresh fruit industries with promotional budgets.

Plums are particularly well adapted because of the numerous colorful varieties and their seasonal nature which requires that their availability be brought to the attention of consumers during their relatively short marketing season. Artistically developed pieces may serve the dual function of both attracting and informing the consumer regarding the varieties as their marketing seasons occur.

....

The third technique is paid advertising, often referred to as "media". Media is expensive but some things can be done in this field that are inexpensive and yet create an impact on the buying trade as well as the consuming public. Trade paper ads, particularly at the beginning of the season, together with the editorial support which trade papers are willing to accord an advertiser are helpful in launching a program for a seasonal fruit such as the plum. Spot radio or TV commercials in the principal markets during peak movement periods is a possibility. It has been found in many fresh promotional programs that such spot announcements, particularly when developed with a "dealer tag" at the end of each spot, have considerable influence in triggering retail promotions. "Dealer tags" are blank spots at the end of the announcements in which the announcer refers to a local retailer as a good place to purchase the product. These spots can be merchandised in such a way as to secure extra display space, and

promotional price and tie-in advertising financed by the retailer.

Since most of the food page publicity occurs in newspapers, some newspaper advertising might be indicated partly because newspapers are understandably influenced in favor of advertisers when scheduling editorial space. Such ads at the beginning of the season could take the form of announcing the seasonal availability of the fruit while later ads could elaborate upon the deliciousness of the fruit and pinpoint periods of greatest availability.

The Plum Commodity Committee should have the responsibility of developing and carrying out each season's advertising and promotional program.

No exceptions to the Plum Recommended Decision were filed (36 Fed.Reg. 11,737, 11,737, (1971)), and the recommended findings were adopted as the Secretary's final findings (*ibid.*). The Order Amending the Order as to plums was effective 30 days after the August 5, 1971, publication date (36 Fed. Reg. 14,381 (1971)).

Based on the formal rulemaking record unchallenged in this proceeding, the Secretary concluded as to peaches in his 1976 Final Decision (41 Fed. Reg. 14,375, 14,376-77 (1976)):

(2) Promotional activities for peaches and pears are presently conducted under State marketing orders. The record shows a wide consensus among the peach and pear industries that promotional activities have been beneficial in increasing demand and should be continued. The evidence indicates that

economies could be effected and that it would otherwise be advantageous to the peach and pear industries if such activities were carried out under the order. Current promotional activities have focused on the "California Summer Fruits" theme covering peaches, pears, plums and nectarines. The sharing of overhead and administrative costs reduces the costs of promotional activities for each fruit. The evidence indicates that provisions for paid advertising activities for peaches and pears and vesting authority therefore in the Peach and Pear Commodity Committees would place the peach and pear industries in a better position to advance the interests of growers, and this would tend to effectuate provisions of the act and the order. Therefore, the order should be amended as hereinafter set forth to authorize any form of marketing promotion for peaches and pears permitted by the act, including paid advertising.

Major promotional effort may appropriately be directed to the following objectives: (1) To make prospective consumers aware of the products' availability, their characteristics and uses, (2) to encourage in-store promotional activity, and (3) to foster improved handling of fruit at wholesale and retail levels. However, such objectives should not be considered all inclusive, and the committees should be authorized to pursue such other objectives as may be determined to be appropriate and authorized by the act.

The following promotional and advertising techniques were cited as examples of techniques which may be employed:

....

Publicity education is a good promotional technique. Food page publicity which makes available recipes, serving suggestions, selection and ripening tips will generally be given newspaper editorial space. The food pages of newspapers and magazines, radio and TV programs and local extension home economists are valuable sources for guidance in meal planning. Consumers readily accept suggestions from these sources as reliable and acceptable information. The proposed authority for market promotion, including paid advertising, would enable the committee to supply peach and pear information and publicity materials to food news editors and similar persons for appropriate distribution. . . .

Another techniques is paid advertising, often referred to as "media." Media generally is expensive but some things can be done selectively in this field that are inexpensive and yet create an impact on the buying trade as well as the consuming public. Trade paper ads, particularly at the beginning of the season, together with the editorial support which trade papers are willing to accord an advertiser are helpful in launching a program for seasonal fruits such as peaches and pears. Spot radio or TV commercials in the principal markets during peak movement periods have proved to be

successful. It has been found in many fresh promotional programs that spot announcements, particularly when developed with a "dealer tag" at the end of each spot, have considerable influence in triggering retail promotions. "Dealer tags" are blank spots at the end of the announcements in which the announcer refers to a local retailer as a good place to purchase the product. These spots can be merchandised in such a way as to secure extra display space and promotional price and tie-in advertising financed by the retailer.

The Peach and Pear Commodity Committees should have the responsibility of developing and carrying out each season's advertising and promotional program. In developing recommendations for such program, the respective committees, prior to initiation of any such program, should submit their recommendations and plans to the Secretary for approval.

The Order Amending the Order as to peaches was effective April 29, 1976 (41 Fed. Reg. 17,528, 17,534 (1976)).

Formal rulemaking hearings to amend Marketing Order 916 regulating nectarines to include authority to conduct research and promotion were held in 1958, 23 Fed. Reg. 3007 (1958); 23 Fed. Reg. 3666 (1958); 23 Fed. Reg. 4616 (1958); and in 1966 (to include paid advertising), 31 Fed. Reg. 5635 (1966); 31 Fed. Reg. 6871 (1966); 31 Fed. Reg. 8176 (1966).²⁷ These formal rulemaking proceedings, unchallenged in this proceeding, led to the adoption of § 916.45 (7 C.F.R. § 916.45) as it reads today:

²⁷The Order was amended to authorize production research in 1971 (36 Fed. Reg. 9289, 9290 (1971)).

The committee, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution and consumption or efficient production of nectarines. Such projects may provide for any form of marketing promotion including paid advertising. The expense of such projects shall be paid by funds collected pursuant to § 916.41.

Based on the unchallenged record of the hearings, the Secretary concluded in his 1966 Recommended Decision as to nectarines (31 Fed. Reg. 5635, 5636 (1966)):

In the past decade production of California nectarines has increased three-fold. With the assistance of quality control regulation and limited market development work under the order, the industry has been able to market this volume with reasonable success. However, nectarines are marketed in a highly competitive situation. They compete for shelf space and retail advertising attention with a host of processed and fresh fruits, many of which are nationally advertised and promoted. Hence, authority for expanded promotional activity, including paid advertising is needed in the order so the committee will possess the means to strengthen the competitive position of nectarines to maintain or to expand sales as the occasion demands. . . .

This [lack of consumer knowledge] makes it difficult to get the volume of nectarine

movement necessary to maintain favorable prices when the peak volume is available for markets. The employment of advertising techniques, as proposed to be authorized under the order, would provide the committee with a means whereby sales would be stimulated and returns to producers enhanced. Such promotional techniques designed to increase the consumer knowledge and awareness relative to the availability, nutritional qualities, and uses of nectarines should be authorized to be employed as the occasion requires to achieve a more favorable balance between supply and demand. It is not possible at this time to visualize the exact type of promotional program that would be required to meet the needs of the industry. Therefore, the authority for the committee to establish promotional and advertising projects should be broad and flexible, and available to the extent permitted under the act to facilitate timely development of programs suitable to the circumstances. Campaigns to expand markets in low consumption areas would necessarily involve long-range objectives and suitable educational techniques to achieve such objectives. Stimulation of demand in areas where nectarines are already being used in volume, and where the objective is to obtain an immediate response would employ different techniques.

In the establishment of promotional programs for nectarines the committee should be authorized to decide the feasibility of and

to employ, with the approval of the Secretary, singly or in combination, such promotional and advertising techniques as may be deemed suitable to the objective. These techniques should include, but not be restricted to, publicity education, merchandizing, dealer service, trade paper and daily newspaper advertisement, spot radio announcements, television, and magazine advertising with the objective of promoting the marketing, distribution, and consumption of nectarines.

....

The funds to cover the costs of any promotional program, including advertising should be obtained by levying assessments on shipments of nectarines in the same manner that such are levied to finance the administrative and other costs of the Nectarine Administrative Committee. Likewise, the anticipated expenses of advertising and promotion should be included in the budget of expenses submitted to the Secretary for his approval.

No exceptions to the Nectarine Recommended Decision were filed (31 Fed. Reg. 6871, 6871 (1966)), and the recommended findings were adopted as the Secretary's final findings (*ibid.*). The Order Amending the Order was effective June 10, 1966 (31 Fed. Reg. 8176, 8177 (1966)).

Thus, the Secretary's decisions to implement the promotional programs for nectarines, plums and peaches were based solely on the record evidence presented at the formal rulemaking hearings cited therein, which record evidence is not challenged in this proceeding. As to each

of the amendments to the Marketing Orders providing for advertising programs to be paid for by handlers' assessments, the Secretary determined, on the basis of the formal hearing records, unchallenged in this proceeding, that the amendments would "tend to effectuate the declared policy of the act." 31 Fed. Reg. 6871, 6872 (1966); 31 Fed. Reg. 8176, 8176 (1966) (nectarines); 36 Fed. Reg. 11,737, 11,737 (1971); 36 Fed. Reg. 14,381, 14,381 (1971) (plums); and 41 Fed. Reg. 14,375, 14,379 (1976); 41 Fed. Reg. 17,528, 17,528 (1976) (peaches). And as to each of the amendments, a referendum was conducted whereby the producers favored the adoption of the amendments to the Orders. 31 Fed. Reg. 8176, 8176 (1966) (nectarines); 36 Fed. Reg. 14,381, 14,381 (1971) (plums); and 41 Fed. Reg. 17,528, 17,528 (1976) (peaches).

C. Petitioners' Challenges to the Promotional Programs Are Without Merit.

Petitioners' attempts to challenge the validity of the Secretary's decision to implement advertising programs under Marketing Orders 916 and 917 fail to address the appropriate records and have no basis in law or fact.

1. Petitioners' Contention That the Rulemaking Records Implementing the Promotional Programs Do Not Provide Substantial Record Evidence for the Secretary's Decisions Is Without Merit.

As discussed above in § XI(A), § 608c(17) of the AMAA directs the Secretary to hold formal hearings on the record to determine whether an amendment to an Order would effectuate the "declared policy" of the Act. Thus, these proceedings are governed by 5 U.S.C. §§ 556 and 557 of the APA. As stated in 5 U.S.C. § 553(c), "[w]hen

rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection." "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title. . . ." 5 U.S.C. § 556(e).

In order to succeed in their challenges to the advertising programs under these Orders, petitioners must prove that the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding," do not provide substantial evidence for the Secretary's decisions. 5 U.S.C. § 556(e). In applying that standard, the "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). See § III, *supra*.

However, petitioners failed to address the appropriate formal rulemaking records before the Secretary. No challenge to the formal rulemaking records is included in their Amended Petition. Then, in their post-hearing reply brief, petitioners merely make the conclusory assertion that "the Secretary of Agriculture failed to measure up to his obligation for reasoned decisionmaking in initially establishing regulations for the imposition of forced 'generic' advertising assessments on the tree fruit industry" (Petitioners' Brief filed July 5, 1990, at 19), with no analysis of the records whatsoever. Indeed petitioners totally ignore the extensive formal records available. Petitioners did not put any evidence presented at the formal rulemaking proceedings of 1966, 1971 and 1976 into this case. Yet, in their post-hearing briefs, they claim to be challenging the rulemaking records. Petitioners cite only the Recommended Decision involving plums, and then they fail to address it whatsoever. Petitioners then mistakenly cite the Recommended Decision involving

production research for nectarines (not paid advertising), and cite nothing at all involving the formal rulemaking implementing paid advertising for peaches. Such a challenge to the records falls far short of meeting petitioners' burden of proof. Since petitioners did not put the formal rulemaking records underlying the Orders' advertising provisions into evidence in this proceeding, it must be presumed that substantial evidence supports the Order provisions at issue here. § III, *supra*.

2. Petitioners' Contention That the Approval of Promotional Budgets Under Marketing Orders 916 and 917 Has Been in Violation of the APA Is Without Merit.

According to petitioners, Marketing Orders 916 and 917 require the Secretary to conduct notice-and-comment rulemaking procedures each year in order to implement advertising programs. A review of the Orders and the formal rulemaking records shows this to be incorrect. The formal rulemaking records provide the legal basis for the manner in which the advertising budgets are to be determined. For example, the Secretary's decision as to nectarines states that "the anticipated expenses of advertising and promotion should be included in the budget of expenses submitted to the Secretary for his approval" (31 Fed. Reg. 5635, 5636 (1966); 31 Fed. Reg. 6871 (1966)). Both Marketing Orders require that the expenses of "marketing promotion including paid advertising" be paid by the assessments collected from handlers, as their pro rata share of the Committees' yearly budgets (7 C.F.R. §§ 916.41, .45, 917.37, .39). It is presumed, until proven contrary, that substantial evidence in the hearing records supports those provisions (§ III, *supra*).

According to the formal rulemaking records and the Orders, the Committees are required to include their

proposed advertising expenditures to the Secretary with their proposed budget of their anticipated expenses for each fiscal year. See 31 Fed. Reg. 5635, 5636 (1966); 31 Fed. Reg. 6871 (1966) (7 C.F.R. §§ 916.31(c), .41, .45, 917.35(f), .37, .39). At that time, the Secretary may approve or disapprove of the proposed expenditures. The Secretary may adopt the proposed expenditures, he may reject portions of the recommended expenditures, or he may reject all advertising expenditures for that year, just as he may do with any expenditure in the Committees' proposed budgets. The desirability of allowing the Committees to propose advertising expenditures was determined through the formal rulemaking procedures of 1966, 1971 and 1976, as described above in § XI(B). If the Secretary wishes to reconsider the desirability of allowing for proposals for paid advertising under the Orders, he may conduct further formal rulemaking. Indeed, petitioners may petition the Secretary to conduct such formal rulemaking hearings. However, petitioners' contention that the Marketing Orders *require* additional notice-and-comment rulemaking regarding the desirability of an advertising program every fiscal year is clearly disproved by examination of the formal rulemaking records, which petitioners have not introduced or challenged.

The Secretary's approval of the Committees' budgets is not subject to rulemaking at all, but is a matter left to the discretion of the Secretary. The ALJ expressly stated that view in her Initial Decision in *Wileman I*, and I agreed with, and adopted, those legal views in my Decision in *Wileman I*, 49 Agric. Dec. at 783-96, slip op. at 76-88. *Res judicata* applies here (claim preclusion as to 1984-87 seasons, issue preclusion as to other seasons) (see § IV, *supra*).

As shown at the oral hearing in this case, the Secretary approved the proposed advertising budgets of the Committees only after review of voluminous documents submitted

by the Committees regarding the proposed advertising to be conducted under the Orders. The Secretary approves the advertising expenditures each season based on review of various documents such as: California Summer Fruit Field Staff Bulletins providing weekly updates of successes and other information regarding promotional activities (Ex. 297(G)-(P)); minutes of promotional subcommittee meetings, export subcommittee meetings, economic subcommittee meetings (Ex. 297(W)-(Z)); research reports (Ex. 297(T), (U), (V), (BB)); and proposed budgets (See e.g., Ex. 297(BB) and (CC)). Thus, through examination of Exhibit 297, it can be seen that the Secretary has approved the advertising and research budget each year, including 1988, only after examination of voluminous reports, proposals and budgets.

Furthermore, the approval of the budget is left to the discretion of the Secretary, and the Secretary is not required to engage in rulemaking every season regarding the desirability of the advertising programs. Rather, based on the authority of the formal rulemaking records implementing the programs, the Secretary has the authority to approve advertising expenditures proposed by the Committees in their yearly budget. See *Wileman I*, 49 Agric. Dec. at 793-95, slip op. at 85-86.

Since deciding *Wileman I*, on further consideration of the legal requirements as to the necessity for publishing assessment rates (as distinguished from the budget determinations) in a regulation, I have concluded that there is no requirement even that the assessment rates be published in a regulation. In *In re Saulsbury Orchards & Almond Processing, Inc.*, 50 Agric. Dec. 23, 170, slip op. at 166 (1991), appeal docketed, No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991), I stated:

In addition, after considering petitioners' argument as to retroactivity, it is no longer

my view that the assessment rate must be included in a *regulation*. In *Wileman I*, quoted above in § V, I adopt the view of the ALJ in that case that, even though the approval of the budget by the Secretary does not have to be accomplished by rulemaking, the levy of an assessment must be done by means of a regulation. However, there is nothing in the Agricultural Marketing Agreement Act of 1937 that requires that a handler's assessment obligations be set forth in a regulation (see 7 U.S.C. §§ 608c(6)(I), 610(b)(2)(ii-(iii))). Since the Order, published in the Federal Register after a formal rulemaking hearing, expressly requires handlers to pay their pro rata share of expenses approved by the Secretary, and expressly authorizes retroactive assessment determinations (7 C.F.R. §§ 981.80, .81), it is my present view that the Secretary could notify handlers by personal notice or otherwise of their assessment obligations, without issuing a regulation.

I further held in *Saulsbury* that if notice-and-comment rulemaking were required, the appropriate remedy would be to let the Secretary now engage in notice-and-comment rulemaking for each year, stating (50 Agric. Dec. at 153-55, slip op. at 148-52):

Even if the Secretary's failure to engage in notice-and-comment rulemaking with respect to the assessment rates for the 1980-81 through the 1986-87 crop years were error (which is not the case), the appropriate remedy would be to remand the matter to the

Secretary, so that the Secretary could now engage in notice-and-comment rulemaking with respect to each crop year, and retrospectively establish the appropriate assessment rate for each year, upon the basis of the comments received (see § I, Additional Conclusions by the Judicial Officer, excerpt from *Wileman I*). It would be a drastic and unconscionable remedy to completely invalidate the assessment rates for 7 years, and hold that, as a result of the Secretary's failure to comply with the notice and comment provisions, handlers were not obligated to pay any assessments for those 7 years.

The expenses for those 7 years have already been incurred on the basis of the Order and the regulations. There is no ready source of funds to repay all the handlers who would be entitled to repayment, under a holding that the assessments were invalid, with no opportunity to correct the mistake. The assessment rates for the 7 years produced approximately 72.3 million dollars (RX 94, 96, 103, 106, 110, 115, 119). If petitioners are entitled to a repayment of their assessments (or to be relieved from the obligation to pay any assessments not already paid), every other handler regulated by the Order may be entitled to the same relief. The Secretary would certainly have to consider whether he should voluntarily repay the assessments to all handlers for all or some of the years involved. There is no statute of limitations applicable to the filing of a § 8c(15)(A) proceeding by any almond

handler regulated by the Order. Unless laches were held to be applicable to some of the earlier years (as to petitioners and other handlers), all other handlers could still file § 8c(15)(A) proceedings as to this same issue.²² Even in the absence of such § 8c(15)(A) petitions, the Secretary would have to consider whether he should voluntarily reimburse all other handlers for all or some of the years.

If the Secretary were to determine that other handlers should be reimbursed for all or part of the assessment obligations during the 7 years, the only source of funds would be through an increase in the Board's budget for the year in which repayments are to be made. That is, handlers in the repayment year would pay an assessment rate that would provide funds not only for the current year but for the 7 years involved in this case. Instead of the typical assessment rate of about 2.8¢ per pound, the assessment rate for the repayment year would be about eight times that amount, or 22.4¢ per pound ($2.8 \times 8 = 22.4$). If all handlers in the repayment year handled the same proportionate part of the almond crop as they did during the 7 years involved here, each handler would merely be providing sufficient money to the Board to repay himself. Any handler whose proportionate part of the total crop was greater during the repayment year than

²²In my view, laches should apply to any assessment obligation as to which a § 8c(15)(A) petition is not filed within 2 years after the Secretary's issuance of the assessment rule. Cf. 7 C.F.R. § 1000.6 (providing 2-year period for the termination of obligations under milk marketing orders).

during the 7 years involved here would pay more than he received as reimbursement. Any handler who received repayment for those 7 years who was no longer in business (and would, therefore, pay no part of the repayment-year's budget), or whose proportionate part of the almond crop in the repayment year was less than during those 7 years, would receive more than he paid to the Board.

The effect of increasing the repayment year's assessment rate to approximately 22.4¢ per pound would have to be carefully considered by the Secretary. Could this rate be passed on to producers, or to the buyers? If so, what would it do to producers or to the demand for almonds? If it could not be passed on, could the handlers afford to pay such an assessment rate, even though most, if not all, of the handlers, would be getting a substantial part of it back from the Board? Until the possibility of an extraordinary expense budget to repay handlers' assessment monies is ended, will handlers be able to sell their businesses to others? Could the Secretary now lawfully establish a statute of limitations, that would cut off the existing rights of handlers who paid assessment obligations during the period involved here, without giving them a reasonable opportunity to file a § 8c(15)(A) proceeding?

The difficulties that would be presented, if the failure to engage in notice-and-comment rulemaking required complete invalidation of the assessment rates for the 7 years in question, strongly support the remedy of

permitting the Secretary to correct his error by retrospective rulemaking, through engaging in notice-and-comment rulemaking as to these 7 years at this time, and issuing the retrospective assessment rates that he would have issued, based on all of the knowledge gained through the notice-and-comment rulemaking proceedings.

Another reason supporting the retrospective rulemaking approach is the fact that the failure to engage in notice-and-comment rulemaking, if it were required by the APA, is a technicality that is not likely to produce any new information not known to the Secretary through the public-meeting approach and Committee-and-Board-meeting approach now followed under the program. The regulated industry is relatively small (there are just over 100 handlers) and highly knowledgeable as to the public meetings and other means that are employed to acquaint the Secretary with all of the facts influencing his ultimate decisions. The same things happen each year at about the same time, and they are widely publicized in industry circles. Furthermore, the assessment rate does not change drastically from year to year, absent some significant program change. For example, in the 7 years involved here, the assessment rates were 2.8¢, 2.85¢, 2.85¢, 2.78¢, 2.7¢, and 2.6¢, all "less any amount credited pursuant to § 981.41 but not to exceed 2.5¢ per pound." (The creditable assessment figure of 2.5¢ per pound did not change at all during the 7 years.) Considering all of the information

available to the Secretary from industry meetings and Board and Committee recommendations, it is not realistic to believe that the Secretary would have changed the assessment rate, including the creditable portion thereof, if notice-and-comment rulemaking had been engaged in. But if it is held that the Secretary's failure to engage in notice-and-comment rulemaking was fatal error, the only reasonable remedy is to remand the proceeding so that the Secretary can retrospectively issue the appropriate assessment rates for those 7 years based upon the knowledge derived from the new notice-and-comment rulemaking. If a reviewing court should disagree with this view, consideration should also be given as to whether any reimbursement is just and reasonable, considering all of the facts and circumstances (see the quotation from *Wileman I*, set forth in § I of the Additional Conclusions by the Judicial Officer).

3. Petitioners' Contention That the Formal Rulemaking Implementing Paid Advertising Was in Violation of the APA Is Without Merit.

Petitioners, in their post-hearing brief (but not in their Amended Petition, which precludes consideration of the issue here (§ II(A))), make the erroneous challenge that the formal rulemaking records, on the basis of which the Orders were amended to authorize advertising programs for plums and nectarines, "allowed only a 10-day notice and comment period, clearly, a violation of the Administrative Procedure Act" (Petitioners' Brief filed July 5, 1990, at 22). Petitioners apparently confused the formal and

informal rulemaking procedures. All of petitioners' case citations in support of this argument refer to informal rulemaking.

As an initial matter, the APA does *not* require a 30-day notice and comment period for *any* rulemaking. (See § XII(B), *infra*). As stated above in § XI(C)(1), the formal rulemaking conducted to implement the advertising programs under the Orders was subject to the provisions of §§ 556 and 557 of the APA. (Informal rulemaking proceedings are governed by 5 U.S.C. § 553). Section 557 states that the parties are entitled to a "reasonable opportunity" to submit, for the consideration of agency employees, "exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions" (5 U.S.C. § 557(c)). Thus, there is a requirement for a reasonable opportunity for parties to submit written exceptions to the Secretary's Recommended Decision. Such opportunity was provided in every instance regarding the formal rulemaking proceedings implementing the advertising programs under these Orders. 36 Fed. Reg. 8735 (1971); 31 Fed. Reg. 5635 (1966) (*See Wileman I*, 49 Agric. Dec. at 794-95, slip op. at 86-87).²⁸ Thus, petitioners' claims are without merit.

4. Petitioners' Contention That the Secretary Should Have Considered Allowing for Advertising "Credits" Under the Promotional Programs for Peaches, Plums and Nectarines Is Without Merit.

Petitioners complain that the Secretary has not considered whether credits should be allowed from mandatory advertising assessment programs for direct expenditures for

²⁸ As shown in *Wileman I*, 49 Agric. Dec. at 794-95, slip op. at 86-87, the 10 days allowed for filing exceptions to the Recommended Decisions was after 2 weeks in one case, and several weeks in the other, had been allowed for filing post-hearing briefs.

specific brand name advertising. (Petitioners' Brief filed July 5, 1990, at 19-20, 88). However, the Secretary of Agriculture is not authorized by the AMAA to implement an advertising program for peaches, plums or nectarines that includes "advertising credits." The AMAA provides an exclusive list of those commodities regulated by Marketing Orders that may include advertising credits in their promotional programs. Only Marketing Orders regulating "almonds, filberts (otherwise known as hazel nuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order" (7 U.S.C. § 608c(6)(I)). Unless Congress amends the AMAA, the Secretary of Agriculture cannot consider a "credit" advertising program for peaches, plums and nectarines.

5. Petitioners' Contention That the Secretary Did Not Consider Alternatives Is Without Merit.

Petitioners complain that the Secretary did not consider "viable alternatives." (See Petitioners' Brief filed July 5, 1990, at 21-24). But the petitioners have not shown what alternatives may have been before the Secretary at the formal hearings. As discussed above, the Secretary must base his decisions exclusively on the records before him. However, petitioners do not cite alternatives placed before the Secretary at the rulemaking proceedings.

In *Farmer's Union Cent. Exch., Inc. v. Federal Energy Regulatory Comm'n*, 734 F.2d 1486, 1511 n.54 (D.C. Cir.), cert. denied, 469 U.S. 1034 (1984), the court observed that the duty to consider alternatives extends only to "significant and viable" alternatives, not to "every alternative device and thought conceivable by the mind of man" (quoting *Vermont Yankee Nuclear Power Corp. v. Natural*

Resources Defense Council, Inc., 435 U.S. 519, 551 (1978)). In *City of Brookings Mun. Tele. Co., v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987), the court held that agencies are required to consider *significant, proposed, alternatives*. The court found in that case that a "*proposed alternative* was 'certainly significant,'" and that "[i]t was also sufficiently 'obvious' to warrant the Commission's attention." *Id.* (emphasis added). Furthermore, "not only was [the proposal] prominently featured in [a] submission, it was discussed further ... by ... two [parties]." *Id.* Petitioners cite *no* proposals or alternatives placed before the Secretary in any rulemaking challenged herein. Thus, petitioners' challenges in this regard are without merit.

In addition, as stated above (§ XI(C)(2)), the Secretary is not required to engage in rulemaking each year to consider the budgets relating to advertising programs, including whether there should be any advertising expenditures. The formal promulgation rulemaking records, which are not challenged by petitioners, are sufficient, in this respect, under the AMAA and the Orders.

6. Petitioners' Contention That the Record Is Devoid of Consideration as to the Benefits of the Promotional Programs Is Without Merit.

Petitioners argue that the record is devoid of consideration as to the benefits of advertising, appropriate formats for advertising and costs of advertising. Petitioners, however, fail to challenge the appropriate formal rulemaking records. The formal rulemaking records discuss these issues at length. See e.g., 41 Fed. Reg. 14,375, 14,376-77 (1976); 31 Fed. Reg. 5635, 5636 (1966). Petitioners make no attempt to examine these records, which include transcripts of the oral hearings cited therein. Therefore, petitioners' contention that there is no evidence that the Secretary considered the issues surrounding the programs is rejected.

The Secretary's decision to implement advertising programs for these commodities, and the manner in which he determines the advertising budget, is supported by formal rulemaking records unchallenged in this proceeding. Furthermore, it is evident that petitioners' claims stem from a disagreement regarding the type of programs that should be administered, how the budget for the programs should be determined, and the type of programs that would be most efficacious. However, these are inappropriate challenges in a § 8c15(A) proceeding. Petitioners' sole remedy lies in petitioning the Secretary for a rulemaking hearing to amend the Orders. *Sequoia*, 47 Agric. Dec. at 99, slip op. at 118. Petitioners' claims are without merit and it seeks its remedy in the wrong forum.

Furthermore, the Secretary's decision to approve the advertising budgets each season can hardly be considered lacking in depth, or as arbitrary or capricious. As discussed above (§ XI(C)(2)), the decision to approve the advertising budgets was based on a review of thousands of documents provided from the field. See Ex. 297.

D. The ALJ's Conclusions as to the Promotional Programs Are Erroneous.

The ALJ's Initial Decision ignores, without comment, most of the contentions of petitioners, as outlined above. Further, the ALJ does not examine in any detail the formal rulemaking documents, or the records therefor, establishing the promotional and advertising programs in the Marketing Orders. The ALJ appears to conclude, without any cited authority, that the formal rulemaking never anticipated the size of the budgets today, or that office space and equipment would be rented from the Tree Fruit Reserve (Initial Decision at 285, 295). She appears to be of the view that each year the Secretary must conduct notice-and-comment rulemaking for the Committees' budget approval. However, I adhere to the view expressed by the ALJ in

Wileman I, and in my Decision in *Wileman I* (49 Agric. Dec. at 783-96, slip op. at 76-88), that the budget approval process is not subject to notice-and-comment rulemaking.

The ALJ does not accept as adequate Exhibit 297, which is the material upon which the Secretary's budget approvals since 1980 were based. First, she states that it contains no comprehensive study of the effects of advertising on sales (Initial Decision at 297). While it appears there are many documents before the Secretary reflecting such effects (e.g., Ex. 297(T), (U), (V)), this in fact is a formal rulemaking question as to whether advertising should be authorized as a desirable expense. To the extent it is a yearly budget approval inquiry, it is within the Secretary's discretion, and does not require notice-and-comment rulemaking. The ALJ also suggests that Exhibit 297 must be faulty since most of the material was supplied by the Committees (Initial Decision at 297). However, it is not even claimed by petitioners that there is any evidence that the material is untrue, unrepresentative, or unreliable. Finally, the ALJ suggests that there is no indication that the material in Exhibit 297 was ever reviewed by the Secretary personally, or by anyone in the Department (Initial Decision at 304). However, there is no requirement that the Secretary of Agriculture personally review every budget item for the Department or its Marketing Order Committees. Furthermore, *Exhibit 297 was stipulated into evidence by the parties at the material that was reviewed by the Department in its budget approval process*. It is not for the ALJ to create an issue where the parties have agreed there is none.²⁹

The remainder of the ALJ's Initial Decision regarding the promotion regulations involves the issue of retroactivity, which is discussed in § XII(D), *infra*.

²⁹The ALJ suggests that since only certain varieties of fruit are advertised, there is "[b]y admission," no benefit to other sellers (Initial Decision at 298). Respondent made no such admission, and the record supports the view that advertising of one variety gives a residual benefit to other varieties (Ex. 297).

* * *

[ORIGINAL PAGES 139-209 omitted to the end]

All arguments made have been fully considered. To the extent that any arguments are inconsistent with the views set forth herein, and are not specifically mentioned, they are rejected as irrelevant, without merit, or without support in the record.

For the foregoing reasons, petitioners' Petitions and Amended Petition should be dismissed.

Order

The relief requested by petitioners is denied and the Petitions and Amended Petitions are dismissed.

Done at Washington, D.C.

September 30, 1991

Donald A. Campbell
Judicial Officer

APPENDIX H

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, provides, in pertinent part:

§ 608a. Enforcement of chapter

* * * * *

(6) Jurisdiction of district courts

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible,

but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans, and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees, and naval stores as included in the Naval Stores Act [7 U.S.C. 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin): *Provided*, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the

Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys and not excepting poultry which produce commercial eggs), fruits and vegetables for canning or freezing, including potatoes for canning, freezing, or other processing¹ and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated

¹So in original. Probably should be followed by a comma.

as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

* * * * *

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of

any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods

shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each

producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding clause (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however,* That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i).

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided,* That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas,

carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, or Florida-grown strawberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: *Provided*, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

* * * * *

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15))

shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

* * * * *

§ 610. Administration

* * * * *

(b) State and local committees or associations of producers; handlers' share of expenses of authority or agency

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

(2)(i) Each order relating to milk and its products issued by the Secretary under this chapter shall provide ***

(ii) Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency,

during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

(iii) Any authority or agency established under an order may maintain in its own name, or in the name of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several district courts of the United States are vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) Regulations; penalty for violation

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this chapter. Any violation of any regulation shall be subject to such penalty, not in excess of \$100, as may be provided therein.

* * * * *

APPENDIX I

Title 7 of the Code of Federal Regulations provides, in pertinent part:

§ 917.16 Designation of Control Committee.

A Control Committee is hereby established consisting of 12 shipper members and 13 commodity committee members, and the members shall be selected in accordance with the provisions of § 917.17 through § 917.19. The members shall be selected annually for a term ending on the last day of February, and said members shall serve until their respective successors are selected and have qualified.

§ 917.20 Designation of members of commodity committees.

There are hereby established a Pear Commodity Committee and a Peach Commodity Committee each consisting of 13 members and a Plum Commodity Committee consisting of 12 members. Each commodity committee may be increased by one public member nominated by the respective commodity committee and selected by the Secretary. The members of each said committees shall be selected biennially for a term ending on the last day of February of odd numbered years, and such members shall serve until their respective successors are selected and have qualified. The members of each commodity committee shall be selected in accordance with the provisions of § 917.25.

§ 917.30 Removal and disapproval.

The members of the Control Committee, including their respective successors and alternates, and the members of each commodity committee, including their respective

successors and alternates, and any agent or employee appointed or employed by the Control Committee and the members of any other committee established pursuant to the provisions of this subpart shall be subject to removal or suspension at any time by the Secretary. Each regulation, decision, determination, or other act of the Control Committee, or any commodity committee, or any other committee established pursuant to the provisions of this subpart, shall be subject to the continuing right of the Secretary to disapprove of the same at any time; and, upon such disapproval, each such regulation, decision, determination, or other act, shall be deemed null and void except as to acts done in reliance thereon or in compliance therewith prior to such disapproval by the Secretary.

§ 917.34 Duties of Control Committee.

The Control Committee shall have the following duties:

(a) To act as intermediary between the Secretary and any grower or shippers.

(b) To keep minute books and records which will clearly reflect all of the acts and transactions of said Control Committee; and such minute books and records shall be subject at any time to examination by the Secretary or by such person as may be designated by the Secretary.

(c) To investigate, from time to time, and assemble data on the growing, shipping, and marketing conditions respecting fruit, as defined in § 917.4; to engage in such research and service activities in connection with the handling of such fruit as may be approved, from time to time, by the Secretary; and to furnish to the Secretary such available information as may be requested.

(d) To appoint such employees, agents, and representatives as it may deem necessary, and to determine the compensation and define the duties of each.

(e) To develop and provide the commodity committees data on shared expenses to facilitate equitable apportionment of such expenses in the development of budgets.

(f) To confer with representatives of shippers and growers of fruit produced in other states and areas with respect to the formulation or operation of marketing agreements providing for the regulation of shipments among the several states and areas in the United States in which such fruit is grown.

(g) With the approval of the Secretary establish procedures for the selection and appointment of a public member and alternate to each of the commodity committees.

(h) To establish and define the duties of additional committees or subcommittees to assist in the performance of any of the duties and functions of the Control Committee.

(i) To defend all legal proceedings against any committee members (individually or as members) or any officers or employees of such committees arising out of any act or omission made in good faith pursuant to the provisions of this part.

(j) To cause the books of the Control Committee to be audited by a competent accountant at least once each fiscal period and at such other time or times as the Control Committee may deem necessary or as the Secretary may request. Such audit shall indicate whether the funds have been received and expended in accordance with the provisions of this part.

(k) To appoint nomination committees if it deems proper for any or each nomination meeting held pursuant to §§ 917.21 through 917.23. Such nomination committees would canvas prospective members and alternate members to the commodity committees to determine their eligibility and willingness to serve and present a slate of nominees to the meeting or meetings. The presentation of nominees by the nominating committee at these meetings shall not exclude the right of any grower to nominate any eligible person at such meeting.

§ 917.35 Powers and duties of each commodity committee.

Each commodity committee shall have the following powers and duties:

(a) With regard to the respective fruit for which it was established, to establish production research and marketing research and development projects as authorized under § 917.39, to recommend to the Secretary regulation of shipments pursuant to the provisions of this part, and to possess such other powers and exercise such other duties as will properly effectuate the purpose of this part: *Provided, however,* That the Peach and Pear Commodity Committee shall each approve actions under § 917.39 and make said recommendations pursuant to §§ 917.40 through 917.43 only upon the affirmative vote of not less than nine members of each said committee: *Provided further,* That the Plum Commodity Committee shall approve such actions pursuant to § 917.39 or make said recommendations pursuant to §§ 917.40 through 917.43 only upon the affirmative vote of not less than eight members of said committee.

(b) To make such rules and regulations with respect to fruit for which it was established as may be necessary to effectuate the terms and provisions of this part.

(c) To forward to the Control Committee and to the Secretary a record of the minutes of each meeting of the commodity committee.

(d) To establish such other committees to aid the commodity committee in the performance of its duties under this part as may be deemed advisable.

(e) Each season prior to any recommendation to the Secretary for a regulation of shipments pursuant to §§ 917.40 through 917.43 to determine the marketing policy to be followed for the respective commodity during the ensuing fiscal period and to submit such policy to the Secretary, said policy report to contain, among other

provisions, information relative to the estimated total production and shipments of the fruit by districts, information as to the expected general quality and size of fruit, possible or expected demand conditions of different market outlets, supplies of competitive commodities, such analysis of the foregoing factors and conditions as the committee deems appropriate, and the type of regulations of shipments expected to be recommended for the respective fruit.

(f) To submit as soon as practicable after the beginning of each fiscal year to the Secretary, for his approval, a budget of its expenses for such fiscal period, including its proportional share of the expenses of the Control Committee and an explanation of the items therein, and a recommendation as to the rate of assessment for the respective fruit for which the commodity committee was established.

(g) With the approval of the Secretary, to redefine the Districts into which the State of California has been divided under § 917.14 or change the representation of any representation area affecting the respective commodity committee: *Provided, however,* That if any such changes are made, representation on any such committee from the various representation areas shall be based, so far as practicable, upon the proportionate quantity of the respective fruit shipped from the respective representation area during the preceding three fiscal periods: *Provided further,* That the commodity committees shall follow the principle, so far as practicable, of assigning a member position on the commodity committees to any representation area from which five percent of regulated shipments have originated during such periods.

§ 917.36 Expenses.

Each commodity committee is authorized to incur such expenses as the Secretary finds are reasonable and are

likely to be incurred by the said commodity committee during each fiscal period for the maintenance and functioning of such committee, including its proportionate share of the expenses of the Control Committee; and for such research and service activities relating to handling of the fruit for which the commodity committee was established as the Secretary may determine to be appropriate. The funds to cover such expenses shall be acquired by the levying of assessments as provided in § 917.37.

§ 917.37 Assessments.

(a) As his pro rata share of the expenses which the Secretary finds are reasonable and are likely to be incurred by the commodity committees during a fiscal period, each handler shall pay to the control Committee, upon demand, assessments on all fruit handled by him. The payment of assessments for the maintenance and functioning of the committees may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) The Secretary shall fix the respective rate of assessment which handlers shall pay with respect to each fruit during each fiscal period in an amount designed to secure sufficient funds to cover the respective expenses which may be incurred during such period. At any time during or after the fiscal period, the Secretary may increase the rates of assessment in order to secure funds to cover any later findings by the Secretary relative to such expenses, and such increase shall apply to all fruit shipped during the fiscal period.

(c) In order to provide funds to carry out the functions of the commodity committee prior to commencement of shipments in any season, shippers may make advance payments of assessments, which advance payments shall be credited to such shippers and the assessments of such

shippers shall be adjusted so that such assessments are based upon the quantity of fruit shipped by such shippers during such season. Any shipper who ships fruit for the account of a grower may deduct, from the account of sale covering such shipment or shipments, the amount of assessments levied on said fruit shipped for the account of such grower.

§ 917.39 Production research, market research and development.

The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of fruit. Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid from funds collected pursuant to § 917.37.

§ 916.20 Establishment and membership.

There is hereby established a Nectarine Administrative Committee consisting of eight members, each of whom shall have an alternate who shall have the same qualifications as the member for whom he is an alternate. The members and their alternates shall be growers or employees of growers. Five of the members and their respective alternates shall be producers of nectarines in District 1. One member and his alternate shall be producers of nectarines in District 2; one of the members and his alternate shall be producers of nectarines in District 3; and one member and his alternate shall be producers of nectarines in District 4.

§ 916.31 Duties.

The committee shall have, among others, the following duties:

- (a) To select a chairman and such other officers as may be necessary, and to define the duties of such officers;
- (b) To appoint such employees, agents, and representatives as it may deem necessary, and to determine compensation and to define the duties of each;
- (c) To submit to the Secretary as soon as practicable after the beginning of each fiscal period a budget for such fiscal period, including a report in explanation of the items appearing therein and a recommendation as to the rate of assessment for such period;
- (d) To keep minutes, books, and records which will reflect all of the acts and transactions of the committee and which shall be subject to examination by the Secretary;
- (e) To prepare periodic statements of the financial operations of the committee and to make copies of each such statement available to growers and handlers for examination at the office of the committee;
- (f) To cause its books to be audited by a competent public accountant at least once each fiscal year and at such times as the Secretary may request;
- (g) To act as intermediary between the Secretary and any grower or handler;
- (h) To investigate and assemble data on the growing, handling, and marketing conditions with respect to nectarines;
- (i) To submit to the Secretary the same notice of meetings of the committee as is given to its members;
- (j) To submit to the Secretary such available information as he may request;
- (k) To investigate compliance with the Provisions of this part;
- (l) With the approval of the Secretary, to redefine the districts into which the production area is divided and to reapportion the representation of any district on the committee: *Provided*, That any such changes shall reflect, insofar as practicable, shifts in nectarine production within the districts and the production area.

§ 916.40 Expenses.

The committee is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred by the committee for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this part. The funds to cover such expenses shall be acquired in the manner prescribed in § 916.41.

§ 916.41 Assessments.

(a) As his pro rata share of the expenses which the Secretary finds are reasonable and likely to be incurred by the committee during a fiscal period, each person who first handles nectarines during such period shall pay to the committee, upon demand, assessments on all nectarines so handled. The payment of assessments for the maintenance and functioning of the committee may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) The Secretary shall fix the rate of assessment to be paid by each such person during a fiscal period in an amount designed to secure sufficient funds to cover the expenses which may be incurred during such period and to accumulate and maintain a reserve fund equal to approximately one fiscal period's expenses. At any time during or after the fiscal period, the Secretary may increase the rate of assessment in order to secure sufficient funds to cover any later finding by the Secretary relative to the expenses which may be incurred. Such increase shall be applied to all nectarines handled during the applicable fiscal period. In order to provide funds for the administration of the provisions of this part during the first part of a fiscal period before sufficient operating income is available from assessments on the current year's shipments, the committee may accept the payment of assessments in advance, and may also borrow money for such purposes.

§ 916.45 Marketing research and development.

The committee, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution and consumption or efficient production of nectarines. Such projects may provide for any form or marketing promotion including paid advertising. The expense of such projects shall be paid by funds collected pursuant to § 916.41.

§ 916.62 Right of the Secretary.

The members of the committee (including successors and alternates), and any agents, employees, or representatives thereof, shall be subject to removal or suspension by the Secretary at any time. Each and every regulation, decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void, except as to acts done in reliance thereon or in accordance therewith prior to such disapproval by the Secretary.

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Supreme Court, U.S.
FILED

MAR 25 1996

No. 95-1184

In the Supreme Court CLERK

OF THE

United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, Secretary of Agriculture,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.;
KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO
FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES;
GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS;
KOBASHI FARMS; NAKAYAMA FARMS, INC.; and
MIHARA FARMS,
Respondents.

**On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Federal Circuit**

**OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI**

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QUESTIONS PRESENTED

1. Should this Court review whether USDA's forcing only California nectarine, peach and plum growers to fund a "generic" (without brand credit) advertising program (run by competitors) was properly analyzed by the Ninth Circuit under the commercial speech test of *Central Hudson*, where USDA argued below that *Central Hudson* was the correct test; and only after failing to satisfy the *Central Hudson* test did USDA then argue, for the first time, in its petition for re-hearing *en banc* (which was summarily unanimously denied) that *Central Hudson* was not the proper test?
2. Should this Court review whether USDA's forcing of only California growers to fund a "generic" advertising program was properly analyzed by the unanimous Ninth Circuit under the commercial speech test of *Central Hudson* where (a) the *Central Hudson* test has been consistently applied by all circuits previously addressing this and other commercial speech issues, and (b) USDA previously admitted to the Ninth Circuit that *Central Hudson* was the proper test?
3. Should this Court review whether forcing only California nectarine, peach and plum growers to fund a "generic" advertising program (without brand credits) implicates the growers' constitutionally protected rights (in relation to USDA's purported aim of increasing the total market) where the underlying trial record: (a) established that growers were forced to fund an advertising program run by their competitors that promoted their competitors' varieties (to the detriment of the growers' own varieties and own branded advertising programs); and (b) the trial record did not demonstrate any increase in total market nor any increase in net per acre financial return to the growers?
4. Based on the trial record developed below, is it constitutionally permissible for USDA to force only California's nectarine, peach, and plum growers to fund a nationwide "generic" advertising program, when all other states' growers who compete by producing the same fruit (in approximately 30 other states) receive a "free ride" by avoiding all forced advertising assessments?

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On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Federal Circuit

OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI

STATEMENT

The petition for certiorari follows the Ninth Circuit Court of Appeals' invalidation of the compelled funding of the "generic" advertising program imposed by the Secretary of Agriculture on "handlers" (i.e., growers, processors, and sellers) of peaches, plums, and nectarines grown in essentially four counties in the San Joaquin Valley of

Central California.¹ Respondents grow, process, and sell peaches, plums and nectarines. App. to Pet. for Cert. p. 3a.

Under the AMAA the United States Department of Agriculture ("USDA") assesses approximately \$.18-\$.20 on every box of peaches, plums, and nectarines packed in the San Joaquin Valley. The assessments total approximately \$10-12 million annually. Approximately 53 percent of these assessments fund the "generic" advertising program. App. to Pet. for Cert. at p. 8a n. 3. See, 7 C.F.R. §§ 916.45, 917.39.² Commodity committees consisting of respondents' competitors, appointed by the Secretary of Agriculture ("Secretary"), control and carry out the generic advertising program. App. to Pet. for Cert. pp. 4a, 8a. The committees control the nature and content of the advertising messages projected. *Id.* p. 8a. The Ninth Circuit found the advertising program failed the commercial speech test articulated in *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *Id.* p. 21a.

This matter began when respondents Wileman Bros. & Elliott, Inc. and Kash, Inc. filed administrative petitions with USDA pursuant to 7 U.S.C. Section 608c(15)(A). The first petition, filed in 1987, alleged certain California nectarine, plum, and peach maturity regulations were neither lawfully promulgated nor lawfully enforced. After a nine-day evidentiary hearing, USDA Administrative Law Judge Dorothea A. Baker ruled in favor of Wileman/Kash.³

¹ The Secretary imposes the program under the Agricultural Marketing Agreement Act of 1937, as amended ("AMAA") 7 U.S.C. § 601, *et seq.*

² The federal plum marketing order was terminated by the Secretary of Agriculture in 1991. App. to Pet. for Cert. p. 5a n. 1.

³ ALJ Baker issued her 401 page Decision and Order on May 18, 1989.

Wileman/Kash filed a second petition in June 1988. That petition challenged the assessment funded "generic" advertising program at issue here. The petition alleged the program violated freedom of association under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), and freedom of speech under *Central Hudson*, 447 U.S. 557. After an evidentiary hearing encompassing approximately 20 days of testimony, ALJ Baker ruled in favor of Wileman/Kash, and in dicta analyzed the "generic" advertising program finding it unconstitutional under *Central Hudson* and *Frame*. App. to Opp. to Pet. for Cert. pp. 362a-393a.⁴

Beginning with the 1987 harvest season Wileman/Kash paid the assessments into an attorney-client trust account maintained by their attorney of record. Despite Wileman/Kash's attempts to work with USDA, the U.S. Attorney's office filed collection actions in the United States District Court, Eastern District of California. App. to Pet. for Cert. p. 7a. District Court Judge Edward D. Price ordered the assessments, and all assessments for future harvest seasons, retained in trust pending final disposition of the case.⁵ App. to Pet. for Cert. p. 7a.

Meanwhile, respondents Gerawan Farming, Inc., Asakawa Farms, Inc., Chiamori Farms, Inc., Phillips Farms, Inc., Kobashi Farms, Inc., Tange Bros., Inc., Nagao Farms, Nilmeier Farms, Chosen Enterprises, George Huebert Farms, Wilmer Huebert Farms, Kobashi Farms, Nakayama Farms, Inc., and Mihara Farms filed

⁴ ALJ Baker issued her Decision and Order on May 29, 1991. It is reproduced at App. to Opp. pp. 17a-401a.

⁵ More than \$5,000,000.00 in advertising and inspection assessments is in trust with the Clerk of the United States District Court, Eastern District of California.

administrative petitions raising the same issues as the Wileman/Kash petitions.

The Secretary of Agriculture's Judicial Officer subsequently issued decisions overruling both of ALJ Baker's decisions on all issues.⁶ See, App. to Pet. for Cert. p. 5a, 7a. Respondents filed complaints with the District Court seeking review of agency action pursuant to 7 U.S.C. Section 608c(15)(B). The parties stipulated that all respondents would rise or fall based on the District Court decision on the Wileman/Kash Complaint.

The District Court heard respondents' challenges on cross-motions for summary judgment. USDA argued it satisfied the *Central Hudson* test, claiming a substantial governmental interest in the promotion of tree fruit to justify the infringement of respondents' First Amendment free speech rights. USDA argued the District Court should *not* apply *Abood*, 431 U.S. 209 and its progeny, contending that line of cases did not apply to a government-mandated, commercial advertising program. App. to Opp. p. 2a.

On January 27, 1993, the District Court ruled in favor of USDA on all issues. The District Court concluded that although the forced "generic" advertising program "implicates the First Amendment rights of handlers forced to participate, [it] was enacted in furtherance of an ideologically neutral compelling state interest, and infringes on their rights to a minimum degree no more than necessary

⁶No matter the issues involved, the Judicial Officer always rules in favor of the Secretary of Agriculture. See, *Utica Packing Co. v. Block*, 781 F.2d 71, 78 (6th Cir. 1986); *Hutto Stockyard v. U.S. Department of Agriculture*, 903 F.2d 299, 304-305 (4th Cir. 1990); *Parchmann v. USDA*, 852 F.2d 858, 866 (6th Cir. 1988).

to achieve the stated goal."⁷ App. to Pet. for Cert. pp. 91a-92a.

Respondents appealed to the Ninth Circuit. In opposition to respondents' appellate brief, USDA argued that respondents' First Amendment free speech challenge must be analyzed under *Central Hudson*, 447 U.S. 557. App. to Opp. 5a. The Ninth Circuit agreed, reasoning that the compelled speech was commercial speech subject to analysis under *Central Hudson*. App. to Pet. for Cert. p. 15a, 16a n. 7. The Ninth Circuit, however, overruled the district court, ruling that, on the record before the court, USDA failed to establish that the program directly advanced USDA's interest or that the program was sufficiently narrowly tailored to achieve USDA's asserted objective. App. to Pet. for Cert. pp. 17a-21a.

After losing, USDA petitioned for rehearing and requested rehearing *en banc*. In its petition for rehearing, USDA shifted position and argued that the Ninth Circuit should not have applied the *Central Hudson* test in analyzing respondents' First Amendment claims. The Court of Appeals denied USDA's petition for rehearing and rehearing *en banc*.

REASONS FOR DENYING THE PETITION

A. USDA Conceded *Central Hudson* Was The Appropriate Test And Cannot Seek Review Claiming *Central Hudson* Was The Wrong Test

USDA untenably seeks review arguing the Ninth Circuit should not have applied the *Central Hudson*, 477 U.S. 557, commercial speech test, but instead should have applied *Abood v. Detroit Board of Education*, 431 U.S. 209 and its

⁷Upon issuing its decision, the District Court consolidated the remaining 14 respondents with Wileman/Kash for purposes of judgment and appeal.

progeny. Before the District Court and the Ninth Circuit Court of Appeals USDA argued the opposite—that *Central Hudson* controlled and *Abood* did not apply to government-mandated advertising programs. USDA cannot now seek review of an issue it conceded below.⁸

“Only in exceptional cases will this Court review a question not raised in the court below.” *Lawn v. United States*, 355 U.S. 339, 362 (1958); *Accord, Husty v. United States*, 282 U.S. 694, 701-702 (1931); *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Abickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 (1970). The Court will not consider a question in a petition when the opinion below reveals the Court of Appeals did not address the question. *Patrick v. Burget*, 486 U.S. 94, 100 n. 5 (1988). A claim that a different constitutional standard applies should not be heard by this Court when the parties have litigated below for years based on another standard. *Heller v. Samuel Doe*, ____ U.S. ____, 113 S.Ct. 2637, 2642 (1993) (Court would not hear respondent’s claim that constitutionality of statutes should be determined by heightened scrutiny when the parties litigated below for years on theory of rational basis test).

Here, since 1988 the parties have litigated whether USDA’s “generic” advertising survives *Central Hudson*’s commercial speech test. Most important, USDA argued below the opposite of what it argues in its petition, and the Ninth Circuit did not address the question now pressed by

⁸ “[The Court’s] decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition.” *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). “Non jurisdictional defects of this sort should be brought to [the Court’s] attention no later than in respondent’s brief in opposition to the petition for certiorari; if not, [the Court considers] it within [its] discretion to deem the defect waived.” *Id.*

USDA. For example, in the district court USDA argued that it met the *Central Hudson* test and contended that:

“the ‘compelled association’ line of cases that begin with *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), simply has no applicability to a government-mandated, commercial advertising program such as this.”

App. to Opp. p. 2a (italics added).⁹

In the Ninth Circuit USDA argued that the *Central Hudson* test applied:

“[A]s the district court correctly noted, ‘the only goal of the speech . . . is to convince consumers to buy growers’ fruit. It is purely commercial speech.’ [Citations omitted.] As such it must be analyzed under the three part test of *Central Hudson Gas and Electric v. Public Service Comm’n. of NY*, 447 U.S. 557, 566 (1980).”

App. to Opp. p. 5a (italics added).

⁹ Similarly, USDA’s Judicial Officer (“JO”) said *Abood* did not apply, claiming assessments were not used for ideological expenditures. See, App. to Pet. for Cert. pp. 197a, 200a. The JO said the only speech conducted is commercial speech (See, App. to Petition for Cert. pp. 188a, 190a). He went on to claim the use of assessments to fund the speech represented a reasonable fit between Congress’ desired ends and the means chosen to accomplish those ends within the meaning of the commercial speech test as explained in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). See, App. to Pet. for Cert. pp. 191a-194a.

After losing before the Ninth Circuit panel, USDA petitioned in August 1995 for a rehearing *en banc*. USDA's petition for rehearing conclusively reveals the shift in position it now undertakes trying to obtain review:

"[b]efore the panel, we were bound by the Court's decision in *Cal-Almond*, applying the commercial speech test to a generic advertising program under a different marketing order. Accordingly, in our brief we analyzed the peach and nectarine generic advertising programs [in this case] under *Central Hudson*, arguing that those programs were factually distinguished from the almond program. In this petition we urge the Court *en banc* to apply what we believe is the correct constitutional test."

App. to Opp. p. 8a n. 2 (italics added).

The Ninth Circuit did not order respondents to file a response (see, Fed. R. App. P. 35; 9th Cir. R. App. P. 35-2), denied the petition for rehearing, and rejected the request for rehearing *en banc*.¹⁰ App. to Pet. for Cert. pp. 38a-39a. USDA's argument that *Central Hudson* has no applicability was neither fully briefed nor argued in the Court of Appeals. The Court of Appeal's opinion did not pass on the question. See, App. to Pet. for Cert. pp. 15a-21a.

USDA's claim that a different line of cases governs the commercial speech here is untenable. USDA previously conceded *Central Hudson* applied, and USDA posits no exceptional circumstances otherwise warranting review. The Petition should be denied.

¹⁰A party in the appellate court, including the government, cannot shift its position on a petition for rehearing when the party has conceded a position during appellate litigation. *United States of America v. Smith*, 781 F.2d 184, 185 (10th Cir. 1986); accord, *Mitchell v. Greenough*, 100 F.2d 1006 (9th Cir. 1939) ("A party cannot on petition for a rehearing shift his position.")

B. *Central Hudson* Applies To USDA's Compelled Funding of Commercial Speech Because The Level Of Scrutiny Applied To Compelled Speech Is Determined By The Nature Of The Speech Compelled

Because USDA failed the *Central Hudson* test, USDA now seeks to use *Aboud v. Detroit Board of Education*, 431 U.S. 209 and its progeny like a Procrustean bed in an attempt to make the compelled funding of commercial speech "germane" to the statutory scheme, justified by an "important" government interest. USDA argues this test applies because USDA "merely" compels the funding of the speech and does not restrict or regulate respondents' speech. See, Pct. for Cert. pp. 14-18. USDA's argument fails at its inception.

1. The Circuits Agree That *Central Hudson* Applies To USDA's Forced Funding Of Commercial Advertising Programs

The Ninth and Third Circuits agree that when USDA compels the funding of commercial advertising programs the applicable test is the commercial speech test articulated in *Central Hudson*. See, e.g., *Cal-Almond v. Department of Agriculture*, 14 F.3d 429, 434-436 (9th Cir. 1993); *United States v. Frame*, 885 F.2d 1119, 1134 n. 12 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990).

2. This Court's Decisions Hold That The Character Of The Speech Compelled Determines The Level Of First Amendment Scrutiny

In *Riley v. National Federation of the Blind*, 487 U.S. 781, 108 S.Ct. 2667, 2677 (1988), this Court held that the level of constitutional scrutiny given to government action

compelling speech is determined by the nature of the speech compelled and the effect of the compelled statements:

"Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statements thereon."

Riley, 108 S.Ct. at p. 2677 (italics added) (commercial speech inextricably intertwined with fully protected speech thereby requiring strict scrutiny).¹¹

By parity of reasoning, when USDA compels commercial speech the scrutiny required is the commercial speech test. USDA cannot avoid this scrutiny by talismanic reliance on the fact that it compels funding of the speech at issue. In *Abood*, 431 U.S. 209, 234-235, in the context of fully protected speech, the Court rejected reasoning that compelling the funding of protected activity instead of proscribing the activity is constitutionally significant:

"The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.¹² For at the heart of the First Amendment is the notion that an individual should be

¹¹ See also, *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 474 (1989) (compelled commercial speech not inextricably intertwined with fully protected speech).

¹² "This view has long been held. James Madison, the First Amendment's author, wrote in defense of religious liberty: 'Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' 2 The Writings of James Madison 186 (Hunt ed. 1901). Thomas Jefferson agreed that "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical'." I. Brant, James Madison: The Nationalist 354 (1948)."

free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. [Citations omitted]."

Id. p. 234-235.

Similarly, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ___ U.S. ___, 115 S.Ct. 2338, 2347 (1995) the Court explained that:

" 'Since all speech inherently involves choices of what to say and what to leave unsaid,' [Citation omitted], one important manifestation of the principal of free speech is that one who chooses to speak may also decide 'what not to say,' [Citation omitted]. Although the state may at times 'prescribe what shall be orthodox in commercial advertising' by requiring the dissemination of 'purely factual and uncontroversial information' [Citations omitted], outside that context it may not compel affirmance of a belief with which the speaker disagrees [Citation omitted]. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . [Citations omitted]."

Hurley, 115 S.Ct. at 2347.

In accord with this fundamental rubric, the appellate court in *United States v. Frame*, 885 F.2d at 1132 reasoned that for purposes of the Constitution, compelling funding of expression is equivalent to decreeing that expression. Likewise, in *Cal-Almond Inc. v. U.S. Department of Agriculture*, 14 F.3d 429, the appellate court squarely rejected USDA's argument that it did not significantly implicate First Amendment free speech rights by forcing the growers to contribute assessments for advertising.

Here, respondents are compelled by USDA to provide financial support for particular advertising messages associated with a particular group — the peach, plum and nectarine committees. See, App. to Pet. for Cert. p. 15a. Respondents are forced to speak, and forced to pay for, messages which do not project what respondents want to say.¹³ In addition, respondents' ability to engage in protected commercial speech is severely diminished because of USDA's capture of substantial sums of respondents' money they could otherwise use to engage in their own directed advertising. See, App. to Pet. for Cert. pp. 15a-21a.

USDA's contention that diminishment of respondents' ability to advertise could still occur if the assessments were expended for purposes unrelated to expression misses the point. See, Pet. p. 16 n. 9. Substantial amounts of growers' assessments *are* spent by USDA for compelled expression. Wileman/Kash, for example, are required to contribute \$50,000 or more in some years toward "generic" advertising. App. to Pet. for Cert. p. 18a. As the Ninth Circuit found, this is a significant amount of money impacting respondents' ability to engage in protected speech. App. to Pet. for Cert. p. 18a. Cumulatively, respondents pay over one million dollars in assessments each harvest season. Although not noted by the Ninth Circuit, respondent Gerawan Farming, Inc., for example, averages between \$600,000 and \$700,000 in tree fruit assessments each harvest season — of which in excess of 50 percent goes to fund "generic" advertising. See, App. to Opp. p. 355a. As a result, promotional material respondents otherwise would like to create and distribute is substantially curtailed; their ability to project the message they desire necessarily becomes less effective. App. to Opp. p. 364a, 369a-372a.

¹³The "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

By extracting the assessments for advertising, USDA fails to leave respondents with constitutionally satisfactory alternate channels for commercial speech.¹⁴ In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614 (1977) the Court found the government's assertion that other avenues of communication remained open failed because the other avenues available involved more cost, less autonomy, were less likely to reach persons not deliberately seeking sales information, and may have been less effective media. *Id.*, at 97 S.Ct. at 1618.

Respondents' ability to speak as they prefer necessarily involves more cost, less autonomy, and reduces their ability to reach persons not deliberately seeking sales information about specific varieties of fruit, due to the restrictions placed on respondents' budgets by being forced to contribute to the "generic" message. Compare, *Turner Broadcasting System, Inc. v. FCC*, ___ U.S. ___, 114 S.Ct. 2445 (1994) (requirement to set aside channels for local broadcasters reduces number of channels over which operators exercise control and makes it more difficult to compete on remaining channels).

Additionally, the regulations at issue severely hamper the free flow of commercial information to the public. In *Linmark*, 431 U.S. 85 after finding the township's regulation unconstitutional as to the speaker, the Court also found the regulation unconstitutionally limited the free flow of information to the listeners. The same can be said here. Important particularized advertising or promotion information fails to reach the listeners' ears due to USDA's diminishment of respondents' ability to advertise.

¹⁴The speaker is in the best position to determine the most economical avenue for dispensing information, and government, through regulation, compelling a more costly avenue cannot escape First Amendment scrutiny. *Meyer v. Grant* 486 U.S. 414, 424 (1988).

In sum, compelling respondents to fund advertising does not dilute the constitutional scrutiny afforded impingement on commercial speech. By forcing respondents to fund "generic" advertising and correspondingly foreclosing or severely diminishing respondents' ability to engage in protected commercial expression, USDA triggers the scrutiny of the *Central Hudson* test.

C. USDA's Claim That The Program Survives Scrutiny Under *Central Hudson* Purportedly Because Generic Advertising Aims To Increase Total Market, Not Individualized Shares of The Market, Fails Because The Program Forces Respondents To Pay For Advertising Their Competitors' Particular Varieties

USDA contends generic advertising aims to increase the overall market while individualized advertising aims to give the particular advertiser a bigger share of the existing market. USDA reasons that because this is so, the Ninth Circuit erred in finding the program failed the second prong of the test in *Central Hudson*, 477 U.S. 557. See, Pet. for Cert. p. 20.

USDA begins with a false premise. The purported aim USDA presses, assuming *arguendo* the aim is an appropriate one,¹⁵ ignores the substantial contrary evidence adduced

¹⁵Currently, in both the House and Senate, Bills to reform and extend agricultural programs are under consideration. See, S. 1541, 104th Cong., 2d Sess. (1996); H.R. 2973, 104th Cong. 2d. Sess. (1996). These Bills include language stating that "generic" advertising of agricultural commodities increases total market. See, S. 1541, proposed Section 961, and H.R. 2973, proposed Section 602. At the time of printing this brief, the last action on S. 1541 was March 12, 1996 when the Senate began consideration of the Bill, taking action on amendments, and the last action on H.R. 2973 was February 28, 1996 when the Bill was referred to committee. See, LEXIS, Genfed library, BLTRCK file. The possibility that these Bills could become law is another reason for this Court to deny the petition. It would be imprudent and a waste of

demonstrating that the "generic" advertising program forced respondents to pay for advertising *particular exclusive varieties* owned by their competitors.

For example, USDA compelled respondents to advertise a proprietary variety owned by a member of the Nectarine Administration Committee. See, App. to Pet. for Cert. p. 15a n. 6. The manager of the California Tree Fruit Agreement (an organization funded by assessment money to administer the marketing orders) testified at an administrative hearing (on a petition brought by respondent Gerawan Farming, Inc.) that the "generic" advertising assessments levied were expended solely on "generic" advertising and no specific variety was promoted through the "generic" advertising program. One week after the manager testified, however, the 1989 "Promotional Chart" was distributed throughout the nation, which included the specific promotion of the "Red Jim" nectarine — a commodity committee member's exclusive proprietary variety. App. to Pet. for Cert. p. 15a n. 6; App. to Opp. p. 349a. Proprietary varieties of others cannot lawfully be planted or sold by respondents.

Respondent Ray Gerawan testified that the Red Jim nectarine directly competes with his varieties. Gerawan testified that to directly compete with the Red Jim nectarine, perhaps one of the most popular varieties sold, he must expend additional money and effort to promote his own "Prima Red" variety. Yet, while he expends his own money to compete with the Red Jim, the commodity committee is spending Gerawan's assessments to directly promote his competitor's variety. See, App. to Opp. pp. 349a.

judicial resources to hear this case when the question could be recast by legislative action.

As Mr. Gerawan testified, the "generic" advertising program:

"... is not helping me and I don't want my dollars being spent for me by a committee or anybody else. I will spend my own dollars on what I created and what I produced... It is proven that free enterprise and private industry is the essence of this whole thing.

... I am interested in advertising... my label. I am not interested in putting my money in anybody else's advertising program. I have the right as a grower to grow what I wish to grow. I don't care what CTFA does with their money. I just don't want any of my money in it. I just don't want any of my money used. Whether it is effective for them or not is of no concern... If growers want to form their own co-ops and they want to be competitive... then God bless them, go for it... It is not a question whether CTFA is effective or not effective for anybody else. They are not effective for me, they are a hinderance to me. I am not here to judge what they do for somebody else."

App. to Opp. p. 350a-351a.

Mr. Gerawan (and the other respondents) understandably objects to the commodity committees' use of in excess of 50 percent of his \$660,000.00 in yearly assessments on a program that directly promotes his competitor's fruit. See, App. to Opp. p. 350a.

In addition, the "generic" advertising program pushes a particularized message that red nectarines are better than other varieties. App. to Pet. for Cert. p. 151 n. 6. This is a broader based promotion of the varieties of respondents' competitors. Requiring respondents to pay for an advertising program that promotes red varieties (of respondents' competitors, including the committee members, to the potential detriment of the yellow varieties grown by respondents)

cannot be said to promote "total market" as claimed by USDA. Moreover, testimony established that the committees' "generic" advertising is actually advertising a selection of the top 15 varieties. See, App. to Opp. p. 333a. This is not "generic" advertising.¹⁶ Instead, this is advertising particular varieties selected by committee members who are in direct competition with respondents. Thus, USDA's claim that the "generic" advertising program increases the "total market" is contrary to the evidence adduced in this case. See, App. to Pet. for Cert. p. 15a n. 6.

Next, even in relation to any true "generic" advertising, USDA's argument fails. USDA's appointed committee chairperson testified that although the industry pays more each year for advertising, the growers' economic position has not improved. App. to Pet. for Cert. p. 19a. USDA failed to substantiate that the generic advertising program is better at increasing consumption than individualized advertising. App. to Pet. for Cert. p. 20a. USDA asked the Ninth Circuit to accept mere speculation and conjecture as sufficient to satisfy its *Central Hudson* burden of demonstrating that the regulation in question directly advanced the asserted governmental interest. See, e.g., *Rubin v. Coors Brewing Co.* — U.S. —, 115 S.Ct. 1585, 1592 (1995) (Government carries burden of showing that the challenged regulation advances the government's interest "in a direct and material way." That burden "is not satisfied by mere speculation and conjecture.").

USDA contends the Ninth Circuit "erred" in pointing out that the generic advertising program could, as an alternative,

¹⁶"Generic" means, among other things, "1a: relating or applied to or descriptive of all members of a genus, species, class or group: common to or characteristic of a whole group or class: typifying or subsuming: not specific or individual... b: ... NONPROPRIETARY." Webster's Third New International Dictionary (Philip Babcock and Merriam-Webster Eds. 1993).

allow handlers credit against their assessments for advertising their own brands. According to USDA "the advertising of individual brands is not necessarily as affective in promoting overall demand for product as is the generic advertising of that product." See, Pet. for Cert. p. 20 n. 12. This is simply the inverse of the assertion which the Ninth Circuit found USDA failed to substantiate. See, App. to Pet for Cert. p. 20a.

Moreover, USDA's refusal to allow credits against assessments to handlers that advertise their own brands is also based on the premise that the *content* of individual advertising is disfavored. This undercuts USDA's contention that the program survives *Central Hudson*. USDA expressly refuses to provide credits for individualized advertising, which arguably reduces the burden on respondents' speech, because USDA objects to the content of individualized advertising as a means of market promotion.

This Court's precedents, however, "... apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. [Citation omitted]." *Turner Broadcasting System, Inc. v. Federal Communications Commission*, ___ U.S. ___, 114 S.Ct. 2445, 2459. "[T]he law ... is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, ___ U.S. ___, 115 S.Ct. at 2350. "[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say) [Citation omitted]." *Turner Broadcasting*, ___ U.S. ___, 114 S.Ct. at 2467. USDA impermissibly burdens respondents' ability to engage in their own advertising as discussed above and refuses credit for such

advertising, because USDA prefers the substance of what the favored speakers — the commodity committees — have to say over the substance of what the disfavored speakers — respondents — have to say. Compare, *Buckley v. Valeo*, 424 U.S. 1, 48-49 n. 55 (1976) (government limit on individual spending to support or oppose candidate could not be justified by claim purpose is to equalize relative ability of groups and individuals to influence elections because government cannot abridge rights of some to enhance relative voice of others). Accordingly, USDA's argument collapses from its own weight.

D. Even Under The Test Urged In The Petition, USDA Fails To Justify Its Impingement On Respondents' First Amendment Rights

1. The *Central Hudson* Test And The Test Urged By USDA Are Intermediate Scrutiny And USDA's Program Fails Intermediate Scrutiny

Beyond failing *Central Hudson*, even under the test now urged in the petition USDA fails to sufficiently justify its impingement on respondents' First Amendment rights. USDA's petition is premised on the mistaken notion USDA would prevail under the test it now urges; however, there is little, if any, difference between USDA's burden under *Central Hudson* and the test it urges in its petition — both require intermediate scrutiny.

A purview of cases shows the substantively similar articulations of the intermediate scrutiny standard: "The lesson of *Abood* ... is that the government may compel an individual to subsidize non-governmental speech when such compulsion accomplishes the 'government's vital policy interest.' [Citation omitted]." *Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992). "The question here is whether [forced funded media] advances an important ... purpose in a narrowly tailored manner." *Id.*; See also, *Carrol*

v. Blinken, 957 F.2d 991, 999 (2nd Cir. 1992) (Content-neutral University regulation giving student activities fees to fund speech and activities of organizations affiliated with University must promote "substantial government interest that would be achieved less effectively absent the regulation."); Compare, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (There is little difference, if any, between time, place, manner test, and the test in *U.S. v. O'Brien*, 391 U.S. 367 (1968) for regulation of conduct with incidental effect on speech); *Turner Broadcasting System, Inc. v. FCC*, — U.S. —, 114 S.Ct. 2445, 2459 (intermediate scrutiny applicable to content-neutral restrictions that impose incidental burden on speech). Because USDA failed *Central Hudson*, USDA failed intermediate scrutiny — no matter how the test is identified.

2. USDA's Forced "Generic" Advertising Program Was Neither Germane To USDA's Purported Aim Nor Justified By An Important Interest

Even if there is a meaningful, fundamental distinction between the tests, USDA still cannot prevail because of the program's impermissible effect on respondents' competitive abilities. For example, when union dues expenditures implicate the affected individuals' competitive advantages and abilities against their profession as a whole, the Court has invalidated the expenditures. For when the challenged activities "relate not to the ratification or implementation of a dissenter's collective bargaining agreement, but to finance support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 520 (1991).

Similarly, here, USDA compels respondents to pay for speech proposing a commercial transaction directly concerning the commodities of respondents' competitors.¹⁷ Such advertising is neither "germane" to USDA's purported aim nor justifiable by an "important" interest.

E. No Conflict Exists Between The Ninth Circuit's Decision And The Third Circuit's Decision In *U.S. v. Frame*

USDA's argument that a conflict exists between the Third and Ninth Circuits is misconceived. USDA claims the Ninth Circuit's decision here, and the Third Circuit's decision in *United States v. Frame*, 885 F.2d 1119 "cannot be squared." Pet. for Cert. p. 21. USDA is wrong. The Courts reached different results based on the underlying factual records — not a misapplication of applicable law.

Unlike the lack of a record here, the Third Circuit found the beef promotion program withstood First Amendment scrutiny based upon a significant congressional record. The government's interest in the preservation of the national economy outweighed a cattleman's right to be free from compelled association. *U.S. v. Frame*, 885 F.2d at 1134, n. 12. In *Frame*, Congress expressly found the beef industry to be on the verge of crumbling which Congress believed would effectively destroy the American way of life. The beef

¹⁷ Some thirty-three states commercially handle peaches and twenty-eight handle nectarines. App. to Pet for Cert. p. 21a. Despite this, USDA treats respondents and other handlers in California different from handlers in those states by assessing only California handlers (in what amounts to four counties) to pay for and disseminate the advertising nationally. Respondents not only raised this disparate treatment as a violation of equal protection, but also argued that such disparate treatment does not represent a reasonable ends/means fit under *Central Hudson*. The Ninth Circuit did not address the equal protection issue but did find that this disparate treatment contributed to the failure of the programs to be sufficiently narrowly tailored under *Central Hudson*. See, App. to Pet. for Cert. pp. 20a-21a.

industry and Congress decided to embark upon an advertising program. Because Congress envisioned the collapse of our nation's economic base without the implementation of a beef promotion program, the court found a "compelling governmental interest sufficient to overcome free speech and associational freedoms within the cattle industry."

The factual scenario in this case is not on equal footing. No economic crisis in the tree fruit industry exists. California plum growers and handlers did not go broke because of not advertising.¹⁸ No in-depth Congressional investigation supported the passage of 7 U.S.C. Section 608c(6)(I) providing the Secretary the authority, *in his discretion*, to implement various advertising programs. No evidence was proffered that the national economy would collapse without commercials imploring consumers to "eat California fruit." At best, the Secretary's comments at the time he proposed the creation of a forced "generic" advertising program on the plum industry indicated a desire to point out the attractiveness of the product:

"The record show that the consensus of the industry is that promotional activities for plums have been beneficial in increasing demand and should be continued. Plums compete for shelf space in retail promotion with many processed and fresh fruits, many of which are now nationally advertised and promoted. In competing for this space and attention, *plums should benefit from a promotional program which offers the retailer an attractive quality product* which the industry helps sell with an advertising and promotion campaign."

36 Fed. Reg. 8736, May 2, 1971 (italics added).

¹⁸The federal plum marketing order was discontinued before the 1991 harvest season. As a result, no forced "generic" advertising took place during the 1991 through 1993 harvest seasons. Instead, the growers formed a voluntary program. In 1994, a state marketing order was put into place for regulating maturity and advertising.

The Secretary of Agriculture's desire to "offer the retailer an attractive quality product" in competing with other fruits for retail shelf space cannot be equated with a compelling interest to preserve our national economy.

The decision to impose mandatory assessments *only* on California growers so that the retailer may present an attractive quality product mocks the First Amendment protection accorded the decision of what not to say. See, e.g., *U.S. v. Frame*, 885 F.2d at 1181-1182 (Sloviter J. Dissenting) (government interest neither compelling nor substantial when advertising messages compelled represent economic interest of one segment of population).

Moreover, the Third Circuit in *Frame* acknowledged that the *Central Hudson* standard was the applicable test to apply to Frame's free speech claim. However, as the majority in *Frame* was "convinced that the government's interest in preventing the collapse of a vital sector of the national economy qualifies as a compelling state interest," and the government interest outweighed the intrusion on Frame's speech and association rights, the *Central Hudson* standard was satisfied. *U.S. v. Frame* 885 F.2d at 1134 n. 12. On the other hand, here the Ninth Circuit did not equate the governmental interest in a forced "generic" tree fruit advertising program to that of "preventing the collapse of a vital sector of the national economy." As such, the Ninth Circuit did not find it necessary to apply the compelling state interest test to the infringement upon respondents' associational freedoms. Instead, the Court found the less restrictive *Central Hudson* test for commercial speech controlling.¹⁹

¹⁹USDA mistakenly refers to the Agricultural Act of 1954, H.R. Report No. 1927, 83d Cong., 2d Sess. 4, as the foundation to support that a compelling governmental interest exists to protect and improve the farm economy. Pet. for Cert. p. 18-19. A review of the Agricultural Act clearly establishes that the Act had absolutely nothing to do with any congressional authorization to support a forced "generic" advertising

The Ninth Circuit here had no substantial congressional record to support the forced "generic" advertising program as did the Third Circuit in *Frame*. There is no evidence that the forced "generic" advertising program benefitted respondents' sales and/or profit margins. App. to Pet. for Cert. pp. 17a-18a; USDA presented no evidence that it had conducted any studies to determine whether the forced "generic" advertising program worked to the growers' benefit. *Id.*, p. 19a; USDA presented no evidence that tree fruit growers in other states do not reap the same, or greater, benefit from the "free ride" they receive from the "generic" advertising program — a program paid for solely with California growers' assessment monies. *Id.*, p. 21a.

The Ninth Circuit found from the extensive hearing record that respondents were being forced to support an advertising program that promotes the "Red Jim" nectarine — a proprietary variety of one of the committee members; forced to associate with "generic" advertising messages with which respondents disagree;²⁰ respondents' own distinctive

program. The Agricultural Act, similar to the congressional findings in *Frame*, sought to preserve the national economy, which respondents do not dispute is of substantial interest to the government. However, the Agricultural Act must not be "bootstrapped" into expanding USDA's interest in promoting California nectarines, peaches and plums. The Agricultural Act dealt solely with extending, for a year, price support programs for wheat, corn, cotton, rice and peanuts following the Korean War. Not once within that Act are the words nectarine, plum or peach referenced. Not once within that Act is the word advertising mentioned.

²⁰The "generic" advertising program implies by its very nature that "red is better" and "all California tree fruit is the same." Many respondents grow yellow varieties of nectarines and peaches. A "generic" advertising program that promotes the red varieties to the exclusion of the yellow varieties not only does not benefit the growers of the yellow varieties, but respondents believe the yellow varieties to be of superior quality and taste than the red varieties; respondents do not want to be clumped into a "generic" advertising program promoting *all* California tree fruit being of equal quality. Respondents believe their

advertising efforts are being hampered by the compelled funding of the "generic" advertising program.²¹

In addition, California cattlemen are not singled out, as California tree fruit growers are, to finance and subsidize a national promotion program for an entire industry. The discriminatory impact of the "generic" advertising program as applied to California tree fruit handlers certainly cannot be equated with a rational "fit" between the asserted governmental interest and the regulations at issue.²² For example, the beef promotion program is nationwide. For every head of cattle sold in America, or imported into America, a \$1.00 assessment, *set by Congress*, is applied to the beef promotion program. On the other hand, within the California "generic" advertising program, the assessment level is left to the Secretary's discretion and, historically, the cost of advertis-

fruit to be of superior quality. To be grouped with inferior fruit detracts from their own varieties. App. to Pet. for Cert. at p. 15a.

²¹The Court found that respondent Kash, Inc., would prefer to conduct in-store promotion to sell its product; respondent Gerawan Farming, Inc., would prefer to advertise its own label; etc. App. to Pet. for Cert. at p. 18 a.

²²ALJ Baker, in her administrative decision, points out many factual circumstances differentiating the tree fruit "generic" advertising program from the beef program upheld in *Frame*. For example: (i) Congress mandated advertising within the beef industry. It is discretionary with the Secretary in the tree fruit industry; (ii) the beef program established a standardized assessment rate set by Congress. The tree fruit assessment rate is discretionary with the Secretary; (iii) the beef program has established proscriptions and standards. The tree fruit program is discretionary with the Secretary; (iv) the beef program has substantial governmental oversight. The tree fruit program is left to the discretion of the tree fruit committees; (v) the beef program applies nationwide. The tree fruit program applies only to four counties in the central San Joaquin Valley of California; (vi) the beef program limits spending to strictly advertising beef. The tree fruit program assessments are used for expenditures which the court in *Frame* denounced. See, App. to Opp. pp. 377a-380a.

ing, and accordingly, the assessment rate continues to rise.²³ The assessments also continue to be redirected to the special interests of those sitting on the tree fruit committees.²⁴

USDA also urges that because the Ninth Circuit found the *Cal-Almond* decision largely governed its analysis in this case and because the Court in *Cal-Almond* concluded the generic advertising program for almonds "closely resembled" the program in *Frame*, the *Frame* result must prevail. See, Pet for Cert. p. 24 n. 16. What the *Cal-Almond* Court found was "... a 'publicly identified group' (cattlemen or almond handlers) must contribute money to fund the 'dissemination of a particular message associated with that group'." *Cal-Almond*, 14 F.3d at 435. That is where any resemblance between the programs ends. The Ninth Circuit's analysis here and in *Cal-Almond* is consistent with the Third Circuit's decision in *Frame*. The fact that the *Frame* Court found the underlying beef promotional program record sufficient to uphold that program, while the Ninth Circuit found the underlying records insufficient to uphold the tree fruit and almond programs does not create a conflict within the Circuits.

²³ As noted by the Ninth Circuit, the Chairman of the Management Services Committee testified that "although each year the industry pays more for the same amount of advertising, the growers' economic position has not improved." App. to Pet. for Cert. at p. 19 a.

²⁴ For example, at the January 18, 1996 meeting of the tree fruit Control Committee, employees of the committees, whose salaries are paid by mandated assessments, discussed their concerted efforts to lobby the Solicitor General to file a petition for writ of certiorari in this case; additionally, the Committee members voted on and approved spending up to \$160,000.00 of growers' assessment monies to pay the outstanding bills of a private law firm hired to assist the U.S. Attorney's Office in defending an antitrust action brought against certain members of the tree fruit committees and their employees. App. to Opp. pp. 11a, 12a, 13a, 15a. See also *Wileman Bros. & Elliott, Inc., et al. v. Giannini, et al.* 909 F.2d 332 (9th Cir. 1990).

F. The Ninth Circuit's Decision Will Not Automatically Invalidate The Operation Of Other "Generic" Promotion Programs Funded By Mandatory Assessments, As Alleged By USDA

USDA would have this Court believe that the Ninth Circuit's decision has broad sweeping ramifications on all remaining commodity "generic" advertising programs. This is not so. The Ninth Circuit's decision did not find the Agricultural Marketing Agreement Act unconstitutional. The Court invalidated the forced "generic" advertising program based on the record presented by USDA to the Court. That record "says nothing about whether mandatory, collectively-financed advertising is more effective than advertising undertaken by individual handlers (or even whether generic advertising is better than brand-name advertising);" nor did the record reflect that the "generic" advertising program was sufficiently narrowly tailored to withstand constitutional scrutiny. App. to Pet. for Cert. at pp. 19a-21a.

On the other hand, many existing promotional programs identified in USDA's petition at footnotes 19 and 20 likely have records sufficient to withstand a *Central Hudson* analysis. Those that do not should fall. They unconstitutionally impact growers' ability to market their product as they prefer. The Ninth Circuit concluded that "each handler knows best how to sell his own [commodity]." App. to Pet. for Cert. at p. 18 a.

That does not mean, however, that a generic advertising program cannot work. First, USDA can conduct the macroeconomic and microeconomic studies necessary to establish that "generic" advertising benefits the grower, and that "generic" advertising works better than a grower's individual efforts. Second, as the Ninth Circuit alluded, USDA could allow for credits to tree fruit handlers for their own individualized advertising programs. A brand-specific advertising program would, logically, assist in the sale of tree

fruit equally as well as a "generic" program. App. to Pet. for Cert. at p. 20a.

Respondents oppose the expenditure of their monies to promote a "generic" advertising program that they ideologically, philosophically, morally, economically and commercially oppose. If tree fruit growers feel the need to advertise, so be it, let them advertise in any manner they desire. They can form cooperatives to promote their particular product. Orange juice has no mandated advertising program, however, Sunkist formed a cooperative to advertise its product — without infringing other growers' constitutional freedoms. Sun-Maid and OceanSpray have done the same thing. By creating their own cooperatives for the purposes of advertising their products, they are allowed to create promotional material that will reach the companies and/or individuals with the message they wish to convey. They are not forced to pay for promotional programs that convey their competitors' specialized or preferred message.

Respondents are forced to spread the message "eat California tree fruit." If USDA wants that message spread, the First Amendment precludes respondents from being compelled to spread it. If one would ask any businessperson, no matter the products sold or the service provided, if he or she believes that it would not infringe their First Amendment rights for the government to compel them to advertise their product, and to compel them to advertise it in a certain method and manner, and that they were to use their own money to do it, it is safe to say that not one person questioned would not be abhorred.

The tree fruit industry is extremely competitive, despite the socialistic programs set up under the nectarine, peach and plum marketing orders. Respondents are competing against every other handler in the industry, including the individual committee members who control the advertising program. Respondents can survive by being efficient,

smarter, and developing their own outlets for tree fruit that provide them a special little niche. As a result of respondents being enterprising, they can expect a decent return on their substantial dollar investment in this industry, except when USDA, at the request of the commodity committees, compels respondents to spend valuable capital assets advertising in methods and means that does not increase respondents' market share, does not increase the return on their tree fruit sold, and does not enhance the sales of their tree fruit.

USDA failed to justify its forced "generic" advertising program. The only generic promotion programs which would be impacted by the Ninth Circuit's decisions here and in *Cal-Almond* are those programs which have the same stifling effect on the growers' constitutional freedoms of speech and association. The tree fruit industry is still marketing nectarines, peaches and plums; Blue Diamond is still imploring consumers to "buy just one can a week."

CONCLUSION

USDA has failed to provide this Court with any sound reason why its Petition for Writ of Certiorari should be granted. Respondents respectfully request that this Court deny USDA's petition for Writ of Certiorari.

Respectfully Submitted,

Thomas E. Campagne
(Counsel of Record)
 Clifford C. Kemper
 Jeffrey C. Heeren
 The Law Firm of
 Thomas E. Campagne &
 Associates

Attorneys for Respondents

No. 95-1184

Supreme Court U.S.

FILED

MAR 25 1996

In the Supreme Court CLERK

OF THE

United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
Petitioner,

vs.

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.;
KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO
FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES;
GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS;
KOBASHI FARMS; NAKAYAMA FARMS, INC.; and
MIHARA FARMS,
Respondents.

**On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit**

**APPENDIX TO OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

THOMAS E. CAMPAGNE
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403 PM

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No. CV-F-90-473 OWW
Consolidated

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

WILEMAN BROTHERS & ELLIOTT, INC.;
and KASH, INC.,
Plaintiffs,

v.

EDWARD MADIGAN, Secretary of Agriculture,
Defendant.

**REPLY TO PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT AND IN FURTHER SUPPORT
OF DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

Date: March 2, 1992

Time: 9:00 a.m.

Ctrm: OLIVER W. WANGER

Defendant hereby responds to the arguments raised in
plaintiffs' Opposition to defendant's Motion for Summary
Judgment.

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Plaintiffs confusing and redundant First Amendment discussion ultimately seems to present two distinct arguments: (1) that their "compelled association" with other tree fruit handlers in a generic advertising program is unconstitutional; and (2) that the requirement to support this generic advertising program leaves less funds available for their own, brand name marketing efforts, thus restraining their commercial speech. Neither argument has any merit.

As noted previously, the "compelled association" line of cases that begins with *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), simply has no applicability to a government-mandated, commercial advertising program such as this. See DMSJ at 53-59 and *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989, cert. denied, 110 S. Ct. 1168 (1990)).

And to the extent that plaintiffs commercial speech promoting the sale of Wileman and Kash brands is curtailed by the compelled assessments to support the promotion of California tree fruit, that limited restriction does not run afoul of First Amendment protections for commercial speech. Governmental restrictions on commercial speech are permissible so long as those restrictions reflect —

... a 'fit' between the legislatures ends and the means chosen to accomplish those ends ... a fit that is not necessarily perfect, but reasonable; that represents not

necessarily the single best disposition but one whose scope is in proportion to the interest served.

Fox, supra at 3035. The government program here — compelled support for a generic advertising program for California tree fruit, albeit at the potential cost of less advertising for particular brand names of fruit — certainly meets that standard.

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USCA DOCKET NO. 93-16977
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
CHIAMORI FARMS INC.; PHILLIPS FARMS, INC.;
KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO
FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES;
GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS;
KOBASHI FARMS; NAKAYAMA FARMS, INC.; and
MIHARA FARMS,

Appellants,

v.

MICHAEL ESPY, Secretary of Agriculture,
Appellee.

Eastern District of California (Fresno)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE

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March 30, 1994

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III. The Assessment-Fund Generic Advertising and Promotion Program Does Not Violate Appellants' First Amendment Rights

Despite appellants' attempt to split and confuse the First Amendment issue between commercial speech and the right to freedom from compelled association, there is only one First Amendment challenge presented here: Did the assessments ordered to fund the marketing orders unlawfully interfere with appellants' right to promote their brand-specific commercial message. As the District Court correctly noted, "the only goal of the speech . . . is to convince consumers to buy growers' fruit. It is purely commercial speech." Order at 54. *Accord Cal-Almond* 14 F.2d at 436, n. 5. As such it must be analyzed under the three part test of *Central Hudson Gas & Electric v. Public Service Comm'n of NY*, 447 U.S. 557, 566 (1980). The distinct nature of the California tree fruit industry, (including approximately 100 large to medium size handlers), and the extensive objective and anecdotal evidence in support of this promotional program, easily distinguishes these marketing orders from the almond program.

A. *Standard of Review.* The government submits that the *Cal-Almond* Court's suggestion in *dicta* that the "compelling state interest" standard from *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984), might apply in this commercial speech context, 14 F.3d at 436, should be rejected. The only compelled association here is the mingling of appellants' funds with those of their competitors to promote a neutral, purely commercial message: buy California tree fruit.²¹ This is not an appropriate case for the

²¹We agree with the District Court's conclusion that with respect to the balance of appellants' confused attempts to allege First Amendment claims — eg. that advertising promotes the "lie" that red colored fruit is better, or that the summer theme of the advertising promotes sexually subliminal messages, *see* Appellants' Brief at 12 — appellants simply

application of the *Roberts* test, which requires a compelling state interest to justify intrusion into "certain intimate human relationships," 468 U.S. at 617, such as marriage, cohabitation and the raising and education of children, *Id.* at 619. A government program compelling producers to associate to advertise the product that they produce is far from the type of state action that the *Roberts* standard is designed to scrutinize. Hence the *Roberts* line of authority has no application to the three-prong *Central Hudson* analysis.

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have not carried their burden of identifying a coherent claim or any evidence in support thereof. Order at 60-61.

No. 93-16977

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILEMAN BROTHERS & ELLIOTT, INC., ET AL.,
Plaintiffs-Appellants,

v.

MICHAEL ESPY, Secretary of Agriculture,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California

APPELLEE'S PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC*

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Cal-Almond's application of the *Central Hudson* test was seriously flawed, however, and the panel decision here perpetuates *Cal-Almond's* central mistake. Both decisions erroneously require the Secretary to demonstrate that generic advertising is "more effective" than any advertising that an individual handler might undertake. That requirement is based on a misunderstanding of the distinct goals of generic and individual product advertising and, moreover, is utterly impractical to apply. As we show below, the panel should have analyzed this case under a variation of the test for government programs that compel association and, under that test, should have concluded that the generic advertising components of the peach and nectarine marketing orders comply with the First Amendment.

1. *Choosing the correct First Amendment test.* Even though the programs challenged here involve advertising, they are unlike the government actions at issue in the Supreme Court's commercial speech cases, which uniformly concern government *restrictions* on private speech. Here, in contrast, peach and nectarine handlers remain totally free to advertise their products as they choose. The marketing orders simply require them also to contribute to an industry-wide advertising program.²

²Before the panel, we were bound by the Court's decision in *Cal-Almond*, applying the commercial speech test to a generic advertising program under a different marketing order. Accordingly, in our brief we analyzed the peach and nectarine generic advertising programs under *Central Hudson*, arguing that those programs were factually distinguishable from the almond advertising program. In this petition, we urge the Court *en banc* to apply what we believe is the correct constitutional test.

MINUTES CONTROL COMMITTEE

January 18, 1996

The meeting of the Control Committee was called to order by Chairman Al Peterson at 11:00 a.m. in the conference room of the California Tree Fruit Agreement on January 18, 1996 in Reedley, California.

Mr. Field called roll.

Shipper Members and Alternates Present:

Fred Berry	Joe Garcia	Rick Paul
Wayne Brandt	Micky George	Albert Peterson
Carl Buxman	Herb Kaprelian	Stuart Rotan
Dan Frauenheim	Harold McClarty	Pat Sanguinetti
		Will Wirht

Grower Members and Alternates Present:

Leo Balakian	Rod Milton	Richard White
Verne Crookshanks	Cliff Sadoian	Gordon Wiebe
Melvin Enns	Martin Trenouth	

Others present were:

Dan Bensing	Pat Pinkham	Marilyn Watkins
Jon Field	Gary Van Sickle	
Kendall Manock	Terry Vawter	

A motion to approve minutes from the February 31, 1995 meeting was made, seconded and approved.

Plus Commodity Committee Balance Sheet

Mr. Field reviewed the Balance Sheet of the Plum Commodity Committee (attached) which indicates the bottom-line estimated cash at March 1, 1996 of \$25,029.25. Mr. Field noted that there was no recommendation regarding the status of Plum Commodity Committee funds at this time. However, if the Control Committee approves any payments of legal fees, the portion owned by the Plum Commodity Committee will have to be paid by the peach

and nectarine committees until any disbursement of trust account funds due the Plum Commodity Committee are made.

Mr. Field explained that moneys being held in attorney-client trust accounts on behalf of the Plum Commodity Committee exceed \$850,000 not including interest. Currently, the Plum Committee's share of this interest is estimated at around \$300,000.

Litigation

Mr. Field then asked for an update on legal activities from U.S. Attorney Dan Bensing and Kendall Manock of Baker, Manock & Jensen.

Mr. Bensing began by announcing that the Solicitor General has authorized petition for certiorari review to the Supreme Court on the First Amendment issues contained in *Wileman vs. Espy*. This petition will be submitted next week. Mr. Bensing noted that they anticipate the Supreme Court to make a decision as to whether it will hear the case in March, that the case would be briefed in the summer, argued in the fall with a decision expected by the winter of 1997.

Mr. Bensing further noted that about 70 to 80 percent of the cases presented to the Supreme Court by the Solicitor General are heard and that the only issue being considered is with respect to the First Amendment freedom of speech components of the case. Although there is a possibility that other issues raised by the plaintiffs will be heard as well, Mr. Bensing stated this was doubtful since the first area the Supreme Court examines in its decision to accept cases is the presence of conflicting decisions. It was also noted that the original deadline for submitting the case to the Supreme Court for review was December 16, 1995. The Solicitor General asked for an extension and was granted one, but the

plaintiffs, who also asked for an extension, had their request denied.

Mr. Manock added that it was a major step for the industry that the Solicitor General had recommended the case be heard by the Supreme Court. He noted that CTFA Manager Jon Field had been instrumental in working with Mark Houston and the Ag Issues Forum to initiate a letter writing Campaign aimed at convincing the Solicitor General the case had broad ranging implications for U.S. agriculture. Mr. Manock reported that letters were received by the Solicitor General from commodity groups in just about every state in the nation asking that the case be reviewed by the Supreme Court. Mr. Manock stated he believed the letter writing Campaign was key in the Solicitor General's decision to request review.

Mr. Bensing then turned to the topic of legal fees involved in the *Wileman vs. Giannini* anti-trust case, stating that the Control Committee had not officially addressed whether attorney fees incurred would be covered by the industry or paid by individuals. The fees have come as a result of defending parties in the District Court case in two different categories. The first category deals with the definition of "persons" under the Sherman Anti-Trust Act. It is the opinion of Assistant U.S. Attorney Bensing that the defendants in the case could not be sued as "persons" since they were serving as part of a governmental entity and therefore were exempt from the anti-trust claim as defined in the Sherman Act. However, the Department of Justice would not authorize Mr. Bensing to make that argument on behalf of the defendant. As a result, it was necessary for defendants to seek private counsel.

In the meantime, the *Wileman vs. Espy* Ninth Circuit ruling came down saying that it was perfectly legal and within the realm of responsibilities for the committees to set quality standards. Although we are still awaiting ultimate

resolution of that issue, it appears this ruling would nullify the anti-trust claims contained in Wileman vs. Giannini. The issue of immunity under the "person" status has still not been resolved, but legal fees remain unpaid. Mr. Bensing noted that he would be willing to seek approval for payment from the Justice Department again, but was not optimistic that would happen. The question at hand, is whether legal fees submitted by private counsel, Baker, Manock & Jensen, in the amount of \$67,724.19 be paid by individuals or whether the Control Committee wishes to authorize the use of grower assessment dollars for this payment.

Mr. Manock stated his position that it is unfair for individual committee members to pay, particularly since the Ninth Circuit ruled that setting standards was proper. The argument made to the Anti-Trust Division of the Justice Department was that the lack of immunity for program committee members and staff and the resulting possibility for law suits would discourage anyone from wanting to serve on the committees.

Mr. Field noted that the immunity issue has broad impact on all marketing orders and commissions throughout the country and agreed that the individuals should not be required to pay legal fees for this defense.

When asked what it would take to fully resolve the issue of "person" status, Mr. Manock responded that it was likely that issue would not be resolved with the Wileman vs. Giannini case, since it was highly possible the case would end once the Ninth Circuit ruling that standards set were proper and legal is finalized. However, he noted that defendants may want the "person" issue resolved in the event of further litigation.

Mr. Sadoian asked how likely it was that the Justice Department would allow USDA to pay attorney fees? Mr. Bensing responded that he would be willing to ask

again, but that we should assume that will not happen. Mr. Sadoian then asked if it was possible to collect attorney fees from the plaintiffs. Mr. Manock responded that this was not allowed.

The discussion then turned to the second category of legal fees involving the motion to disqualify the law firm of Thomas E. Campagne because it had represented some of the defendants in previous proceedings. This motion was made with respect to defendants Virgil Rasmussen, Leroy Giannini and Micky George. In the case of both Rasmussen and Giannini, the motion was denied, but in the case of George, it was granted.

Therefore, Campagne has been disqualified in any case involving Micky George. Mr. Campagne is appealing this ruling. Attorney fees generated by Baker, Manock & Jensen in this effort are currently \$86,720.24. Mr. Manock explained that the case required extensive investigation and briefings and that the judge had issued a lengthy opinion when making his ruling. Mr. Manock further noted that the effort had proven successful with respect to Mr. George and it has been reported by Mr. Campagne that it would cost the plaintiffs over \$1 million to replace the work performed by his law firm.

Mr. Manock noted that at one point, Mr. Campagne tried to disqualify Baker, Manock & Jensen from the case because he claimed the firm had represented the USDA. The motion was determined to be unfounded and the court sanctioned Mr. Campagne \$3,517.50. Mr. Manock noted that this amount will be applied as a credit toward the fees owed by defendants.

When asked about the status of the anti-trust case, Mr. Bensing explained that if the 1980 maturity regulation is lawful, as the Ninth Circuit has now ruled, the only issue remaining in the anti-trust case concerns any losses the

plaintiffs might claim as a result of specific variances in the standards set by the defendants. It is believed that there are very few damages to be collected by the plaintiffs should a claim in this area be pursued. Mr. Bensing further noted that there are only two instances where it could possibly be shown there could have been improper decisions made. Mr. Bensing stated that given the Ninth Circuit ruling, it was possible the court would dismiss the case. However, future litigation could not be ruled out entirely.

Mr. Field asked if Mr. George's insurance company would pay for one-third of the fees generated in the disqualification effort. When Mr. Manock asked if CTFA had paid the insurance and was told yes, he said the matter would certainly be investigated.

Mr. Field then asked that since CTFA had prevailed in the disqualification of Mr. Campagne's firm with respect to Mr. George, is it possible to seek damages from Mr. Campagne to cover legal fees. Mr. Manock responded that to the extent that damages are realized, yes it was possible. He felt that Mr. George could bring that action when the Ninth Circuit ruling is finalized.

Mr. Peterson asked if the disqualification of Mr. Campagne included other attorneys of his firm? Mr. Manock replied that it does involve any attorney in the firm or any that have worked for the firm during the period in question. Mr. Manock noted that would include Mr. Brian Leighton and Mr. James Moody who assisted Campagne in the ISA proceedings.

At 12:10 p.m. the Control Committee convened in the executive session. All defendants involved in the current litigation left the room including: Jon Field, Al Peterson, Gary Van Sickle, Micky George and Pat Pinkham. Other committee members who had left the meeting previously

and would not be voting on motions during executive decision were Leo Balakian and Carl Buxman.

At 12:25 p.m. the public meeting was reconvened. Control Committee Vice Chairman Herb Kaprelian announced that during executive session a motion was made, seconded and unanimously approved as follows: *With respect to the Sherman Anti-Trust immunity issue, the Committee recommends that the billing submitted by Baker, Manock & Jensen (maximum amount of \$70,000) be resubmitted to the Justice Department for payment. If the Justice Department refuses payment, the Committee recommends that USDA approve payment of this billing using assessment dollars to be divided equally among the Peach Commodity Committee, the Nectarine Administrative Committee and the Plum Commodity Committee.*

Mr. Kaprelian further stated that a second motion was made, seconded and unanimously approved as follows: *With respect to the disqualification issue, the Committee recommends that the billing submitted by Baker, Manock & Jensen (maximum amount of \$90,000) be resubmitted to the Justice Department for payment. If the Justice Department refuses payment, the Committee recommends that USDA approve payment of this billing using assessment dollars to be divided equally among the Peach Commodity Committee, the Nectarine Administrative Committee and the Plum Commodity Committee.*

Other Business

Mrs. Vawter announced that assessments which the Department has been unable to collect will now be submitted to a credit collector and any IRS income tax refunds due the parties in question will be held in lieu of payment and credit reporting services will be notified of the outstanding debt. Ms. Vawter asked that this be made public in the CTFA newsletter.

16a

There being no further business, the meeting was adjourned at 12:30 p.m.

Respectfully Submitted,

/s/ JONATHAN W. FIELD
JONATHAN W. FIELD
Manager

JWF/mfw
Attachment

17a

UNITED STATES DEPARTMENT OF
AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:

WILEMAN BROS. & ELLIOTT, INC.,
a California Corporation,
Petitioner

and

KASH, INC.,
a California Corporation,
Petitioner.

AMA Docket No. F&V 916-3
(Nectarines)

AMA Docket No. F&V 917-4
(Plums and Peaches)

DECISION AND ORDER

May 24, 1991

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a California Corporation and
Kash, Inc., a California Corporation,
AMA Docket Nos. F&V 916-3, 917-4

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UNITED STATES DEPARTMENT OF
AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

WILEMAN BROS. & ELLIOTT, INC.,
a California Corporation,
Petitioner

and

KASH, INC.,
a California Corporation,
Petitioner.

AMA Docket No. F&V 916-3
(Nectarines)

AMA Docket No. F&V 917-4
(Plums and Peaches)

Decision and Order
As to Wileman/Kash II

PRELIMINARY STATEMENT

These proceedings were instituted under 7 U.S.C. section 608C(15)(A), being section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended. It arises by reason of a Petition filed on June 6, 1988, and an Amended Petition filed on July 31, 1989. For purposes of convenience of reference, both the Initial Petition and the Amended Petition will be referred to herein as the "Petition."

The Petition of the parties raises various allegations with respect to the Nectarine, Plum and Peach Marketing Orders found in Title 7 C.F.R. § 916.1 *et seq.*, and 917.1 *et seq.* concerning what is referred to herein, for convenience of reference, as the "1988 Harvest Season" and the "1989 Harvest Season" with respect to Plums and Nectarines and for those years and prior thereto as to Peaches.

The Petitioners have been handlers of both Nectarines and Plums for well over 20 years and growers of both Nectarines and Plums for over 40 years. The Petitioners and their businesses are regulated pursuant to the Agricultural Marketing Agreement Act (7 U.S.C. § 601 *et seq.*) and the Nectarine, Peach and Plum Marketing Orders (Title 7 C.F.R. §§ 916.1 *et seq.* and 917.1 *et seq.*, respectively).

Petitioner Wileman Bros. & Elliott, Inc. farm approximately 3,000 acres of citrus and tree fruits which they pack and market through their own packing house. Petitioner Elliott packs fruit grown on approximately 400 to 500 acres of Nectarines and Plums for outside growers. Petitioner Elliott handles approximately 10 different varieties of Nectarines and 20 different varieties of Plums. There are approximately 249 handlers of Nectarines regulated by the Nectarine Marketing Order and 402 handlers of Plums regulated by the Plum Marketing Order.

Kash, Inc., including family members who are shareholders, and Officers, are farming approximately 1,300 acres of Peaches, Plums and Nectarines. In addition, Petitioner Kash, Inc. packs for approximately 12 outside growers who farm approximately 500 acres of Peaches, Plums and Nectarines.

As such, they are regulated handlers.

DUE PROCESS

The instant proceeding, *In re: Wileman Bros. & Elliott, Inc. and Kash, Inc.* (AMA Docket Nos. F&V 916-3 and 917-4), encompassed oral hearing of nineteen (19) days. The hearing was conducted on October 24 through 27, 1989 and January 29 through February 16, 1990. At the conclusion of the hearing a briefing schedule was established. Petitioners' Post-Hearing Brief was Ordered submitted by April 30, 1990; Respondent's Opposition Brief to be filed on

June 6 1990; and, Petitioners' Reply Brief to be filed by June 30, 1990 (Tr. 4945-4946). The briefing schedule was premised on the transcripts of the hearing being provided to the parties on or before March 9, 1990. (Tr. 4944).

The transcripts of the original hearing, however, were not delivered until March 18, 1990, at which time, Petitioners were involved in briefing Respondent's Appeal of a prior 7 U.S.C. § 608c(15)(A) Petition Decision and Order issued in a related matter involving the same parties (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3). Petitioners' Opposition Brief and Cross-Appeal were to be filed on March 30, 1990. As a result, Petitioners indicated they were unable to commence review of the transcripts of the instant proceeding until April 2, 1990.

The instant hearing encompassed 4,994 pages of transcript and several thousand pages of exhibits. Petitioners, further indicated they were aware that to adequately review the transcript and the exhibits and to then draft their Post-Hearing Brief by April 30, 1990, would require uninterrupted effort. In the interim, however, the U.S. Attorney's Office filed, against these same Petitioners, a motion to modify the Stay order issued by the Honorable Edward Dean Price on July 6, 1989 (CV-F-568 EDP). (The matter of modification of the Stay Order resulted in its continuance). Petitioners, recognizing their inability to comply with the briefing schedule in the instant matter and, at the same time, respond to the U.S. Attorney's Office's Motion, sought to extend the briefing schedule previously established in the instant matter. When Petitioners contacted Administrative Law Judge Dorothea A. Baker, the hearing Judge, requesting an extension in which to file their Post-Hearing Brief to May 31, 1990, I had anticipated, due to the complex nature of the instant matter, the likelihood of a request to modify the briefing schedule. (Tr. 4946). The initial briefing

schedule was also premised upon timely receipt of the hearing transcript.

I found Petitioners' request for an extension reasonable under the circumstances, and advised Petitioners' counsel to file a formal written Motion requesting said extension. The formal Motion was placed in the mail on April 5, 1990.

In the interim, Petitioners filed with the Secretary of Agriculture a Motion to Recuse Judicial Officer Donald A. Campbell from hearing the Appeal in the original 7 U.S.C. § 608c(15)(A) Petition proceeding. Petitioners contended that Judicial Officer Donald A. Campbell was prejudiced and biased against Petitioners and that he was predisposed to overturn the Decision and Order issued by Administrative Law Judge Dorothea A. Baker in the prior proceeding (*In re: Wileman Bros. & Elliott, Inc. and Kash, Inc.*, AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3).

On April 6, 1990, prior to receipt of Petitioners' Motion for Extension of Time, the Judicial Officer for the Department of Agriculture, Donald A. Campbell, denied Petitioners' request that the Judicial Officer be recused from presiding over the Government's appeal. Petitioners stated — "as if to buttress Petitioners' argument that the Judicial Officer was prejudiced and biased," Judicial Officer Campbell ordered consolidated the appeal of the Government in the first 15(A) case, (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3) with the instant matter (AMA Docket Nos. F&V 916-3 and 917-4) which had not then been briefed and at a time when the transcript was still not available to the Administrative Law Judge. His unprecedented Order, wherein he expressed his desire to expedite the instant proceeding, effectively recused and removed me, Administrative Law Judge Dorothea A. Baker, from issuing my Decision and Order in the instant matter and instead replaced the Administrative Law Judge with the Judicial Officer, who would "act as the agency in the place and stead

of the ALJ in issuing the Decision in *Wileman II*." He further ordered that all motions were to be ruled on by the Judicial Officer rather than the Judge who presided over the hearing.

Administrative Law Judge Baker, upon receipt of Petitioners' Motion For An Extension of Time to file its Post-Hearing Brief, no longer having the authority to rule on this Motion, forwarded Petitioners' Motion to the Judicial Officer with the notation, "I was going to grant their [Petitioners] Motion for Extension of Time * * *."

The Judicial Officer, as the final deciding authority for the Department, declined to grant Petitioners' Motion for an extension to May 31, 1990, instead he ordered Petitioners to file their Post-Hearing Brief on or before May 16, 1990. He also ordered: "*Wileman I* and *Wileman II* are hereby consolidated. The Judicial Officer will act as the agency in the place and stead of the Administrative Law Judge in issuing the decision in *Wileman II*. Unless modified by further order, the Administrative Law Judge shall expeditiously issue a recommended decision in *Wileman II* * * *." Petitioners, aware that they would be unable to review the extensive record and adequately brief this matter in the time allotted, drafted a letter to Judicial Officer Campbell requesting that he reconsider Petitioners' request. Petitioners pointed out that their request was reasonable under the circumstances and further that they were seeking only an additional two (2) weeks beyond the date designated for the filing of their Post-Hearing Brief. The Judicial Officer refused Petitioners' request.

As the Judicial Officer had previously stated that he would consider modification of Orders issued if Respondent had no objection, Petitioners sought a Stipulation from Respondent to modify the briefing schedule. Petitioners contacted trial counsel, Helen Boutrous, Esquire, staff attorney with the Office of the General Counsel, requesting a

Stipulation that Petitioners might be granted a "professional courtesy" and be allowed until May 31, 1990, to submit their Post-Hearing Brief. Petitioners were advised that Attorney Boutrous would have to "check with her clients," the Agricultural Marketing Service. As Petitioners' counsel had previously allowed Attorney Boutrous extensions of time on other related matters, Petitioners assert that they believed that Attorney Boutrous would understand Petitioners' need for an extension and would so stipulate. However, on May 10, 1990, Attorney Boutrous advised Petitioners that her clients were unwilling to allow any extensions of time.

Petitioners, in their pleading have indicated that they, " * * * have resigned themselves to the fact that they are unable to secure a fair and impartial ruling before the Secretary of Agriculture." Petitioners seek redress from the Secretary of Agriculture; and have pointed out that the Administrative Law Judge assigned to hearing the case is employed by the Secretary of Agriculture; the attorneys representing the Secretary of Agriculture are employed by the Secretary of Agriculture; and when Petitioners prevailed in the earlier case before the Administrative Law Judge, the matter was reviewed by the Judicial Officer who is employed by the Secretary of Agriculture.

Further quoting Petitioners, "Then, when Administrative Law Judge Baker issued a Decision and Order (AMA Docket Nos. F&V 916-1, 916-2, 917-2, 917-3) inconsistent with the Secretary's position, the Judicial Officer, to insure that this does not again occur, orders the same Administrative Law Judge not to write the Decision and Order in the subsequent related matter, but instead is willing to violate the Administrative Procedure Act to guarantee a ruling in favor of the Department of Agriculture." The Judicial Officer indicated, among other things, in his April 6, 1990, "Order Granting Respondent's Motion to Consolidate and Denying Petitioners' Motion to Recuse,

that: " * * * the Judicial Officer may issue the final order in a case, without waiting for the Administrative Law Judge to issue an initial decision." (Page 7). And: " * * * If the Administrative Law Judge has not issued a recommended decision in *Wileman II* by the time my decision in *Wileman I* is to be issued, I will then determine whether it is desirable to modify my present order, and issue my own recommended decision in *Wileman II*, rather than having the Administrative Law Judge issue a recommended decision. My determination at that time would be based on ascertaining from the Administrative Law Judge how long it would take her to issue a recommended decision * * * ."

On July 10, 1990, the Judicial Officer issued a notice and Order that stated, *inter alia*, "After a telephone discussion with Administrative Law Judge Dorothea A. Baker, I have decided to issue the recommended decision in *Wileman II* myself, without any further action by Judge Baker. Order — The recommended decision in *Wileman II* will be issued by the Judicial Officer rather than the ALJ." On August 17, 1990, the Department (Respondent) filed a motion to the Judicial Officer to vacate his July 10, 1990 Order, because, *inter alia*, " * * * It would appear that a recommended decision by the Judicial Officer would necessarily be required to be followed by a final decision by the same Judicial Officer, limited to the same adjudicatory record. Thus, it would be an act without substance." A few days later the Judicial Officer granted Respondent's motion and transferred the case back to Judge Baker.

In addition to the period after April 6, 1990, when the Administrative Law Judge was removed from the case, ordered not to issue rulings, and the like, (which would include requests for additional briefing time, requests for additional information from the attorneys, etc.), there was an earlier period (January 25, 1989 to March 8, 1989), when the case was re-assigned by the Chief Administrative

Law Judge to himself, and, Administrative Law Judge Baker was no longer the Judge assigned to the case. In other words the jurisdiction of Judge Baker as such has not existed from April 6, 1990, to the end of August, 1990, and did not exist for a period from January 25, 1989, when the Chief Administrative Law Judge issued a "Reassignment of Proceedings" stating among other things: "To assure that the instant proceeding will be resolved expeditiously, it is hereby reassigned to Chief Judge Victor W. Palmer. An oral hearing shall be held on March 21, 1989, in San Francisco, California." The "Reassignment of Proceedings" apparently followed a letter from Respondent's counsel dated January 25, 1989 and hand delivered to the Chief Administrative Law Judge. Within hours after receiving this request from Respondent's counsel, the Chief Administrative Law Judge agreed with the Respondent's counsel and issued the "Reassignment of Proceedings." This is more fully set forth in letters dated January 25, 1989, and, February 23, 1989, from Respondent's counsel to Chief Administrative Law Judge Palmer; February 20, 1989, from Petitioners' counsel to Chief Administrative Law Judge Palmer; and February 6, 1989, and stamped in by the Hearing Clerk on February 14, 1989, in which Petitioners' counsel indicated among other things that the Chief Administrative Law Judge was being requested to reconsider because he had issued an order based on Respondent's letter *before* Petitioners had seen it and had an opportunity to respond; that it was inappropriate for Government counsel to try to change an agreement as to trial procedures which had been reached among counsel and Judge Baker; that there would be considerable savings of resources if the trial in *Wileman II* occurred after the issuance of the Administrative Law Judge's decision with respect to *Wileman I*. By January 3, 1989, Judge Baker had been enjoined from holding any hearings, which included that of *Wileman/Kash II*.

As the result of the Chief Administrative Law Judge enjoining Judge Baker from proceeding with her cases as had been assigned to her, it became necessary to advise various counsel, including counsel for these Petitioners, and counsel for the Respondent herein, that Judge Baker had been so enjoined and, accordingly, was precluded from holding hearings including the hearing on this particular case (*Wileman/Kash II*). Included among the correspondence which ensued between Government counsel and the Chief Administrative Law Judge is the letter dated February 23, 1989, in which it is stated among other things:

* * * Respondent submits that noticing a Decision by Judge Baker in the earlier case would be of absolutely no utility. In the first place, since both parties have already stated that they would appeal an unfavorable decision, Judge Baker's decision will not be a Final decision of the Secretary and, thus, will have no precedential value. Indeed, petitioners even assert that they want both decisions (Judge Baker's and the subject proceeding) consolidated for appeal before the Judicial Officer. In addition, Judge Baker's decision will not be "evidence" but rather just her findings and conclusions based solely on the evidence (the transcripts and exhibits) in the earlier proceeding.

In addition, said letter asserted to the Chief Administrative Law Judge that with respect to the color chip test assignments: "* * * It is undisputed that for many years before 1988 such actions were undertaken as informal application of a general maturity standard and *were not subject to rulemaking*. Thus, at the prior hearing, much testimony dealt with the basis for particular applications over the years * * *." (Emphasis added). Referring to the notice and comment procedure which occurred in 1988, it is stated by Respondent: "Since the basis for all of these requirements is now the rulemaking record, *rather than just some informal*

interpretations, it is clear there has been a substantial change of circumstances." (Emphasis added). In addition, the Respondent's counsel, to the Chief Administrative Law Judge, strongly urged that the *Reassignment to the Chief Administrative Law Judge be maintained*. Apparently, there were conference telephone calls involving the Chief Administrative Law Judge and/or counsel for either or both the Respondent and the Petitioners to which this Judge was not a party. In any event, on May 18, 1989, nine and a half months from referral to Judge Baker by the Hearing Clerk for decision (the last brief was Filed July 21, 1988 and referred to her on August 4, 1988) I issued my Decision in *Wileman/Kash I*, AMA-F&V 916-2, 917-2, 916-1, 917-3, assigned to me on June 10, 1987, and September 25, 1987. The above facts differ from the Chief Administrative Law Judge's assertion in *Gerawan Co., Inc.*, AMA Docket Nos. F&V 916-4, and 917-5 (July 6, 1990) that there was a " * * a 1-year delay between the completion of briefing and the issuance of a decision by Judge Baker."

The instant proceeding is being issued approximately nine months from its referral back to the Administrative Law Judge from the Judicial Officer.

These Petitioners have followed every known avenue to have their Petition for redress administratively determined. They have indicated that they, "are confident that they will ultimately prevail through the 7 U.S.C. § 608c(15)(B) process. Petitioners are equally convinced that the 'exhaustion' requirement is a travesty of justice. The 'administrative process' does not even attempt to create a facade of fairness, but rather a 'kangaroo' court has been established to guarantee that the Secretary of Agriculture prevails. It is clear that the Judicial Officer will manipulate, distort and ignore the relevant evidence to mold a decision consistent with Department policy." The aforesaid recited views of Petitioners are set forth because this case is subject to scrutiny for due

process, which cannot be overridden by administrative convenience, and should not be overridden by administrative power accomplished through subtle and indirect ways. Due process requires that when Governmental agencies adjudicate or make binding determinations which directly affect fundamental and legal rights of individual and/or entities, such agencies must employ procedures which are traditionally associated with judicial process. It takes on added importance because, for the most part, the Courts have adhered to the doctrine of exhaustion of administrative remedies.

The Petition filed herein seeks, alternatively, to:

- (1) Modify various provisions of Orders Nos. 916 and 917;
- (2) Terminate various provisions of said Orders; and/or
- (3) Exempt Petitioners from various provisions of said Orders and any obligations imposed in connection therewith that are not in accordance with law.

The issues raised are numerous and are enumerated hereinafter to enable a reviewing Federal Court to be apprised thereof. Briefly stated, but not inclusive, the Petitioners contend that the Department of Agriculture has violated their Constitutional rights by denying them due process; taking their property without due process and without just compensation; and by denying to Petitioners First Amendment rights. In addition, it is claimed that certain provisions of Market Orders 916 and 917 are invalid; that actions (or inactions) taken pursuant thereto, are illegal, that adherence to the Administrative Procedure Act has not been done; that certain acts undertaken, allegedly pursuant to the provisions of the Marketing Orders are improper without proper formulation, and are either *ultra vires*, without proper delegation, or that there is an absence of delegation to the extent that obligations imposed therewith, as written and/or as applied, are not in accordance with law.

This case follows the earlier case by these Petitioners, AMA Docket Nos. F&V 916-1, 917-3, 916-2, 917-2, wherein a 401 page Initial Decision by this Administrative Law Judge was filed on May 19, 1989, finding for Petitioners on many issues concerning Nectarines and Plums and involving years prior to the 1988, 1989 Harvest Seasons. On appeal the Judicial Officer reversed that Initial Decision in his 129 Page Decision, issued on behalf of the Secretary, on July 9, 1990. The Judicial Officer maintained, among other things, that a scrutiny of the promulgation record of 1980-81 precluded judicial inquiry or consideration of many of the issues raised in the earlier Petition.

No attempt will be made to summarize the Judicial Officer's entire decision, but a brief synopsis indicates various significant pronouncements by the Judicial Officer. In view of the extensive stipulation in *Wileman/Kash II*, the material in brackets and the underlined portions represent the Administrative Law Judge's comments as they might relate to a better understanding of *Wileman/Kash II*.

The Judicial Officer's decision in *Wileman/Kash I* indicates the Department's views that: "The only distinction between the situation under these Marketing Orders and the other grading and inspection activities of the Department is that the Committees and their Maturity Subcommittees may make exceptions and changes in test levels." (P. 53-slip op.). [This "distinction" translates into power to determine whose fruit, and how much may be shipped. Reliance for the Subcommittees' power was said to be premised upon "intent" which the Judicial Officer said was subsequently reflected in the Bylaws of the Committees in 1982 and 1983 to express this intent. *However, there is no indication of delegation, specific or otherwise, directly from the Secretary.*] Finding 36 thereof by the Judicial Officer also indicates that, "Only Shipping Point Inspectors are permitted to

determine whether fruit is U.S. No. 1 or meets the assigned color chip or other maturity test." (P. 56).

The Judicial Officer's finding No. 41 indicates the term " 'California Tree Fruit Agreement' (CTFA) is a term that has different meanings, depending on the context in which it is used. The term is variously used by different people, or even the same people at different times, to refer to any or all of the various groups of people associated with Marketing Orders 916 and 917, or to Marketing Order 917 by itself. To growers, handlers, and others associated with the industry, 'CTFA requirements' may mean, at times, explicit U.S.D.A. regulations under Order 916 or Order 917, or specific maturity tests either as determined by the Inspection Service or as determined by changes and variances made by the administrative committees. Inspection service personnel use the term to refer to any Committee members or staff personnel or to requirements under the two Marketing Orders, as distinct from Inspection Service personnel and the requirements in the U.S. Standards. The Committees' members and the hired staff personnel tend to use the term 'CTFA' to mean the hired staff employees, and use 'the CTFA requirements' to mean any Marketing Order requirements, although such usage is not consistent." The Judicial Officer then goes on to acknowledge that the term California Tree Fruit Agreement is nowhere defined in Marketing Orders 916 and 917 and is used just once in the regulations for Order 917, where there is a reference to sending reports, requests, etc. to the "Control Committee, California Tree Fruit Agreement." (7 C.F.R. § 917.110). [This finding by the Judicial Officer reinforces the Petitioners's position that the objectives of the Administrative Procedure Act defy ascertainment — namely, that interested persons be able to ascertain who makes the decisions which affect them, and, in what capacity. When no one knows what the term CTFA means, it is difficult to charge the public and other interested persons with such knowledge. How can it be

ascertained when its use is consistent and when it is not? In addition, this Finding of the Judicial Officer affirms that there are *various standards*, i.e. (1) "*explicit*" regulation; (2) *specific maturity tests determined by the Inspection service*; and (3) *maturity tests determined by the administrative Committees pursuant to their power to grant chances and variances.*]

Among other statements made by the Judicial Officer in *Wileman/Kash I* are the following: "First, the ALJ and the Judicial Officer can only rule on matters raised in the petitions filed by petitioners; second, they cannot rule on discretionary determinations as to a particular lot of fruit; and third, the Act does not permit an award of monetary damages." (P. 65). With respect to whether or not a particular shipment meets the required criteria, the Judicial Officer noted: "If the appropriate procedure has been followed *and the Marketing Order and regulations are valid*, the obligation not to ship the lot has been imposed 'in accordance with the law' *irrespective of whether an error of judgment was, in fact, made* in determining the suitability for shipment of a particular lot." (Emphasis added). "• • • By the same reasoning, if the procedure for variances from the maturity requirement is valid, whether a variance should or should not have been given in a particular case is not reviewable in a § 8c(15)(A) proceeding." [Without belaboring this point, as it is not necessary to this decision, it relates to the question of availability of effective and timely relief. What if the refusal to let a handler ship is premised on something more than "error of judgment," such as malice, gross negligence or incompetency, or monetary gain?]

Further, in his opinion, the Judicial Officer stated: "There is no authorization in the Act, the Marketing Orders, or the Rules of Practice for consequential damages (as distinguished from a return of monies paid) to be awarded in § 8c(15)(A) proceedings. In over 50 years of proceedings

under this Act, consequential damages have never been awarded. Petitioners and the ALJ attempt to distinguish fruit and vegetable orders from milk orders. • • • This allegation is incorrect." The Judicial Officer then indicated cases where refunds had been made to milk handlers and he further stated that: "Furthermore, even though an obligation unlawfully imposed on a milk handler might permit a return of the money unlawfully exacted from the handler, the general practice in this Department is first to give the Secretary the opportunity in his rulemaking capacity, to correct the error, retroactively." In this regard, the Judicial Officer made reference, to a number of milk cases including *In re: Defiance Milk Products Co.*, 44 Agric. Dec. 11, (1985), *aff'd on other grounds*, No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd* 857 F.2d 1065 (6th Cir. 1988). The Judicial Officer noted, among other things, that: "In *Defiance*, the Judicial Officer recognized that some courts had awarded monetary relief to some handlers, *but the Judicial Officer did not adopt that policy as the proper Departmental policy.*" Further setting forth the Judicial Officer's authority to make determination of Departmental policy he made reference to the case *In re: Borden, Inc.*, 37 Agric. Dec. 987, 997-1000 (1978), remanded 38 Agric. Dec. 1061 (1979), dismissed per settlement agreement 40 Agric. Dec. 1711 (1979), and, in connection therewith the Judicial Officer noted: "• • • the Judicial Officer remanded the proceeding to the ALJ to determine the damages [i.e., the return of money paid by the handler]. But that remand order does not reflect the Department's customary practice, since the remand order related to two related proceedings, one of which was controlled by a court decision holding that *Borden* was entitled to recover the overpayments from the producer-settlement fund • • •."

It basically is the position of the Judicial Officer that if the Secretary's rulemaking actions are found to be unlawful, the proper course is to remand the matter to the Secretary

for lawful action and that irrespective of whether the Secretary should be permitted to correct an error retroactively, where error has been found in a section 8c(15)(A) proceeding, an award of monetary damages (is distinguished from a return of money already paid, is not permitted by the Act). (P. 75). [Until the filing of the Petitions in *Wileman/Kash I* there have been scant section (15)(A) Fruit and Vegetable Petitions before the Secretary — and none involving all the issues and facts present herein. Therefore, *Wileman/Kash I* and *Wileman/Kash II* are cases of first impression as to whether there is preclusion of remedy no matter how grievous the wrong. The Federal Courts have made no such determinations and have it within their judicial powers to fashion a remedy where one is due. Since the filing of the Petition in *Wileman/Kash I*, there have been a number of cases decided by the Judicial Officer relating to Marketing Orders: *In re: Cal-Almond, Inc., et al.*, 50 Agric. Dec. —, slip op. (March 8, 1991); *In re: Sequoia Orange Co., Inc.*, AMS Docket Nos. F&V 907-12, 907-15, 907-16, 910-8 (March 29, 1991); *In re: Saulsbury Orchards and Almond Processing, Inc., et al.*, AMA Docket No. F&V 981-4 (January 23, 1991). It is believed these cases have been or will be appealed.

The matter of assessments and the California Tree Fruit Agreement, as set forth in *Wileman I*, was determined by the Judicial Officer as: "Accordingly, the issue is not properly in this case * * *."

Among other determinations made by the Judicial Officer in the aforesaid decision on behalf of the Department are those of: (1) in addition [*Wileman I*] neither Petition questioned the constitutionality of requiring Petitioners to pay for advertising and, therefore, the constitutionality of requiring Petitioners to pay for advertising was not properly raised in this proceeding [*Wileman I*].

With respect to the validity of the Committees' expenses, the Judicial Officer noted: " * * * I am in complete agreement with the ALJ's holding [which was based upon the evidence adduced in the *Wileman I* proceeding] holding that notice and comment rulemaking is not required for the Secretary's approval of any of the Committees' expenses, including advertising expenses." The Judicial Officer likened the Secretary's authority to: "The Secretary's right to approve the budgets of the Committees without notice and comment rulemaking is the same as his right to approve, without notice and comment rulemaking, the budget of his other agencies, such as the Office of the Administrative Law Judge, the Office of the General Counsel, the Agricultural Marketing Service, its Fruit and Vegetable Division, or its Marketing Order Administration Branch." [Based upon the more extensive evidence and pleadings, in *Wileman II*, I am now of the opinion that the aforesaid conclusion by me, and affirmed by the Judicial Officer, in *Wileman I*, was in error. The vast amount of documentary evidence and testimony in *Wileman II* shows the applicability of the Administrative Procedure Act and the necessity of notice and comment to the budgetary approval process in order to be in compliance with the Administrative Procedure Act.]

With respect to advertising, in *Wileman I*, the Judicial Officer stated: "Petitioners are essentially arguing the desirability of spending Order money for advertising. But the Marketing Orders in question (7 C.F.R. §§ 916.45, 917.39) expressly authorize spending assessment monies for advertising. Since Petitioners have not challenged the formal rulemaking records that determine the desirability of those Order provisions, they are barred from litigating the question of whether these particular Marketing Orders should contain such provisions. " * * * Petitioners' argument regarding the desirability of advertising is not justiciable herein."

Although indicating that the advertising issue was not justiciable before the Department in *Wileman I*, the Judicial Officer by way of dicta, stated: "No Secretarial approval of budget items requires notice and comment rulemaking." The Judicial Officer indicated that approval of the budget items is not subject to the Administrative Procedure Act and that when the Secretary publishes the actual assessment rate as a final rule, he invokes the "good cause" exception to the Administrative Procedure Act (5 U.S.C. § 553(b)) for not engaging in notice and comment procedures. "This is entirely appropriate since the law requires that the assessment conform with a ministerial calculation." In arriving at this conclusion the Judicial Officer recognized: "At the time of the publication of the final rule setting forth the assessment rate, all discretionary budget determination have previously been made, and the budgetary-approval process is not subject to the Administrative Procedure Act." [This is precisely what the Petitioners are raising in their Petitions namely, in *Wileman II*, that the bureaucratic process is made up of a maze where there are various discretionary determinations made, into which they and other handlers have no meaningful input.] There is no place and no time where they can question the amounts and purposes of the budget items. The "public meetings" referred to are meaningless.

With respect to the Petitioners' contention as to the proper time period for submitting comments with respect to the informal rulemaking as well as formal rulemaking matters in the *Wileman I* proceeding, the Judicial Officer quoted his decision in *In re: Farm Fresh, Inc.*, 49 Agric. Dec.-slip op. at 45 (April 12, 1990), *appealed docketed*, Civ-90-688T (W.D. Okla. May 1, 1990) in which the Judicial Officer indicated that the Administrative Procedure Act required only three-days notice before an amendment hearing and that: "The Rules of Practice under the statute also provide for 3-days' notice for an amendment hearing

(7 C.F.R. § 900.4(a)). Short notice periods for amendment hearing have long been upheld * * *."

Among other holdings by the Judicial Officer were: (1) the Secretary's maturity regulations are valid and were properly interpreted and applied; (2) the Secretary's regulations, as amended in 1980, established a higher maturity level (a.k.a. "well-matured"); (3) there is no difference between the "higher" maturity standard and the "well-matured" standard; (4) changes in color chip designation for a particular variety did not change the law and were not subject to the rulemaking requirements of the Administrative Procedure Act; and (5) the higher maturity standard (a.k.a "well-matured") is not too vague.

The Judicial Officer indicated: "Although it would have been better practice to have published the variance procedure in the Federal Register in 1980, I do not regard the failure to do so as a fatal error, in the circumstances here." (P. 108).

In summarization, the Judicial Officer's decision has as an underlining premise a rationale that whether the Secretary acted or not, "Under the Orders (7 C.F.R. §§ 916.62, 917.30), the Secretary has the unilateral power to disprove and void any regulation, decision or determination of the Committees." (P. 112). The Judicial Officer further concluded notwithstanding the evidence of record, that the Department did exercise its oversight authority during the time period involved in *Wileman I*.

To what degree mistakes of judgment and failure to act are tolerated is not known nor is the line delineated where they become illegal. However, in arriving at his conclusion that the maturity requirements were not arbitrary and capricious, the Judicial Officer stated: "Although some mistakes of judgment were made in isolated instances over the years in failing to grant variances, or failing to grant them

promptly enough, such lack of perfection does not invalidate the maturity program." (P. 123). "The Minutes of the Nectarine and Plum Committees over the years show recognition of the fact that the maturity program has not worked perfectly in every instance in every year, but that the plum and nectarine growers and handlers are much better off with the program than under the lesser maturity standard in effect prior to 1980. [Footnote omitted]. The program is not arbitrary and capricious, notwithstanding the lack of 100 percent perfection."

The Judicial Officer further concluded that the Federal Advisory Committee Act is not applicable to the Committees administering the Market Order programs. In arriving at that conclusion he first determined that no issue was raised in the Petition with respect to the Federal Advisory Committee Act and therefore could not be considered in *Wileman I* but then goes on to state that even if the issue could be raised, the Federal Advisory Committee Act applies to Advisory Committees, not to Committees with operational responsibilities.

The above highlights of the Judicial Officer's decision in *Wileman I* are recognized by the Administrative Law Judge as a guiding light; however, because his decision in that case, as well as other cases presently pending before the Department, are or will be on appeal to the Federal Courts, and also because *Wileman II* must be decided on the record made herein, to the extent that it is helpful to the Judicial Officer, certain matters, with which he may not agree, are nevertheless set forth in this *Wileman II* decision. Hopefully this will be of assistance to him in his review thereof as well as to a Federal Court. Reference to *Wileman/Kash I*, and *Wileman/Kash II* have been underlined for ease of recognition.

The Respondent herein maintains that the doctrine of issue preclusion and/or *res judicata* is applicable to

Wileman/Kash II. This Judge has found that although the parties are the same, the issues and evidence are different. *Wileman/Kash I* did not litigate the validity of the Order provisions applicable to Peaches; the circumstances of *Wileman/Kash I* are different from those of *Wileman/Kash II* in that in 1988, for the first time, since 1981, the Secretary published regulations which have relevance to the 1988-89 and subsequent Harvest Seasons; new and different evidence was presented in *Wileman/Kash II*, particularly with respect to the role played by an entity called the Tree Fruit Reserve, as well as numerous, new evidentiary matters. In addition, the Judicial Officer declined to rule on a number of issues as being beyond the scope of *Wileman/Kash I*. Accordingly, his statements as to issues not ruled upon must be considered *dicta*.

The oral hearing in the instant case commenced on October 24-28, 1989, and continued January 29 through February 16, 1990, in Fresno, California, before Administrative Law Judge Dorothea A. Baker. The Petitioners were represented by Thomas E. Campagne, Esquire, and Clifford Kemper, Esquire, of the Law Firm of Thomas E. Campagne, 5108 E. Clinton Way, Suite 122, Fresno, California 93727; also appearing as counsel for Petitioners was James Moody, Esquire, 2300 N St., N.W., Suite 600, Washington, D.C. 20037; the Department of Agriculture was represented by Gregory Cooper, Esquire, and Helen Boutrous, Esquire, of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250. The Department of Justice was represented by William Haahsy, Esquire, and Carl Blackstone, Esquire, Assistant U.S. Attorneys. Lawrence A. Wengel, Esquire, of Greve, Clifford, Diepenbroch & Paras, 1000 G St., Suite 400, Sacramento, California 95814-0885 appeared as counsel on behalf of the accounting firm, Bennett Associates. The Tree Fruit Reserve Corporation was represented by Michael P. LeLouis, Esquire, of Heron, Burchette,

Ruckert & Rothwell, One City Centre, 770 L St., Suite 1150, Sacramento, California 95814.

At the oral hearing, testimony was heard from 21 witnesses, there were several thousand pages of Exhibits (Exh. 1-400) and the hearing transcript encompasses 4,994 pages.

The various motions, requests, and other pleadings are extensive. Unless otherwise required, they shall not be enumerated herein. However, they should not be overlooked by a reviewing Federal Court. There is a preeminent issue existing in this case as to the lack of an effective, timely relief mechanism when a handler believes itself aggrieved by Order provisions. Congress has clearly indicated, and the courts have agreed, that the Agricultural Marketing Agreement Act provides and compels the filing of a Petition with the Secretary of Agriculture whenever a handler seeks exemption or modification of Order obligations. The handler has no choice but to exhaust his administrative remedies. This undoubtedly is premised on the assumption that the administrative agency can and will grant relief when warranted. The question raised in this proceeding is the concern which arises, when the remedy provided is neither timely nor effective. To add to the importance of this matter is the fact that the monetary obligations arise by reason of application of assessments to a limited number of people for a particular purpose and are not amounts derived from Congressionally appropriated funds. However, were they considered the latter they would be in the nature of a tax, and would be illegal since neither the Committees nor the Secretary has been delegated taxing authority.

Achievement of simplicity is attempted with the purpose of rendering an Initial Decision as expeditiously as circumstances permit.

Before proceeding to the Findings of Fact, there is an area requiring clarification: the only thing to be adjudicated

herein relates to relief sought by reason of Federal Marketing Orders, F&V 916 and 917. It is not a promulgation proceeding; no new rules and regulations will be forthcoming from this Administrative Procedure Act litigation case. There is no challenge to the regulatory scheme of the Orders. Except for the argument as to delegation and lack of record supportive evidence, it is not maintained that they are illegal. What must be decided herein is whether Petitioners should be relieved of obligations imposed by Marketing Orders 916 and 917 because the imposition of such obligations *was not in accordance with law*. This requires consideration of Constitutional rights, the Administrative Procedure Act, the Agricultural Marketing Agreement Act and any other laws entering into a determination of the legality of the operations of the Committees and the interpreting application, and *de facto* administering of the Order provisions. Above all, it is *not* a proceeding to ascertain and evaluate the functions of the California Tree Fruit Agreement, the Tree Fruit Reserve, the Federal-State Inspection Service, or any other person or entity except to the extent their operations and actions reflect, influence, or otherwise enter into the Secretary of Agriculture's statutory duties and his delegations thereunder. The issues raised by Petitioners are not in the nature of "attacking" any entity, but rather have as their objective, and ascertainment, the legality of the Department of Agriculture's actions (or non-actions), pursuant to the provision of the Agricultural Marketing Agreement Act which provides:

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of

Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

Great deference has been accorded the July 9, 1990, Judicial Officer's Department's Decision in *Wileman/Kash I*. In that Decision he stated, *inter alia* that although he had "taken" some of the Administrative Law Judge's findings, with editing and rearranging, "Many other findings by the ALJ were omitted, frequently because I regarded them as irrelevant or based on improper legal conclusions." (fn. 4). Because of the ambiguity and vagueness for rejection of certain facts in *Wileman/Kash I*, and because the determination of "relevancy" can be a substantive matter, I have set forth herein, as to the present case, those facts which I believe to be relevant to the many issues presented. This is done to be of assistance to a reviewing Federal Court so that if there is a facade of technical compliance that overshadows the actual manner in which the handlers' businesses were regulated, the Court can ascertain same.

The documentation consists, among other things, of the Respondent's submissions, including its 140 page Post-Hearing Brief; and:

- (1) The brief originally submitted at the commencement of the instant matter, as Petitioners' Post-Hearing Brief, with specific transcript citations referenced in Petitioners' Reply Brief to Respondent's Opposition Brief;
- (2) Appendix to Petitioners' Post-Hearing Brief;
- (3) Petitioners' Proposed Findings of Fact;
- (4) The 4,994 pages of transcript from the instant proceeding (AMA Docket Nos. F&V 916-3 and 917-4);

- (5) All exhibits admitted into evidence in the instant proceeding (AMA Docket Nos. F&V 916-3 and 917-4);
- (6) The 3,459 pages of transcript from the prior 7 U.S.C. § 608c(15)(A) Petition hearing (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3) which have been consolidated, by the Judicial Officer. (AMA Docket Nos. F&V 916-3 and 917-4); and
- (7) All exhibits admitted into evidence in the previous 7 U.S.C. § 608c(15)(A) Petition hearing (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3) flowing from the Judicial Officer's consolidation of the two cases.

APPLICABLE STATUTES AND REGULATIONS

The principal statutes and regulations are referred to in the text herein. However, for a more complete understanding of the regulatory programs and their relationship to pertinent statutes, the following provisions are set forth in some detail. (With Emphasis added). However, this decision is written on the assumption that the reader is familiar with the particular Marketing Orders programs here involved. Greater specificity thereto was set forth in *Wileman/Kash I*.

THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, AS AMENDED, AND SUPPLEMENTED:

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress —

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title [which includes fruits], such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

§ 608. Powers of Secretary

Investigations; proclamation of findings

(1) Whenever the Secretary of Agriculture has reason to believe that:

(a) The current average farm price for any basic agricultural commodity is less than the fair exchange value thereof, or the average farm price of such commodity is likely to be less than the fair exchange value thereof for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, and

he shall cause an immediate investigation to be made to determine such facts. If, upon the basis of such investigation, the Secretary finds the existence of such facts, he shall proclaim such determination and shall exercise such one or more of the powers conferred upon him under subsections (2) and (3) of this section as he finds, upon the basis of an investigation, administratively practicable and best calculated to effectuate the declared policy of this chapter.

Agreements for adjustment of acreage or production and for rental or benefit payments

(2) Subject to the provisions of subsection (1) of this section, the Secretary of Agriculture shall provide, through agreements with producers or by other voluntary methods,

(a) For such adjustment in the acreage or in the production for market, or both, of any basic agricultural commodity, as he finds, upon the basis of the investigation made pursuant to subsection (1) of this section, will tend to effectuate the declared policy of this chapter, and to make such adjustment program practicable to operate and administer, and

(b) For rental or benefit payments in connection with such agreements of methods in such amounts as he finds, upon the basis of such investigation, to be fair and reasonable and best calculated to effectuate the declared policy of this chapter, and to make such program practicable to operate and administer, to be paid out of any moneys available for such payments or, subject to the consent of the producer, to be made in quantities of one or more basic agricultural commodities acquired by the Secretary pursuant to this chapter.

Payments by Secretary

(3) Subject to the provisions of subsection (1) of this section, the Secretary of Agriculture shall make payments, out of any moneys available for such payments, in such amounts as he finds, upon the basis of the investigation made pursuant to subsection (1) of this section, to be fair and reasonable and best calculated to effectuate the declared policy of this chapter:

(a) To remove from the normal channels of trade and commerce quantities of any basic agricultural commodity or product thereof,

(b) To expand domestic or foreign markets for any basic agricultural commodity or product thereof;

(c) In connection with the production of that part of any basic agricultural commodity which is required for domestic consumption.

Additional investigation; suspension of exercise of powers

(4) Whenever, during a period during which any of the powers conferred in subsection (2) or (3) of this section is being exercised, the Secretary of Agriculture has reason to believe that, with respect to any basic agricultural commodity:

(a) The current average farm price for such commodity is not less than the fair exchange value thereof, and the average farm price for such commodity is not likely to be less than the fair exchange value thereof for the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, or

(b) The conditions of and factors relating to the production, marketing, and consumption of such commodity are such that none of the powers conferred in subsections (2) and (3) of this section, and no combination of such powers, would, if exercised, tend to effectuate the declared policy of this chapter,

he shall cause an immediate investigation to be made to determine such facts. If, upon the basis of such investigation, the Secretary finds the existence of such facts, he shall proclaim such determination, and shall not exercise any of such powers with respect to such commodity after the end of the marketing year current at the time when such proclamation is made and prior to a new proclamation under subsection (1) of this section, except insofar as the exercise of such power is necessary to carry out obligations of the Secretary assumed, prior to the date of such proclamation made pursuant to this subsection, in connection with the exercise of any of the powers conferred upon him under subsections (2) or (3) of this section.

Hearings; notice

(5) In the course of any investigation required to be made under subsection (1) or (4) of this section, the Secretary of Agriculture shall hold one or more hearings, and give due notice and opportunity for interested parties to be heard.

Commodity in which payment made

(6) No payment under this chapter made in an agricultural commodity acquired by the Secretary in pursuance of this chapter shall be made in a commodity other than that in respect of which the payment is being made. For the purposes of this subsection, hogs and field corn may be considered as one commodity.

Section 608c of the Act contains *inter alia* the following provisions:

§ 608c. *Orders regulating handling of commodity*(1) *Issuance by Secretary*

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) *Commodities to which applicable; single commodities and separate agricultural commodities*

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits

(3) *Notice and hearing*

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section [which includes fruits], he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) *Finding and issuance of order*

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the *issuance* of such order and *all of the terms and conditions thereof* will tend to effectuate the declared policy of this chapter with respect to such commodity.

(6) *Other commodities; terms and conditions of orders*

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section [including fruits] *orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:*

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or *handled during any specified period or periods shall be apportioned equitably among producers.*

(C) Allotting, or *providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or*

foreign commerce in such commodity or product thereof, during any specified period or periods equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(7) *Terms common to all orders*

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(C) *Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:*

(i) *To administer such order in accordance with its terms and provisions;*

(ii) *To make rules and regulations to effectuate the terms and provisions of such order;*

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order, and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

(D) *Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.*

(9) *Orders with or without marketing agreement*

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be

approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(11) *Regional application*

(A) *No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.*

(B) *Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production area or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.*

(C) *All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.*

(12) *Approval of cooperative association as approval of producers*

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(14) *Violation of order; penalty*

Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a *pro rata* share of expenses) shall, on conviction, be fined not less than \$50 or more than \$5000 [changed from \$500 to \$5000 by P. L. 99-198] for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such*

violations as occurred between the date upon which the defendant's petition was filed with the Secretary and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(15) *Petition by handler for modification of order or exemption; court review of ruling of Secretary*

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) *to take such further proceedings as, in its opinion, the law requires.* The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to

section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A) * * * *the Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.*

(B) *The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: Provided, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then*

current marketing period) as may be specified in such marketing agreement or order

(C) * * * the termination or suspension of any order or amendment thereof or provision thereof, shall not be considered an order within the meaning of this section.

(17) *Provisions applicable to amendments*

The provisions of this section and section 608d of this title applicable to order shall be applicable to amendments to orders: *Provided, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof The Secretary shall not be required to call a hearing on any proposed amendment to an order in response to an application for a hearing on such proposed amendment if the application requesting the hearing is received by the Secretary within ninety days after the date on which the Secretary has announced the decision on a previously proposed amendment to such order and the two proposed amendments are essentially the same.*

* * * * *

(19) *Producer or processor referendum for approving order*

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percent-

age required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section

§ 610. *Administration*

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(b) *State and local committees or associations of producers; handlers' share of expenses of authority or agency*

(1) The Secretary of Agriculture is authorized to establish for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. *The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.*

**RULES OF PRACTICE GOVERNING
PROCEEDINGS ON PETITIONS TO MODIFY OR
TO BE EXEMPTED FROM MARKETING ORDERS:**

(7 C.F.R. § 900.50, *et seq.*)

§ 900.51 Definitions.

As used in this subpart, the terms as defined in the act shall apply with equal force and effect. In addition, unless the context otherwise requires:

(a) The term "act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. and Sup. 601);

(b) The term "Department" means the United States Department of Agriculture;

(c) The term "Secretary" means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in his stead;

(d) The terms "administrative law judge" or "judge" means any Administrative Law Judge, appointed pursuant to 5 U.S.C. 3105, and assigned to the proceeding involved;

(e) The term "Administrator" means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employee of the Department to whom authority has been delegated or may hereafter be delegated to act in his stead;

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(h) The term "marketing order" means any order or any amendment thereto which may be issued pursuant to section 8c of the act;

(i) The term "handler" means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable;

(j) The term "proceeding" means a proceeding before the Secretary arising under subsection (15)(A) of section 8c of the act;

(k) The term "hearing" means that part of the proceeding which involves the submission of evidence;

(l) The term "Party" includes the Department;

• • • • •

(o) The term "decision" means the *judge's initial decision* in proceedings subject to 5 U.S.C. 556 and 557, and includes the judge's (1) findings of fact and conclusions with respect to all material issues of fact, law or discretion as well as the reasons or basis thereof, (2) order, and (3) rules on findings, conclusions and orders submitted by the parties;

(p) The term "petition" includes an amended petition.

§ 900.52 Institution of proceeding.

(a) *Filing and service of petition. Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary. Promptly upon receipt of the petition, the hearing clerk shall transmit a true copy thereof to the Administrator and the General Counsel, respectively.*

(b) *Contents of petition. A petition shall contain:*

(1) The correct name, address, and principal place of business of the petitioner. If petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the

names, addresses, and respective positions held by its officers; If an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the order, *or the interpretation or allocation thereof*, which are complained of;

(3) *A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and the manner in which petitioner claims to be affected by the terms or provisions of the order, or the interpretation or application thereof, which are complained of;*

(4) A statement of the grounds on which the terms or provisions of the order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Prayers for the specific relief which the petitioner desires the Secretary to grant;

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

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§ 900.52b Amended pleadings.

At any time before the close of the hearing the answer may be amended, but the hearing shall, at the request of the adverse party, be adjourned or recessed for such reasonable

time as the judge may determine to be necessary to protect the interests of the parties. Amendments subsequent to the first amendment or subsequent to the filing of an answer may be made only with leave of the judge or with the written consent of the adverse party.

§ 900.55 Judges.

(a) *Assignment.* No judge who has any pecuniary interest in the outcome of the proceeding, or who has participated in any investigation preceding the institution of the proceeding, shall serve as judge in such proceeding.

(b) *Conduct.* The judge shall conduct the proceeding in a fair and impartial manner and shall not discuss ex parte the merits of the proceeding with any person who is or who has been connected in any manner with the proceeding in an advocative or investigative capacity.

(c) *Powers of judges.* Subject to review by the Secretary, is provided elsewhere in this subpart, the judge shall have power to:

- (1) Rule upon motions and requests;
- (2) Adjourn the hearing from time to time, and change the time and place of hearing;
- (3) Administer oaths and affirmations and take affidavits;
- (4) Issue subpoenas, under the facsimile signature of the Secretary, requiring the attendance and testimony of witnesses and the production of books, records, contracts, papers, and other documentary evidence;
- (5) Examine witnesses and receive evidence;
- (6) Take or order, under the facsimile signature of the Secretary, the taking of depositions;
- (7) Admit or exclude evidence;

(8) Hear oral argument on facts or law;

(9) Consolidate hearings upon two or more petitions pertaining to the same order;

(10) Do all acts and take all measures necessary for the maintenance of order at the hearing and the efficient conduct of the proceeding.

(d) *Who may act in absence of judge.* In case of the absence of the judge of his inability to act, the powers and duties to be performed by him under these rules of practice in connection with a proceeding may, without abatement of the proceeding unless otherwise ordered by the Secretary, be assigned to any other judge.

(e) *Disqualification of Judge.* The judge may at any time withdraw as judge in a proceeding if he deems himself to be disqualified. Upon the filing by an interested person in good faith of a timely and sufficient affidavit of personal bias or *disqualification of a judge, the Secretary shall determine the matter as a part of the record and decision in the proceeding, after making such investigation or holding such hearings, or both, as he may deem appropriate in the circumstances.*

§ 900.56 Consolidated hearings.

At the discretion of the judge, hearings upon two or more petitions pertaining to the same order may be consolidated, and the evidence taken at such consolidated hearing may be embodied in a single record.

§ 900.59 Motions and requests.

(a) *General.* (1) All motions and requests shall be filed with the hearing clerk, except that those made during the course of an oral hearing may be filed with the judge or may be stated orally and made a part of the transcript.

(2) The judge is authorized to rule upon all motions and requests filed or made prior to the transmittal by the hearing

clerk to the Secretary of the record as provided in this subpart. The Secretary shall rule upon all motions and requests filed after that time.

(b) *Certification of motions.* The submission or certification of any motion, request, objection, or other question to the Secretary, as provided in this subpart, shall be in the discretion of the judge.

§ 900.60 Oral hearings before judge.

(a) *Time and place.* The judge shall set a time and place for hearing and shall file with the hearing clerk a notice stating the time and place of hearing. If any change in the time or place of hearing becomes necessary, it shall be made by the judge, who, in such event, shall file with the hearing clerk a notice of the change. Such notice shall be served upon the parties, unless it is made during the course of an oral hearing and made a part of the transcript.

* * * * *

(c) *Order of proceeding.* Except as may be determined otherwise by the judge, the petitioner shall proceed first at the hearing.

(d) *Evidence — (1) In general.* The hearing shall be publicly conducted, and the testimony given at the hearing shall be reported verbatim.

(i) The testimony of witnesses at a hearing shall be upon oath or affirmation and subject to cross-examination.

(ii) Any witness may, in the discretion of the judge, be examined separately and apart from all other witnesses except those who may be parties to the proceeding.

(iii) The judge shall exclude, insofar as practicable, evidence which is immaterial, irrelevant, or unduly repeti-

tious, or which is not of the sort upon which reasonable persons are accustomed to rely.

(2) *Objections.* If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination, or any other ruling of the judge, he shall state briefly the grounds of such objection, whereupon an automatic exception will follow which may be pursued in an appeal pursuant to § 900.65 by the party adversely affected by the judge's ruling.

* * * * *

(5) *Proof and authentication of official records or documents.* An official record or document, when admissible for any purpose, shall be admissible in evidence without the production of the person who made or prepared the same. Such record or document shall in the discretion of the judge, be evidenced by an official publication thereof or by a copy attested by the person having legal custody thereof and accompanied by a certificate that such person has the custody.

(6) *Exhibits.* All written statements, charts, tabulations, or similar data offered in evidence at the hearing shall, after identification by the proponent and upon a satisfactory showing of the admissibility of the contents thereof, be numbered as exhibits and received in evidence and made a part of the record. *Except where the judge finds that the furnishing of copies is impracticable, a copy of each exhibit, in addition to the original, shall be filed with the judge for the use of each other party to the proceeding.* The judge shall advise the parties as to the exact number of copies which will be required to be filed and shall make and have noted on the record the proper distribution of the copies. If the testimony of a witness refers to a statute, or to a report, document, or transcript, the judge, after inquiry relating to the identification of such statute, report, document, or

transcript, shall determine whether the same shall be produced at the hearing and physically be made a part of the evidence as an exhibit, *or whether it shall be incorporated into the evidence by reference.* If relevant and material matter offered in evidence is embraced in a report, document, or transcript containing immaterial or irrelevant matter, such immaterial or irrelevant matter shall be excluded and shall be segregated insofar as practicable, subject to the direction of the judge

(7) *Official notice.* Official notice will be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided, That* the parties shall be given adequate notice, at the hearing or by reference in the judge's report or the tentative order or otherwise, of matters so noticed, and (except where official notice is taken, for the first time in the proceeding, in the final order) shall be given adequate opportunity to show that such facts are erroneously noticed.

(8) *Offer of proof.* Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof shall consist of a brief statement describing the evidence to be offered. If the evidence consists of a brief oral statement or of an exhibit, it shall be inserted into the transcript in toto. In such event, it shall be considered a part of the transcript if the Secretary decides that the judge's ruling in excluding the evidence was erroneous. The judge shall not allow the insertion of such evidence in toto if the taking of such evidence will consume a considerable length of time at the hearing. In the latter event, if on appeal the Secretary decides that the judge erred in excluding the evidence, and that such error was substantial, the hearing shall be reopened to permit the taking of such evidence.

* * * * *

(f) *Transcript.* (1) During the period in which the proceeding has an active status the transcript and exhibits shall be kept on file in the office of the hearing clerk, where it shall be available for examination during official hours of business. Thereafter said transcript and exhibits shall be made available by the hearing clerk for examination during official hours of business after prior request and reasonable notice to the hearing clerk.

(2) If a personal copy of the transcript is desired, such copy may be obtained upon written application filed with the reporter, and upon payment of fees at the rate (if any) provided in the contract between the reporter and the Secretary.

§ 900.62 Subpenas.

(a) *Issuance of subpoenas.* The attendance of witnesses and the production of documentary evidence from any place in the United States on behalf of any party to the proceeding may, by subpoena, be required at any designated place of hearing. Subpenas may be issued by the Secretary or by the judge, under the facsimile signature of the Secretary, upon a reasonable showing by the applicant of the grounds, necessity and reasonable scope thereof.

(b) *Application for subpoena duces tecum.* Subpoenas for the production of documentary evidence, unless issued by the judge upon his own motion, shall be issued only upon a certified written application. Such application shall specify, as exactly as possible, the documents desired and shall show their competency, relevancy, and materiality and the necessity for their production.

* * * * *

§ 900.64 The Administrative Law Judge's decision.

(a) *Corrections to and certification of transcript.* (1) At such time as the judge may specify, but not later than the time fixed for filing proposed findings of fact, conclusions and order, or briefs, as the case may be, the parties may file with the judge proposed corrections to the transcript. (2) As soon as practicable after the filing of proposed findings of fact, conclusions and order, or briefs, as the case may be, the judge shall file with the hearing clerk his certificate indicating any corrections to be made in the transcript, and stating that, to the best of his knowledge and belief, the transcript, as corrected, is a true, correct, and complete transcript of the testimony given at the hearing, and that the exhibits are all the exhibits properly a part of the hearing record. The original of such certificate shall be attached to the original transcript and a copy of such certificate shall be served upon each of the parties by the hearing clerk who shall also enter onto the transcript (without obscuring the text) any correction noted in the certification.

(b) *Proposed findings of fact, conclusions, and orders.* Within 10 days (unless the judge shall have announced at the hearing a shorter or longer period of time) after the transcript has been filed with the hearing clerk, as provided in paragraph (a) of this section, each party may file with the hearing clerk proposed findings of fact, conclusions, and order, based solely upon the evidence of record, and briefs in support thereof.

(c) *Administrative Law Judge's Decision.* The judge, within a reasonable time after the termination of the period allowed for the filing of proposed findings of fact, conclusions, and orders, and briefs in support thereof, shall prepare upon the basis of the record, and shall file with the hearing clerk, his initial decision, a copy of which shall be served by the hearing clerk, upon each of the parties. Such decision shall become final without further proceedings 35 days after the date of service thereof, unless there is an appeal to the

Secretary by a party to the proceeding: *Provided, however, That* no decision shall be final for the purpose of judicial review except a final decision issued by the Secretary pursuant to an appeal by a party to the proceeding.

§ 900.65 Appeals to Secretary; Transmittal of record.

(a) *Filing of appeal.* Any party who disagrees with a judge's decision or any part thereof, may appeal the decision to the Secretary by transmitting an appeal petition to the hearing clerk within 30 days after service of said decision upon said party. Each issue set forth in the appeal, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations and authorities being relied upon in support thereof. The appeal petition shall be served upon the other party to the proceeding by the hearing clerk.

(b) *Argument before Secretary — (1) Oral argument.* A party bringing an appeal may request within the prescribed time period for filing such appeal, an opportunity for oral argument before the Secretary. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Secretary, in his discretion, may grant, refuse or limit any request for oral argument on appeal.

(2) *Scope of argument.* Argument to be heard on appeal, whether oral or in a written brief, shall be limited to the issues raised by the appeal, except that if the Secretary determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all the issues to be argued.

(c) *Response.* Within 20 days after service of an appeal brought by a party to the proceeding, any other party may file a response in support of or in opposition to such appeal.

(d) *Transmittal of record.* Whenever an appeal is filed by a party to the proceeding, the hearing clerk shall transmit to the Secretary the record of the proceeding. Such record shall include: The pleadings; any motions and requests filed, and the rulings thereon; the transcript of the testimony taken at the hearing, as well as the exhibits filed in connection therewith; any statements filed under the shortened procedure; any documents or papers filed in connection with prehearing conferences; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the hearing; the judge's initial decision, and the appeal petition; briefs in support thereof, and responses thereto as may have been filed in the proceeding.

§ 900.70 Applications for interim relief.

(a) *Filing the application.* A person who has filed a petition pursuant to § 900.52 may by separate application filed with the hearing clerk apply to the Secretary or an order postponing the effective date of, or suspending the application of, the Marketing order or any provision thereof, or any obligation imposed in connection therewith, pending final determination of the proceeding.

(b) *Contents of the application.* The application shall contain a statement of the facts upon which the relief is requested, including any facts showing irreparable injury. The application must be signed and sworn to by the petitioner and any facts alleged therein which are not within his personal knowledge shall be supported by affidavits of a person or persons having personal knowledge of such facts or by proper documentary evidence thereof.

(c) *Answer to Application.* Immediately upon receipt of the application, the hearing clerk shall transmit a copy thereof, together with all supporting papers, to the Administrator, who shall, within 20 days, or such other time fixed by

the Secretary, after the filing of the application file an answer thereto with the hearing clerk.

(d) *Contents of answer.* The answer shall contain a statement of the objections, if any, of the Administrator to the application for interim relief, and may be supported by affidavits and documentary evidence.

(e) *Transmittal to Secretary.* Upon receiving the answer of the Administrator or upon the expiration of the time for filing the answer, the hearing clerk shall transmit to the Secretary for his decision all papers filed in connection with the application.

(f) *Hearing and oral argument.* The Secretary may, in his discretion, permit oral argument or the taking of testimony in connection with such application. However, unless written request therefor is filed with the hearing clerk prior to the transmittal of the papers to the Secretary, the parties shall be deemed to have waived oral argument and the taking of testimony.

(g) *Decision by Secretary.* The Secretary may grant or deny the application. Any action taken by the Secretary shall be in the form of an order filed with the hearing clerk and shall contain a brief statement of the reasons for the action taken. The hearing clerk shall cause copies of the order to be served upon the parties.

§ 900.71 Hearing before Secretary.

The Secretary may act in the place and stead of a judge in any proceeding hereunder. When he so acts the hearing clerk shall transmit the record to the Secretary at the expiration of the period provided for the filing of proposed findings of fact, conclusions and corders, and the Secretary shall thereupon, after due consideration of the record, issue his final order in the proceeding: *Provided, That* he may issue a tentative order in which event the parties shall be afforded an opportunity to file exceptions before the issuance of the final order.

ADMINISTRATIVE PROCEDURE ACT

THE ADMINISTRATIVE PROCEDURE PROVIDES, IN PART, (5 U.S.C. 551, et seq).

§ 551. Definitions

• • • • •

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

• • • • •

§ 553. Rule making

• • • • •

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —

• • • • •

(b) Persons entitled to notice of an agency hearing shall be timely informed of —

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for —

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section

557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) *be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.*

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply —

* * * * *

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representa-

tives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirements of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. *In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.*

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

§ 556. Hearings; presiding employees, powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence —

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners [Administrative Law Judge] appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may —

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) *rule on offers of proof and receive relevant evidence;*

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) *regulate the course of the hearing;*

(6) *hold conference for the settlement or simplification of the issues by consent of the parties;*

(7) *dispose of procedural requests or similar matters;*

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) *take other action authorized by agency rule consistent with this subchapter.*

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses as agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties.

When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses —

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely

execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions —

(1) proposed findings and conclusion; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of —

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law —

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding,

an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

- (i) all such written communications;
- (ii) memoranda stating the substance of all such oral communications; and
- (iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but

in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

A detailed knowledge of the Orders and Regulations, and a complete understanding of how the Marketing Orders work, are essential to a proper resolution of the issues involved here. The following are some of the pertinent provisions here relevant, but it is suggested that only a reading of the entire Orders will suffice. For convenience purposes, the pre-1988 provisions are set forth first, followed by certain provisions as amended in 1988. [Emphasis has been added.]

NECTARINES GROWN IN CALIFORNIA — 7 C.F.R. PART 916

§ 916.20 Establishment and membership.

There is hereby established a Nectarine Administrative Committee consisting of eight members, each of whom shall have an alternate who shall have the same qualifications as the member for whom he is an alternate. The members and their alternates shall be growers or employees of growers. Five of the members and their respective alternates shall be producers of nectarines in District 1. One member and his alternate shall be producers of nectarines in District 2; one of the members and his alternate shall be producers of nectarines in District 3; and one member and his alternate shall be producers of nectarines in District 4.

§ 916.21 Term of office.

The term of office of each member and alternate member of the committee shall be for 2 years beginning on March 1 of an odd numbered year and ending on the last day of February of an odd numbered year. Members and alternate members shall serve in such capacities for the portion of the term of office for which they are selected and have qualified and until their respective successors are selected and have qualified.

§ 916.22 Nomination.

* * * * *

(b) *Successor members.* (1) The committee shall hold or cause to be held, not later than February 15 of each odd numbered year, a meeting or meetings of growers in each district for the purpose of designating nominees for successor members and alternate members of the committee. *These meetings shall be supervised by the committee which shall prescribe such procedure as shall be reasonable and fair to all persons concerned.*

(2) Only growers who are present at such nomination meetings, or represented at such meetings by duly authorized employees, may participate in the nomination and election of nominees for members and their alternates.

(3) A particular grower, including employees of such grower, shall be eligible for membership as principal or alternate to fill only one position on the committee.

§ 916.23 Selection.

From the nominations made pursuant to § 916.22, or from other qualified persons, the Secretary shall select the eight members of the committee and an alternate for each such member.

§ 916.25 Acceptance.¹

Any person selected by the Secretary as a member or as an alternate member of the Committee shall qualify by filing a written acceptance with the Secretary promptly after being notified of such selection.

§ 916.30 Powers.

The committee shall have the following powers:

(a) *To administer the provisions of this part in accordance with its terms;*

(b) *To receive, investigate and report to the Secretary complaints of violations of the provisions of this part;*

(c) *To make and adopt rules and regulations to effectuate the terms and provisions of this part; and*

(d) *To recommend to the Secretary amendments to this part.*

§ 916.31 Duties.

The committee shall have, among others, the following duties:

(a) *To select a chairman and such other officers as may be necessary, and to define the duties of such officers;*

(b) *To appoint such employees, agents, and representatives as it may deem necessary, and to determine compensation and to define the duties of each;*

(c) *To submit to the Secretary as soon as practicable after the beginning of each fiscal period a budget for such*

¹Exh. 393, 394, 395 are examples of forms by which the nominee states: "I am willing to serve on the [Peach, Plum, or Nectarine] Commodity Committee." Said forms provide to the Secretary information such as acres farmed, firm affiliates, and ownership in other fruit crops and acreage.

fiscal period, including a report in explanation of the items appearing therein and a recommendation as to the rate of assessment for such period;

(d) To keep minutes, books, and records which will reflect all of the acts and transactions of the committee and which shall be subject to examination by the Secretary;

(e) To prepare periodic statements of the financial operations of the committee and to make copies of each such statement available to growers and handlers for examination at the office of the committee;

(f) To cause its books to be audited by a competent public accountant at least once each fiscal year and at such times as the Secretary may request;

(g) To act as intermediary between the Secretary and any grower or handler;

(h) To investigate and assemble data on the growing, handling, and marketing conditions with respect to nectarines;

(i) To submit to the Secretary the same notice of meetings of the committee as is given to its members;

(j) To submit to the Secretary such available information as he may request;

(k) To investigate compliance with the Provisions of this part;

(l) With the approval of the Secretary, to redefine the districts into which the production area is divided and to reapportion the representation of any district on the committee: *Provided, That* any such changes shall reflect, insofar as practicable, shifts in nectarine production within the districts and the production area.

§ 916.40 Expenses.

The committee is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred by the committee for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this part. The funds to cover such expenses shall be acquired in the manner prescribed in § 916.41.

§ 916.41 Assessments.

(a) As his *pro rata* share of the expenses which the Secretary finds are reasonable and likely to be incurred by the committee during a fiscal period, each person who first handles nectarines during such period shall pay to the committee, upon demand, assessments on all nectarines so handled. The payment of assessments for the maintenance and functioning of the committee may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) The Secretary shall fix the rate of assessment to be paid by each such person during a fiscal period in an amount designed to secure sufficient funds to cover the expenses which may be incurred during such period and to accumulate and maintain a reserve fund equal to approximately one fiscal period's expenses. At any time during or after the fiscal period, the Secretary may increase the rate of assessment in order to secure sufficient funds to cover any later finding by the Secretary relative to the expenses which may be incurred. Such increase shall be applied to all nectarines handled during the applicable fiscal period. In order to provide funds for the administration of the provisions of this part during the first part of a fiscal period before sufficient operating income is available from assessments on the current year's shipments, the committee may accept the

payment of assessments in advance, and may also borrow money for such purposes.

§ 916.42 Accounting.

(2) The committee, with the approval of the Secretary, may carry over such excess into subsequent fiscal periods as a reserve: *Provided*, That funds already in the reserve do not equal approximately one fiscal period's expenses. Such reserve funds may be used (i) to defray expenses, during any fiscal period, prior to the time assessment income is sufficient to cover such expenses, (ii) to cover deficits incurred during any fiscal year when assessment income is less than expenses, (iii) to defray expenses incurred during any period when any or all provisions of this part are suspended or are inoperative, (iv) to cover necessary expenses of liquidation in the event of termination of this part. *Upon such termination, any funds not required to defray the necessary expenses of liquidation shall be disposed of in such manner as the Secretary may determine to be appropriate: Provided, That to the extent practical, such funds shall be returned pro rata to the persons from whom such funds were collected.*

(b) All funds received by the committee pursuant to the provisions of this part *shall be used solely for the purpose specified in this part and shall be accounted for in the manner provided in this part.* The Secretary may at any time require the committee and its members to account for all receipts and disbursements.

§ 916.51 Recommendations for regulation.

(a) Whenever the committee deems it advisable to regulate the handling of any variety or varieties of nectarines in the manner provided in § 916.52, it shall so recommend to the Secretary.

(b) In arriving at its recommendations for regulation pursuant to paragraph (a) of this section, *the committee shall give consideration to current information with respect to the factors affecting the supply and demand for nectarines during the period or periods* when it is proposed that such regulations should be made effective. With each such recommendation for regulation, the committee shall submit to the Secretary the data and information on which such recommendation is predicated and such other available information as the Secretary may request.

§ 916.52 Issuance of regulations.

(a) *The Secretary shall regulate, in the manner specified in this section, the handling of nectarines whenever he finds, from the recommendations and information submitted by the committee, or from other available information, that such regulations will tend to effectuate the declared policy of the act.* Such regulations may:

(1) Limit, during any period or periods, the shipment of any particular grade, size, quality, maturity, or pack, or any combination thereof, of any variety or varieties of nectarines grown in the production area;

(2) Limit the shipment of nectarines by establishing, in terms of grades, sizes, or both, *minimum standards of quality and maturity* during any period when season average prices are expected to exceed the parity level;

(3) Fix the size, capacity, weight, dimensions, markings, or pack of the container, or containers, which may be used in the packaging or handling of nectarines.

(b) The committee shall be informed immediately *of any such regulation issued by the Secretary* and the committee shall promptly give notice thereof to handlers.

§ 916.53 Modification, suspension, or termination of regulations.

(a) In the event the committee at any time finds that, by reason of changed conditions, any regulations issued pursuant to § 916.52 should be modified, suspended, or terminated, it shall so recommend to the Secretary.

(b) Whenever the Secretary finds from the recommendations and information submitted by the committee or from other available information, that a regulation should be modified, suspended, or terminated with respect to any or all shipments of nectarines in order to effectuate the declared policy of the act, he shall modify, suspend, or terminate such regulation. *If the Secretary finds that a regulation obstructs, or does not tend to effectuate the declared policy of the act,* he shall suspend or terminate such regulation. On the same basis and in like manner the Secretary may terminate any such modification or suspension.

§ 916.55 Inspection and certification.

(a) Whenever the handling of any variety of nectarines is regulated pursuant to § 916.52, or § 916.53, each handler who handles nectarines shall, prior thereto, *cause such nectarines to be inspected by the Federal or Federal-State Inspection Service* and certified as meeting the applicable requirements of such regulation: *Provided*, That inspection and certification shall not be required for nectarines which previously have been so inspected and certified if such prior inspection was performed within such period as may be established pursuant to paragraph (b) of this section. Promptly after inspection and certification, each such handler shall submit, or cause to be submitted, to the committee a copy of the certificate of inspection issued with respect to such nectarines. The committee may, with the approval of the Secretary, prescribe[d] [sic], rules and regulations waiving the inspection requirements of this section where it

is determined that inspection is not available: *Provided*, That all shipments made under such waiver shall comply with all regulations in effect.

(b) The committee may, with the approval of the Secretary, establish a period prior to shipment during which the inspection required by this section must be performed.

(c) The committee may enter into an agreement with the Federal and Federal-State Inspection Services with respect to the costs of the inspection required by paragraph (a) of this section, and may collect from handlers their respective *pro rata* shares of such costs.

§ 916.62 Right of the Secretary.

The members of the committee (including successors and alternates), and any agents, employees, or representatives thereof shall be subject to removal or suspension by the Secretary at any time. Each and every regulation, decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void, except as to acts done in reliance thereon or in accordance therewith prior to such disapproval by the Secretary.

§ 916.64 Termination.

* * * * *

(e) The Secretary shall conduct a referendum within the period beginning December 1, 1974, and ending February 15, 1975, to ascertain whether continuance of this part is favored by the growers. The Secretary shall conduct such referendum within the same period of every fourth fiscal period thereafter.

* * * * *

Subpart — Grade and Size Regulation (Prior to 1988)

§ 916.356 Nectarine Regulation 14.

(a) No handler shall ship:

(1) Any package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade: *Provided, That* maturity shall be determined by the application of color standards by variety or such other tests *as determined to be proper by the Federal or Federal-State Inspection Service: Provided further, That* nectarines 2 inches in diameter or smaller, shall not have fairly light colored, fairly smooth scars which exceed the aggregate area of a circle $\frac{3}{8}$ inch in diameter, and nectarines larger than 2 inches in diameter shall not have fairly light colored, fairly smooth scars which exceed an aggregate area of a circle $\frac{1}{2}$ inch in diameter: *Provided further, That* an additional tolerance of 25 percent shall be permitted for fruit that is not well formed but not badly misshapen.

§ 916.356 Nectarine Regulation 14. (Applicable to 1988 and thereafter)

(a) No handler shall ship:

(1) Any lot or package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade, except that the nectarines shall be "well-matured," rather than "mature," but not overripe or shriveled: *Provided, That* nectarines 2 inches in diameter or smaller, shall not have fairly light colored, fairly smooth scars which exceed an aggregate area of a circle $\frac{3}{8}$ inch in diameter, and nectarines larger than 2 inches in diameter shall not have fairly light colored, fairly smooth scars which exceed an aggregate area of a circle $\frac{1}{2}$ inch in diameter: *Provided further, That* an additional tolerance of 25 percent

shall be permitted for fruit that is not well formed but not badly misshapen.

(i) During the 1988 and subsequent seasons, the Federal or the Federal-State Inspection Service will use the maturity guides listed in Table I in making maturity determinations for the specified varieties. For these varieties, not less than 90 percent of any lot shall meet the color guide established for the variety, and an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety, except that for the Fairlane, Tom Grand, and 61-61 varieties of nectarines, not less than an aggregate area of 80 percent of the fruit surface shall meet the color guide established for the variety. For varieties not listed, the Federal or Federal-State Inspection Service will use such tests as deemed to be proper by the Nectarine Administrative Committee and the Federal or Federal-State Inspection Service. A variance for any variety from the application of the maturity guides specified in Table I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of "well-matured." The maturity determination variance procedure is set forth as follows:

FRESH PEARS, PLUMS, AND PEACHES GROWN
IN CALIFORNIA 9 C.F.R. PART 917

§ 917.1 Secretary.

"Secretary" means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated to act in his stead.

§ 917.4 Fruit.

"Fruit" means the edible product of the following three kinds of trees (a) all varieties of plums, (b) all varieties of peaches, and (c) all varieties of pears except Beurre Hardy, Beurre D'Anjou, Bosc, Winter Nelis, Doyenne du Comice, Beurre Easter, and Beurre Claigau.

§ 917.16 Designation of Control Committee.

A Control Committee is hereby established consisting of 12 shipper members and 13 commodity committee members, and the members shall be selected in accordance with the provisions of § 917.17 through § 917.19. The members shall be selected annually for a term ending on the last day of February, and said members shall serve until their respective successors are selected and have qualified.

§ 917.24 Procedure for nominating members of various commodity committees.

(a) The Control Committee shall hold or cause to be held not later than February 15 of each odd numbered year a meeting or meetings of the growers of the fruits in each representation area set forth in §§ 917.21, 917.22, and 917.23 for the purpose of designating nominees of the commodity committees. These meetings shall be supervised by the Control Committee, which shall prescribe such procedure as shall be reasonable and fair to all persons concerned.

(b) With respect to each commodity committee only growers of the particular fruit who are present at such nomination meetings or represented at such meetings by duly authorized employees may participate in the nomination and election of nominees for commodity committee members. Each such grower, including employees of such grower, shall be entitled to cast but one vote for each position to be filled for the representation area in which he produces such fruit.

(c) A particular grower, including employees of such growers, shall be eligible for membership as principal or alternate to fill only one position on a commodity committee. * * * A grower nominated for membership on the Plum Commodity Committee may be a producer who has a proprietary interest in or is an employee of a commercial plum handler: *Provided*, That at least one such nominee from each representation area shall be a producer who does not have a proprietary interest in or is not an employee of a commercial plum handler.

§ 917.32 Funds and other property.

(a) All funds received by the Control Committee, pursuant to the provisions of this part, shall be used solely for the purpose specified in this part; and the Secretary may require the Control Committee and its members to account for all receipts and disbursements.

* * * * *

§ 917.33 Powers of Control Committee.

The Control Committee shall have the following powers:

(a) To administer, as specifically provided in this part, the terms and provisions of this part.

(b) To make administrative rules and regulations in accordance with and to effectuate the terms and provisions of this part.

(c) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this part.

(d) To recommend to the Secretary amendments to this part.

§ 917.34 Duties of Control Committee.

The Control Committee shall have the following duties:

(a) To act as intermediary between the Secretary and any grower or shippers.

(b) To keep minute books and records which will clearly reflect all of the acts and transactions of said Control Committee; and such minute books and records shall be subject at any time to examination by the Secretary or by such person as may be designated by the Secretary.

(c) To investigate, from time to time, and assemble data on the growing, shipping, and marketing conditions respecting fruit as defined in § 917.4; to engage in such research and service activities in connection with the handling of such fruit as may be approved, from time to time, by the Secretary; and to furnish to the Secretary such available information as may be requested.

(d) To appoint such employees, agents, and representatives as it may deem necessary, and to determine the compensation and define the duties of each.

(e) To develop and provide the commodity committees data on shared expenses to facilitate equitable apportionment of such expenses in the development of budgets.

(f) To confer with representatives of shippers and growers of fruit produced in other states and areas with respect to the formulation or operation of marketing agreements providing for the regulation of shipments among the several states and areas in the United States in which such fruit is grown.

(g) With the approval of the Secretary establish procedures for the selection and appointment of a public member and alternate to each of the commodity committees.

(h) To establish and define the duties of additional committees or subcommittees to assist in the performance of any of the duties and functions of the Control Committee.

(i) To defend all legal proceedings against any committee members (individually or as members) or any officers or employees of such committees arising out of any act or omission made in good faith pursuant to the provisions of this part.

(j) To cause the books of the Control Committee to be audited by a competent accountant at least once each fiscal period and at such other time or times as the Control Committee may deem necessary or as the Secretary may request. Such audit shall indicate whether the funds have been received and expended in accordance with the provisions of this part.

* * * * *

§ 917.36 Expenses.

Each commodity committee is authorized to incur such expenses as the Secretary finds are reasonable and are likely to be incurred by the said commodity committee during each fiscal period for the maintenance and functioning of such committee, including its proportionate share of the expenses of the Control Committee; and for such research and service activities relating to handling of the fruit for which the commodity committee was established as the Secretary may determine to be appropriate. The funds to cover such expenses shall be acquired by the levying of assessments as provided in § 917.37.

§ 917.37 Assessments.

(a) As his pro rata share of the expenses which the Secretary finds are reasonable and are likely to be incurred by the commodity committees during a fiscal period, each handler shall pay to the Control Committee, upon demand,

assessments on all fruit handled by him. The payment of assessments for the maintenance and functioning of the committees may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) The Secretary shall fix the respective rate of assessment which handlers shall pay with respect to each fruit during each fiscal period in an amount designed to secure sufficient funds to cover the respective expenses which may be incurred during such period. At any time during or after the fiscal period, the Secretary may increase the rates of assessment in order to secure funds to cover any later findings by the Secretary relative to such expenses, and such increase shall apply to all fruit shipped during the fiscal period.

(c) In order to provide funds to carry out the functions of the commodity committee prior to commencement of shipments in any season, shippers may make advance payments of assessments, which advance payments shall be credited to such shippers and the assessments of such shippers shall be adjusted so that such assessments are based upon the quantity of fruit shipped by such shippers during such season. Any shipper who ships fruit for the account of a grower may deduct, from the account of sale covering such shipment or shipments, the amount of assessments levied on said fruit shipped for the account of such grower.

§ 917.38 Accounting.

If, at the end of a fiscal period the assessments collected are in excess of expenses incurred, each commodity committee, with the approval of the Secretary, may carry over such excess into subsequent fiscal periods as a reserve: *Provided*, That funds already in the reserve do not exceed approximately one fiscal period's expenses. Such reserve funds may be used (1) to cover any expenses authorized by

this part and (2) to cover necessary expenses of liquidation in the event of termination of this part. If any such excess is not retained in a reserve, each handler entitled to a proportionate refund shall be credited with such refund against the operations of the following fiscal period or be paid such refund. Upon termination of this part, any funds not required to defray the necessary expenses of liquidation shall be disposed of in such manner as the Secretary may determine to be appropriate: *Provided*, That, to the extent practical, such funds shall be returned *pro rata* to the persons from whom such funds were collected.

§ 917.40 Recommendations for regulations.

(a) Whenever a commodity committee deems it advisable to regulate the handling of any variety or varieties of fruit in the manner provided in § 917.41, it shall so recommend to the Secretary.

(b) In arriving at its recommendations for regulation pursuant to paragraph (a) of this section, *the commodity committee shall give consideration to current information with respect to the factors affecting the supply and demand* for such fruit during the period or periods when it is proposed that such regulation should be made effective. With each such recommendation for regulation, the commodity committee shall submit to the Secretary the data and information on which such recommendation is predicated and such other available information as the Secretary may request.

§ 917.41 Issuance of regulations.

(a) The Secretary shall regulate, in the manner specified in this section, the handling of any variety or varieties of fruit whenever he finds, from the recommendations and information submitted by the commodity committee, or from other available information, that such regulations will

tend to effectuate the declared policy of the act. Such regulations may:

(1) Limit, during any period or periods, the total quantity of any grade, size, quality, maturity, or pack, or any combination thereof, of any variety or varieties of fruit;

(2) Limit the shipment of any variety or varieties of fruit by establishing, in terms of grades, sizes, or both, minimum standards of quality and maturity during any period when season average prices are expected to exceed the parity level;

(3) Fix the size, capacity, weight, dimensions, markings, or pack of the container, or containers, which may be used in the packaging or handling of any fruit.

(b) The commodity committee shall be informed immediately of any such regulation issued by the Secretary, and the commodity committee shall promptly give notice thereof to handlers.

§ 917.45 Inspection and certification.

(a) Whenever the handling of any variety of a particular fruit is regulated pursuant to § 917.41 or § 917.42, each handler who handles such fruit shall, prior thereto, cause such fruit to be inspected by the Federal or Federal-State Inspection Service: *Provided*, That inspection and certification shall not be required if such fruit has previously been so inspected and certified. Promptly after inspection and certification, each such handler shall submit, or cause to be submitted, to the commodity committee a copy of the certificate of inspection issued with respect to such fruit. The commodity committees may, with the approval of the Secretary, prescribe rules and regulations waiving the inspection requirements of this section where it is determined that inspection is not available: *Provided*, That all shipments made under such waiver shall comply with all regulations in effect.

(b) The Control Committee may enter into an agreement with the Federal and Federal-State Inspection Services with respect to the costs of the inspection required by paragraph (a) of this section, for any or all fruits, and may collect from handlers their respective *pro rata* shares of such costs.

§ 917.66 Agents.

The Secretary may by a designation in writing name any person, including any officer or employee of the Government or any agency or Division in the United States Department of Agriculture, to act as his agent or representative in connection with any of the provisions of this part.

Subpart — Grade and Size Regulation (Applicable to 1988 and thereafter)

§ 917.459 Peach Regulation 14.

(a) No handler shall ship:

(1) Any lot or package or container of any variety of peaches unless such peaches meet the requirements of U.S. No. 1 grade, except that the peaches shall be "well-matured", rather than "mature," but not overripe or shriveled.

(i) During the 1988 and subsequent seasons, the Federal or Federal-State Inspection Service will use the maturity guides listed in Table I in making maturity determinations for the specified varieties. For these varieties, not less than 90 percent of any lot shall meet the color guide established for the variety, and an aggregate area of not less than 90 percent of the fruit surface shall meet the color guide established for the variety. For varieties not listed, the Federal or Federal-State Inspection Service will use such tests as deemed to be proper by the Peach Commodity Committee and the Federal or Federal-State Inspection Service. A variance for any variety from the application of the maturity guides specified in Table I may be granted during the season to reflect changes in crop, weather, or other conditions that would make the specified guides an inappropriate measure of "well-matured." The maturity determination variance procedure is set forth as follows:

(ii) A grower or handler may initiate a request for variance from a maturity guide (e.g., color chip) by calling an authorized committee fieldman to arrange for an on-site examination of the fruit. This fieldman will call the officer-in-charge of the local Federal-State Inspection Service office to accompany the fieldman to the site.

(iii) The committee fieldman and the officer-in-charge or a designee of the officer-in-charge shall accompany the requester to the site.

(iv) If either the fieldman or the inspection representative or both agree that a variance is warranted, the request for the variance and the written views of the fieldman and inspection official shall be forwarded to the maturity subcommittee for review and written determination. A copy of the written report shall be provided to the requester. The fieldman shall notify the requester when the request has been forwarded to the maturity subcommittee and whether the request will be considered at a public or a telephone meeting. The requester may participate in public meetings or telephone meetings and may provide additional information in support of the request to the chairman of the maturity subcommittee prior to a public or telephone meeting. In reaching its determination, the subcommittee shall take into account written comments, observations and recommendations of the fieldman and inspection official, and any other information provided by the requester. The inspection official shall participate in the subcommittee meeting until the deliberations are completed and the decision is reached. Decisions of the maturity subcommittee shall be made within two days from the time the request for a variance is received. A majority of the subcommittee must vote in favor of the variance for it to be implemented. The subcommittee shall prepare a written report of its determination and the reasons therefor. The fieldman shall, in a timely manner, inform the requester of the subcommittee's decision, the basis therefor, and the procedure for appealing the decision. A copy of the written report shall be provided to the requester and the Department's California Marketing Field Office in Fresno. If the requester is dissatisfied with the maturity subcommittee's determination, the requester may file an appeal in accordance with paragraph (a)(1)(vi) of this section.

(v) If neither the fieldman nor the inspection official believe a variance is warranted, the variance shall not be

granted. The requester may file an appeal from this determination as specified in paragraph (a)(1)(vi) of this section.

(vi) To file an appeal, the requester shall notify the Peach Commodity Committee manager who will immediately refer the appeal to the Appeal Committee. The Appeal Committee shall consist of the Chairman of the Plum Commodity Committee, the Chairman of the Nectarine Administrative Committee, and the appropriate Federal-State shipping point inspection program supervisor, or their designees. The Appeal Committee shall review all documentation and any further information provided by the requester. Decisions of the Appeal Committee must be made within one day from the time the Peach Commodity Committee manager is notified of the appeal. A majority vote of the Appeal Committee is needed to grant a variance. The Appeal Committee may hold telephone meetings. The Appeal Committee shall prepare a written report of its determination and the reasons therefor. A representative of the Appeal Committee shall in a timely manner, inform the requester of the Appeal Committee's decision and the reasons therefor. A copy of the written report shall be provided to the requester, to the committee manager, and to the California Marketing Field Office.

§ 917.460 Plum Regulation 19.

(a)(1) No handler shall ship any lot of packages or containers of any plums unless such plums grade at least U.S. No. 1, except that the plums shall be "well-matured," rather than "mature" but not overripe or shriveled.

ISSUES

In *Wileman/Kash I*, the Judicial Officer's recognition of what issues were presented emanated from his holding that the Petitioners' evidence and pleadings, including their Petitions, related to the wisdom or folly of how well the Secretary, and his Committees, were carrying out the Order provisions which the Judicial Officer maintains were properly promulgated, and the correctness of the Secretary's actions may not be questioned. *Cf. Farm Fresh*, Pet. M106-2, April 12, 1990, where the Judicial Officer indicates *only* Petitioner may raise issues — not the Judicial Officer nor the Administrative Law Judge *sua sponte* and that rulings are to be made on prayers for relief. The Petitioners in *Wileman/Kash II* have not been deficient in this respect. Their pleadings more than cover the issues raised herein.

Section 900.52 of the Regulations pertaining to the institution of a proceeding require a Petitioner to set forth " * * * clearly and concisely the nature of the petitioner's business and the manner in which petitioner claims to be affected by the terms or provisions of the order, or the interpretation or application thereof * * * ."

A § 8(c)(15)(A) proceeding "is instituted by a private party, who is responsible for framing the issues." and rulings are made upon the prayers of the Petition (which reference herein includes the Amended Petition). Thus, it becomes relevant to note the scope of the Petition filed herein.

The Petitioners specific prayers for relief are found in six legal pages of their Petition/Amended Petition and, summarized and restated, seek:

A. A ruling that §§ 917.460 (Plum Regulation No. 19), 917.459 (Peach Regulation No. 14) and 916.356 (Nectarine Regulation No. 14), and their respective tables showing the specific "maturity tests" or other "color standards," of the Nectarine, Plum and Peach regulations issued in 1988,

and the obligations imposed therewith, as written and/or as applied, are not in accordance with law;

B. A ruling that the specific color standards and/or maturity tests referenced above, as written and/or as applied, are not in accordance with the law; are a denial of equal protection of the laws; result in a denial of due process of law since they amount to a "taking" without due process and without just compensation;

C. A ruling that the maturity tests and/or "color standards," and the procedures in determining said maturity tests and/or color standards, and the procedures to be utilized in requests for changes or variances to the maturity tests and the appeals, are a denial of due process of law since they constitute procedures involved without lawful delegation and/or constitute an unlawful delegation of authority to Petitioners' competitors;

D. A ruling that the specific maturity tests and/or "color standards" referenced above, as written and/or as applied, are arbitrary, capricious and not based upon substantial evidence and were enacted in violation of the Administrative Procedure Act and are null and void;

E. A ruling that the specific *size* regulations for Nectarines and Peaches, issued as Interim Final Rules by the Secretary in May, 1988, as written and/or as applied, were enacted in violation of the Administrative Procedure Act and are void, and/or are in actuality volume control and are contrary to the Agricultural Marketing Agreement Act;

F. A ruling that the specific maturity tests or specific color standards referenced above, as written and/or as applied, are in effect volume regulation, and violative of the Agricultural Marketing Agreement Act;

G. A ruling that neither the Nectarine Administrative Committee, the Plum Commodity Committee, the Peach Committee, the Control Committee of the California Tree

Fruit Agreement, the Maturity Subcommittees of any of the above-described Committees nor the "Appeals Committee" are empowered, by statute, delegation, or in any other manner, to set and determine, change, vary, deny changing, deny varying, or ruling on the appeal from the denial of specific color standards, or other maturity tests;

H. A ruling that the assessments issued for the 1988 and 1989 harvest seasons are not in accordance with law, since they were not enacted in accordance with the Administrative Procedure Act and since they are violative of Petitioners' First Amendment Constitutional rights;

I. A ruling that the assessments levied and collected from Petitioners from 1980 through 1986, and the assessments levied against Petitioners in 1987 through 1989 and subsequent seasons, are not in accordance with law since the majority of the assessments are being used to pay for promotion, other forms of research, and other items reflecting the ideological, economic, philosophical, and commercial viewpoints of Petitioners' competitors, to which Petitioners do not subscribe and are violative of the First Amendment of the United States Constitution and are not in accordance with law as the majority of the assessments are used to pay for promotion, and other forms of research, which violate the equal protection rights of Petitioners protected by the deprivation of liberty clause within the Fifth Amendment of the United States Constitution;

J. A ruling that the advertising and expense assessments collected from Petitioners from 1980 through 1986, and the advertising and expense assessments levied against Petitioners in 1987 through 1989, and subsequent seasons, are being expended without the approval, required by law, of the Secretary, pursuant to 7 U.S.C. § 610(b)(2)(ii), and in a manner violative of the laws of the United States of America and in violation of the provisions of the

Agricultural Marketing Agreement Act and the Administrative Procedure Act.

K. A ruling that the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid because they do not afford any retroactive relief or any monetary damages for financial injuries as a result of an invalid Marketing Order or Marketing Agreement regulation and are invalid because they do not afford any timely or effective relief and thus are a violation of the due process clause of the United States Constitution;

L. A ruling that the Secretary has failed to comply with the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" by refusing to grant any form of interim relief, despite the irreparable injury that would occur in the event interim relief is not granted, and thus the Secretary has failed to follow his own rules of procedure;

M. A ruling that Petitioners need not exhaust their administrative remedies pursuant to the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" and § 608c(15)(A) of the Agricultural Marketing Agreement Act, since the Secretary has already determined that Petitioners' Petition would be futile to exhaust since he has already made up his mind that no violation stated herein will be found to have occurred, no remedy can be afforded, no retroactive relief can be granted, and no relief at all will be granted to the Petitioners;

N. A ruling that the entire testimony and evidence and record of the 7 U.S.C. § 608c(15)(A) Petition hearing (AMA Docket Nos. F&V 916-1, 917-3, 916-2, and 917-2) conducted in February and March of 1988, involving the identical parties to the instant 15(A) proceeding, be

incorporated by reference into this hearing record. With respect to this prayer for relief, the Administrative Law Judge, as part of the oral hearing, incorporated by reference all testimony received, all exhibits admitted and any and all judicial/administrative notice taken at the hearing conducted in February and March of 1988 as to Peaches, and as to Plums and Nectarines, to the extent said prior hearing was referenced by the parties as to the 1988-89 Harvest seasons. The incorporation by reference, of the aforementioned 15(A) Petition hearing, substantially reduced the likelihood of a duplication of the issues presented in the previous 15(A) hearing, did not prejudice either party to the instant action and benefitted judicial economy. Although originally opposed by Respondent, such incorporation was subsequently sought by Respondent and utilized by the Judicial Officer through consolidation of the proceedings.

O. A ruling that, to the extent of any Government claim that Petitioners have an obligation to pay the levied assessments imposed by the Secretary of Agriculture, there shall be a "set-off", (pursuant to common-law set-off rights and statutory set-off rights, including 31 U.S.C. § 3701, *et seq.*, and as otherwise allowed by law), against the monetary damages suffered by Petitioners as a result of unconstitutional and unlawful regulations and enforcement of the Marketing Orders; and,

P. A ruling that, pursuant to the Equal Access To Justice Act, 5 U.S.C. § 504 and/or Federal Rule of Civil Procedure § 11, due to the special circumstances herein, Petitioners are entitled to be awarded reimbursement of all their fees and expenses, including reasonable attorney's fees and expert witnesses' fees.

To understand the issues, it must be kept in mind that the Petitioners, at times, have pleaded in the alternative. However, in their Petition the following issues and factual assertions have been raised. The following factual issues

raised in the Petition have been set forth herein in a manner to assist a reviewing Federal Court and, also, so as to not preclude consideration of the Petitioners' issues on the basis of failure to plead.

Petitioners have set forth contentions as to why various provisions of the Nectarine, Plum and Peach Marketing Orders or the interpretation, administration, or application thereof, as written, and/or as applied are not in accordance with law.

These reasons (summarized) given for the relief prayed in their Petition are:

(1) Petitioners claim that various provisions of the Nectarine, Plum and Peach Orders, in their language and/or in their application, and/or in their obligations imposed in connection therewith, are void and not in accordance with law.

(2) Petitioners claim that certain provisions of said Orders are a violation of the First Amendment of the United States Constitution and the Due Process Clause of the Fifth Amendment of the Constitution of the United States.

(3) Petitioners claim that the promulgation of the "well-matured" color chip standard was arbitrarily and capriciously imposed upon the tree fruit industry with no substantial basis nor purpose because the "well-matured" color chip standard does not objectively and rationally evaluate the internal maturity of fruit nor determine good consumer quality and/or good marketable quality. When the Committee members promulgated the maturity regulations themselves rather than making recommendations to the Secretary, the issuance and enforcement of the color chip standards permitted them to improve their own profitability and diminish the earnings of Petitioners.

(4) Petitioners claim that various indicated provisions of said Orders are void as being an improper delegation of authority from the Secretary of Agriculture to the Nectarine, Plum and Peach Committees, the Control Committee of the California Tree Fruit Agreement, and the Nectarine, Plum and Peach Maturity Subcommittees, and their respective Appeal Committees.

(5) Petitioners claim that various provisions of said Orders, as interpreted and as applied, are void as there has been no properly delegated authority to either the Nectarine, Plum and Peach Committees, the Nectarine, Plum and Peach Maturity Subcommittees, the California Tree Fruit Agreement, and the Appeal Committees.

(6) Petitioners claim that various provisions of the pertinent Orders are void since the Administrative Procedure Act was not followed with respect to implementing the "laws".

(7) Petitioners claim that various provisions of said Orders, and the regulations executed thereunder, are void and not in conformity with the law with respect to assessments assessed against the Petitioners with respect to the fruits involved.

(8) Petitioners contend that certain provisions of said Marketing Orders, and the rules and regulations executed thereafter as written, and/or in their application, and/or in their obligations imposed in connection therewith, are a violation of procedural and substantive due process since, in the application of "regulations" which were not promulgated pursuant to law, or in those rules which, although promulgated pursuant to law but not applied in accordance with law, amount to a complete "taking" of the subject fruit, without just compensation and without furthering any proper governmental purpose, and without

providing a pre-deprivation hearing in accordance with law.

(9) Petitioners contend that whatever delegation of authority may have existed to the Committees, made up of competitors of Petitioners, such delegation was contrary to the intent and policy of Congress in enacting the Agricultural Marketing Agreement Act and contrary to various Supreme Court rulings.

(10) Petitioners further contend that the Secretary of Agriculture for each harvest season from 1980 to the present season, failed to engage in reasoned decision-making in establishing regulations authorizing the imposition of forced assessments, all in violation of the Administrative Procedure Act. Further, in failing to engage in reasoned decision-making, the Secretary failed to engage in notice and comment and made no provision for notice and comment regarding:

(a) Whether the tree fruit industry benefits from a "generic" advertising program;

(b) Whether the tree fruit industry should continue year to year with the "generic" advertising program;

(c) Whether *pro rata* credits from the forced advertising assessments should be provided to handlers engaging in direct, specific, brand-name advertising programs;

(d) In what manner advertising programs should be conducted;

(e) What, if any, limitations should be placed on the Committees in regards to the monetary level allowed to be expended on a "generic" advertising program;

(f) How advertising money, if any, should be spent; and

(g) Which public relations firm, if any, should be retained.

These contentions of Petitioners are raised not for the purpose of having the Secretary re-examine his position herein (which would be improper and beyond the scope of this proceeding) but rather to show that the decisions and determinations which did come forth lacked necessary foundation and evaluation.

(11) Petitioners also contend that the monetary assessments for Nectarines, Plums and Peaches for the 1988 and subsequent seasons are invalid, were not enacted according to law, nor applied according to law, and were not enacted in accordance with the Administrative Procedure Act, and that their adoption and/or enforcement is not in accordance with law.

(12) The Petitioners maintain that the monetary assessments, for 1980 through 1988 and subsequent seasons, are invalid and unconstitutional. [This contention for 1980 through 1988 is applicable only to the Peach Order assessments inasmuch as said contention with respect to Nectarines and Plums was adjudicated in the *Wileman/Kash I* case unless the consolidation by the Judicial Officer of the two *Wileman/Kash* cases is sufficient reason to re-examine *Wileman/Kash I*. Accordingly, only the harvest seasons for 1988 and subsequent years are to be adjudicated in this case with respect to Nectarines and Plums except to the extent altered by the Judicial Officer's "consolidation" of *Wileman I* and *Wileman II*, which was done, upon Motion of the Respondent.] The reasons the Petitioners so contend, in this regard, is set forth in the allegation that at least fifty percent of the assessments compelled to be paid by the Petitioners are violative of the First Amendment of the Constitution of the United States because said assessments result in compulsory subsidization of philosophical,

ideological, economic, and commercial activities engaged in by the Nectarine, Plum and Peach Committees to which the Petitioners object, and which they maintain are in contravention of the Supreme Court's holdings and the Constitution of the United States. Accordingly, such assessments are alleged to be invalid, not enacted according to law, nor applied according to law, and, in particular, not enacted in accordance with the Administrative Procedure Act, and their "adoption" or "approval" by the Secretary, and/or collection of assessments, is not in accordance with law, but rather, in a manner violative of the Administrative Procedure Act. Additionally it is maintained that all assessments for each season, are null and void as they were adopted and/or collected for expenditures which are not authorized by the Agricultural Marketing Agreement Act, and/or for expenditures which are specifically prohibited by the terms of the Agricultural Marketing Agreement Act and/or by the terms of other laws. Also, all assessments for each season are said to be null and void because the "decisions" to make said expenditures are decisions accomplished in a manner violative of the law (including, but not limited to, lack of proper public notice and participation and public decision-making, input and openness as required by "the sunshine" laws); and/or because said "decisions" to make said expenditures and said expenditures themselves, were not previously approved, properly authorized in accordance with the law, by the Secretary of Agriculture; and/or because some expenditures from said assessments were for unauthorized and/or legally prohibited purposes.

(13) Petitioners also contend that the Nectarine, Plum and Peach Orders assessments for 1980 through the 1989 and subsequent seasons are invalid and unconstitutional as they are violative of equal protection as applied through the Fifth Amendment's deprivation of liberty provision, in that California growers of Nectarines, Plums and Peaches

are discriminated against in relation to growers of the same tree fruit in other states, as well as being discriminated against in relation to growers of other commodities within the State of California.

(14) Additionally, the Petitioners maintain that the Interim Final rules issued by the Secretary dated May 24, 1988, and subsequent final rules, regarding the new maturity regulations, the maturity testing devices, including color chips, the color chip variance procedures, and fruit size elimination, for Nectarines, Plums and Peaches, are invalid because the Administrative Procedure Act was not followed, and/or otherwise are not in accordance with the law as written and/or as applied, and thus are null and void. Additionally, it is maintained they are null and void because they are violative of the Administrative Procedure Act inasmuch as they did not sufficiently address comments submitted, they are arbitrary and capricious; they were not premised on a substantial basis; alternatives were not considered; and/or otherwise are not in accordance with the law as written and/or as applied.

(15) It is further argued that the budgets and assessments for the Nectarine, Plum and Peach Marketing Orders for the 1980 through 1989 and subsequent seasons are violative of the Administrative Procedure Act since they are improperly retroactively imposed, that there is no substantial basis and purpose for said assessments and budgets, that the Secretary failed to review the alternatives and there is "no good cause" and/or "no emergency" exception (pursuant to Title 5 U.S.C. § 553) for non-compliance with the notice-and-comment procedures in promulgating the budgets and assessments for the 1980 through 1989 and subsequent seasons.

(16) The Petitioners raise the question of whether the imposition of advertising assessments, pursuant to 7 C.F.R. §§ 916.45 and 917.39, is an unlawful delegation

of the Constitutional authority to levy taxes. They maintain that insufficient legislative guidelines, restrictions and limitations have been placed upon the Secretary of Agriculture for Congress to have legally delegated its taxing power. Therefore, it is argued that the collection of assessment "taxes" pursuant to 7 C.F.R. §§ 916.41 and 917.37 is void as an improper unrestricted delegation of authority.

(17) Petitioners seek a declaration that as a tax, the advertising assessments must be declared null and void as the Secretary of Agriculture has not been properly delegated the authority by Congress, if indeed such authority could be delegated, to impose taxes on the tree fruit industry. By definition, the advertising assessments imposed on the tree fruit industry shall be done in the "public interest" 7 U.S.C. § 608c(6)(I), it being maintained that advertising assessments cannot be deemed "fees," but must be categorized as "taxes," as any benefit ~~inure~~ to the public and not to Petitioners.

(18) It is alleged that the Secretary has violated the "Rules of Practice Governing Proceedings on Petitions to Modify Or To Be Exempted From Marketing Orders," and thus denied Petitioners due process and equal protection under the law, by refusing to follow his own rule in § 900.70 of Title 7 C.F.R., by continuously determining that interim relief is unavailable with respect to any administrative Petition filed pursuant to Title 7 U.S.C. § 608c(15)(A).

(19) Petitioners also contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" (Title 7 C.F.R. § 900.50 *et seq.*) are invalid because they do not afford any timely or effective relief and thus are a violation of the due process and equal protection clauses of the United States Constitution.

(20) Petitioners also contend that the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" (Title 7 C.F.R. § 900.50 *et seq.*) are invalid to the extent that they do not provide Petitioners with any timely, adequate, pre-taking equitable relief and do not provide any timely or adequate post-taking equitable relief and do not provide any timely or adequate post-taking monetary relief, particularly to the extent that they do not afford any retroactive monetary relief or any prospective monetary damages for any financial injury suffered as a result of invalid provisions of the Nectarine, Plum or Peach Marketing Orders or their invalid application.

(21) Petitioners also contend that the administrative and legal positions of the Secretary of Agriculture were not "substantially justified" and as a result of the arbitrary and capricious actions undertaken by the Nectarine, Plum and Peach Committees, their Maturity Subcommittees, California Tree Fruit Agreement and the United States Department of Agriculture, Petitioners should be awarded fees and expenses, including attorney's fees and the reasonable expenses of expert witnesses, pursuant to the Equal Access To Justice Act, 5 U.S.C. § 504, and/or pursuant to Federal Rule of Civil Procedure § 11, and/or as otherwise allowed by law. It is noted that the use of expert witnesses was helpful in this proceeding, particularly with respect to demonstrations and testimony establishing that the color chip test was not necessarily accurate as to establishing maturity and that other tests could and were utilized to determine maturity.

The Petitioners set forth a detailed statement of requested and proposed facts, comprising approximately twenty-five legal pages. There is no doubt but that the issues and facts have been more than adequately presented. Any deficiencies in pleadings in *Wileman/Kash I* as perceived by the Judicial

Officer, are more than compensated for in the extensive and detailed pleadings in *Wileman/Kash II*.

During the hearing, and as reflected in the record, numerous stipulations and/or stipulated responses were entered into. These take on material impact herein and are also significant because, except for a few conclusory requested Findings of Fact, the Respondent has not sought Findings of Fact. Supposedly, on appeal the Respondent will not present to the Judicial Officer Findings of Fact which it has not sought initially.

FINDINGS OF FACT

1. Petitioner, Wileman Bros. & Elliott, Inc., is a California corporation incorporated on May 10, 1948, and has a principal place of business located at 40232 Road 128, Cutler, California. Its mailing address is P.O. Box 309, Cutler, California 93647.
2. Petitioner Kash, Inc., is a California corporation, incorporated on May 28, 1968, and has a principal place of business located at Parlier, California. Its mailing address is P.O. Box 310, Parlier, California 93648.
3. Petitioner Wileman Bros. & Elliott, Inc., hereinafter, for convenience purposes sometimes referred to as Petitioner Elliott, and Petitioner Kash, Inc., hereinafter sometimes referred to as Petitioner Kash, are both growers and handlers of Plums and Nectarines. Petitioners handle their own varieties of Plums and Nectarines as well as that of outside growers' varieties of Plums and Nectarines.
4. Petitioner Kash, Inc., is also both a grower and a handler of Peaches.
5. Petitioner Elliott is the only commercial grower and handler of Tom Grand Nectarines. Petitioner Elliott is one of two growers of Ebony Plums and one of two handlers of Ebony Plums, and grows and handles a significantly greater volume of Ebony Plums than the one other grower of Ebony Plums.
6. Petitioner Elliott, as a corporation, has been a handler of Nectarines and Plums since 1948. Petitioner Kash, Inc., as a corporation, has been a handler of Nectarines, Plums, and Peaches since 1968.
7. Petitioners, Wileman Bros. & Elliott, Inc., and Kash, Inc., subsequent to the granting of a Motion to Consolidate their separate 15(A) Petitions, had their grievances heard in a hearing conducted during February-March of 1988. Said

hearing was presided over by Dorothea A. Baker, Administrative Law Judge, United States Department of Agriculture, in case No. AMA Docket Nos. F&V 916-1, 917-2, 916-2 and 917-3. Said (15)(A) Petition hearing encompassed certain issues regarding the 1980 through 1987 harvest seasons for Nectarines and Plums. That proceeding raised a substantial number of issues relating to various provisions of the Nectarine and Plum Marketing Orders. The hearing involved the admission of substantial evidence through oral testimony, the admission of hundreds of exhibits, and factual evidence which was admitted through judicial/official, and administrative notice being taken by the Administrative Law Judge. The Initial Decision rendered by the Administrative Law Judge on May 19, 1989, was reversed in substantial respect by the Department's Judicial Officer on July 9, 1990, wherein he found that the Petitioners were not entitled to any relief and dismissed their Petitions.

8. On or about May 4, 1988, the Nectarine Administrative Committee recommended the adoption of an 18 cents per carton assessment against each container of Nectarines packed by Petitioners. Of that 18 cents, only (approximately) 5 cents was for inspection of those cartons of Nectarines, and over 10 cents was assessed against each container for "Market Development," which included: field staff activities; retail advertising incentives; trade communications; retail projects; point of sales material; publicity; educational activities; food service activities; T.V. and Radio production; T.V. advertising; radio advertising; outdoor advertising; Canadian promotions; production research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Nectarine Administrative Committee in May, 1988, was approximately One Million Seven Hundred Sixty-one Thousand Eight Hundred Eight-six Dollars (\$1,761,886.00).

9. From 1980 through the present harvest season over half of the assessments, imposed by the Nectarine Administrative Committee have been used for "Market Development".

10. On or about May 4, 1988, the Plum Administrative Committee recommended the adoption of a 19 cents per carton assessment against each container of Plums packed by Petitioners. Of that 19 cents only (approximately) 6 cents was for inspection of those cartons of Plums and approximately 10 cents was assessed against each container for "Market Development," which included: field staff activities; retail advertising incentives; trade communications; retail projects; point of sales materials; publicity; educational activities; food service activities; T.V. and radio production; T.V. advertising; radio advertising; outdoor advertising; Canadian promotions; promotion research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Plum Administrative Committee in May 1988 was approximately One Million Eight Hundred Thirty-one Thousand Four Hundred Fifty-nine Dollars (\$1,831,459.00). From 1980 through the present harvest season, over half of the aforementioned assessments have been used for "Market Development".

11. On or about May 4, 1988, the Peach Administrative Committee recommended the adoption of an 18 cents per carton assessment against each container of Peaches packed by Petitioner, Kash, Inc. Of that 18 cents only (approximately) 6 cents was for inspection of Peaches and approximately 9 cents was assessed against each container for "Market Development," which included: field staff activities; retail advertising incentives; trade communications; retail projects; point of sales material; publicity; educational activities; food service activities; T.V. and radio production; T.V. advertising; radio advertising; outdoor advertising;

Canadian promotions; promotion research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Peach Administrative Committee in May 1988 was approximately One Million Two Hundred Twenty-five Thousand Four Hundred Thirty-five Dollars (\$1,225,435.00). Regarding said Peach assessments, from 1980 through the present harvest season, over half of the assessments paid by Petitioner Kash, Inc., have been used for "Market Development".

12. Approximately five to six cents per container is currently being assessed against Petitioners to provide for inspection services, (performed by the Shipping Point Inspection), to inspect fruit.

13. Any monies expended by Petitioners for promotion of their specific brand of fruit receives no *pro rata* credits toward the amount of advertising assessments levied against Petitioners.

14. California's tree fruit handlers, subject to Marketing Orders 916 and 917, are the only tree fruit handlers subject to advertising assessments. Other State's handlers are not required to advertise under Federal Marketing Orders.

15. On April 8, 1988, the Secretary of Agriculture issued proposed rules with respect to Plum sizes, maturity, and requests for variances, which proposed rules sought to define the term "well-matured" (53 Federal Register 11669).

16. On April 18, 1988, the Secretary of Agriculture issued proposed rules with respect to Nectarine and Peach sizes, maturity, requests for variances, which proposed rules sought to define the term "well-matured" (53 Federal Register 12690, regarding Nectarines); (53 Federal Register 12694 regarding Peaches).

17. With respect to the Peach, Plum and Nectarine proposed rules described in the immediately preceding two

stipulations, (Paragraphs 15 and 16) a fifteen-day comment period, was provided except as to Plums for which a seven-day extension was granted.

18. Said proposed rules, with respect to Peaches, Plums and Nectarines, were issued four months after the respective Peach, Plum and Nectarine Committees met in December 1987.

19. No documents exist which in any way support Respondent's position that "color-chips" objectively, rationally, and reasonably evaluate and test the actual internal maturity of fruit, other than the rulemaking record produced in this proceeding. (Contained in Exhibit Nos. 31, 32 and 33, and all subparts thereto.)

20. The position of the Respondent is that everything relied upon by the Secretary with respect to the stipulated responses, is contained in Petitioners' and Respondent's Joint Exhibit Nos. 31, 32, and 33, and the subparts thereto, which comprise the entire "rulemaking record." If the data is not in those Exhibits, the Secretary did not have it.

21. The following documents do not exist other than to the extent they may be in the rulemaking record produced in this proceeding:

(1) No documents exist regarding the Secretary's consideration, if any, during the 1980 harvest season through the 1987 harvest season, of other possible testing devices, other than "color chips," for measuring the internal maturity of Peaches, Plums and/or Nectarines; and

(2) No documents exist other than the rulemaking record showing that the "color chips" selected for each particular variety of Peaches, Plums and Nectarines, were objectively and rationally tested and evaluated to judge the internal maturity of that particular variety of fruit.

22. Other than the aforesaid rulemaking record, identified as Joint Exhibits 31 and 32, the Respondent relies upon nothing to support each and every particular "color chip" which was designated and selected by Respondent for each variety of Plum, for each variety of Nectarine, and for each variety of Peach during the 1988 and 1989 harvest seasons.

23. Other than what is contained in Joint Exhibits 31 and 32, there are no documents, studies or reports regarding the Secretary's consideration of any other testing devices, other than "color chips," to test the internal maturity of Peaches, Plums and Nectarines, for the 1988 and 1989 harvest seasons.

24. The rulemaking record (Exhibits 31, 32, and 33, and all subparts thereto) does not include "color chips," in the physical sense. A reviewing Court may not go to the rulemaking record and look at the "color chips" which are used as the determining factor with respect to the ascertainment of maturity and thus, the determining factor in the ability of a handler to pick, pack and ship his produce. The "color chips" which a reviewing Court may view are evidence in this administrative proceeding. When a reviewing Court looks at the color chips in evidence in both *Wileman/Kash I* and *Wileman/Kash II*, it is looking at demonstrative data, not used by the Secretary in his legislative capacity.

25. Other than Joint Exhibits 31 and 32, no documents exist with respect to the Secretary of Agriculture having engaged in any Administrative Procedure Act notice and, opportunity for comment, with respect to exercising his discretionary authority regarding whether or not to implement an advertising program with respect to Peaches, Plums and/or Nectarines. In regard to this stipulated response, the Respondent reserved the right to argue and make reference to the 1971 formal rulemaking procedure.

26. Other than Joint Exhibits 31 and 32, there are no documents evidencing the publication by the Secretary of Agriculture of any notice and/or providing any opportunity for comment with respect to the decision of whether or not to institute a "generic" advertising program with respect to Peaches and/or Plums and/or Nectarines and said Joint Exhibits 31 and 32 are the sole documents establishing whether or not there has been compliance with the requirements of the Administrative Procedure Act. Respondent reserved the right to reference the 1971 formal rulemaking procedure.

27. Other than Joint Exhibits 31 and 32 no documents exist evidencing that the Secretary of Agriculture has ever published notice, and/or provided an opportunity for comment, with respect to the manner in which to spend advertising assessment funds collected. (i.e., whether or not the funds should be spent on "generic" rather than brand label advertising; whether the funds should be spent and allocated among the various advertising media; what public relation's firm if any, should be retained, etc.) In this respect the Respondent reserved the right of referring to the 1971 formal rulemaking procedure.

28. The Respondent's stipulated response to the following is that no documents exist in this regard other than those documents provided in Petitioners' and Respondent's Joint Exhibits 31 and 32 and the Respondent's response in that regard is that there is an understanding that the documents therein, that will be referred to, are those relating to the Secretary's approval of the Committees' budgets. Said stipulated response relates to the following:

Documents relating to whether the Secretary of Agriculture has ever set any monetary limitation on the Committees as to the cost of each generic advertising program for Peaches, Plums and Nectarines.

29. The following request was made: the rulemaking record upon which Respondent relies to support its position that advertising assessments have satisfied the requirements of the Administrative Procedure Act from 1980 through the present with regard to Peaches, Plums and Nectarines. The stipulated response to this request was that Joint Exhibit 33 is the entire rulemaking record with respect to advertising for the harvest seasons 1980 through 1987. The Respondent reserved the right to reference the 1971 formal rulemaking procedure which occurred when the Peach, Plum and Nectarine Marketing Orders were amended on or about 1971, after the Act was amended on or about 1965.

30. A stipulated response was made to the request for those documents relating to the extent, if any, the Secretary of Agriculture provided a "substantial basis and purpose statement" as required by the Administrative Procedure Act, regarding the assessment rates from 1980 through the present with regard to the advertising assessments applicable to Peaches, Plums and Nectarines. The stipulated response was: The Secretary relies upon Joint Exhibits 31, 32 and 33.

31. The Respondent admits that the Secretary's imposition of "final rules" regarding assessments for Peaches, Plums and Nectarines for the years 1980 through 1987 was not preceded by "proposed rules" allowing for a thirty-day notice and comment period.

32. Respondent admits that the "proposed rules" issued in 1988 regarding Peach, Plum and Nectarine assessment rates did not provide for a thirty-day notice and comment.

33. Joint Exhibits 31, 32 and 33 are the only documents, and constitute the entire rulemaking record, regarding expenses and advertising assessments for Peaches, Plums and Nectarines commencing with the 1980 harvest season through the present. (Tr. 737). With respect to that

acknowledgment, the Respondent reserved the right to reference the rulemaking records.

34. The Respondent denied the assertion that the rulemaking record (Joint Exhibits 31, 32 and 33 and all subparts thereto) failed to establish that the Secretary of Agriculture ever engaged in notice and comment as to whether or not to advertise or *in* what manner to advertise. Production of the Joint Exhibits 31, 32, and 33, and their subparts, constitutes the sole basis for the Respondent's response to the effect that the Secretary abided by the Administrative Procedure Act, with the Respondent reserving the right to explain the documents contained therein by referencing the "formal" rulemaking record of 1971 when the Peach, Plum and Nectarine Marketing Orders were amended. [The Respondent has continuously objected to the Petitioners adducing documents into evidence with respect to the implementation and operation of the Orders. However, when it comes to the Respondent's reliance upon the rulemaking records, the Respondent reserves the right to "explain" such documents. Thus, fairness dictates that both parties have an opportunity to "explain" and reference the rulemaking records.]

35. The Respondent admitted the following stipulation, with the exception noted below. The admission is:

Respondent admits that, from the 1980 season through and including the present, the Secretary of Agriculture has never provided any notice and comment and given no statement in the Federal Register whatsoever, with respect to *how much of the assessments for peaches, plums and nectarines were earmarked to be utilized for advertising, promotion and production research.* (Emphasis added).

The Respondent admitted the above except as regards the language contained within the proposed and final rules for the 1988 and 1989 seasons. (Tr. 743).

36. The Respondent admits the following statement, with reservation to the Respondent, of the right to reference the formal rulemaking record of 1971. The admitted statement is as follows:

Respondent admits that, from the 1980 season through the present, with respect to peaches, plums and nectarines, the Secretary of Agriculture has never published in the Federal Register any statement with regard to his determination that advertising is beneficial to the handler or that generic advertising is beneficial to the handler and/or beneficial to the grower, other than the Secretary making the following statement — "It is found that the expenses and rates of assessment, as hereinafter provided, will tend to effectuate the declared policy of the Act" —
* * *

37. The Respondent admits the following statement reserving unto the Respondent the right to explain said admissions with respect to the years' 1988 and 1989 harvest seasons and to the mention in Respondent's post-hearing brief that this was a publication in 1988 and 1989 that gave notice although not specifically with respect to those items. The Respondent reserved the right to argue that the notice that was provided would "somehow have allowed for that type of comment." The admission of the Respondent is to the following:

From the 1980 season through the present, the Secretary of Agriculture has never published in the Federal Register any notice and comment opportunity regarding how the generic advertising program for peaches, plums, and nectarines should be assessed, i.e., on a per carton basis verses a per acre basis.

[Apparently the Respondent takes the position that with respect to the years 1988 and 1989 there was notice and comment with respect to assessments and that although not specifically mentioned, nevertheless, the Respondent argues that such general notice "would provide the public the opportunity to bring up such issues if they so [d]esired."] (Tr. 746). However, on brief, Respondent's position is that a review of the rulemaking record does not contain a requirement that the Secretary conduct formal rulemaking procedures because the formal rulemaking record provides the legal basis for the manner in which the advertising budgets are to be determined. Respondent's brief points out that the Secretary's decision states at 31 Fed. Reg. 5636 (April 9, 1966) that, "the anticipated expenses of advertising and promotion should be included in the budget of expenses submitted to the Secretary for his approval." Relying on said rulemaking record, Respondent argues that the Committees are required to include their proposed advertising expenditures to the Secretary with their proposed budget of their anticipated expenses for each fiscal year. See 31 Fed. Reg. 6525. (7 C.F.R. §§ 916.31(c) and 917.35(f)). "At that time, the Secretary may approve or disapprove of the proposed expenditures. The Secretary may adopt the proposed expenditures, he may reject portions of the recommended expenditures or he may reject all advertising expenditures for that year, just as he may do with any expenditure in the Committees' proposed budgets. The desirability of allowing the Committees' to propose advertising expenditures was determined through the formal rulemaking procedures of 1966, 1971 and 1976 as described above. If the Secretary wishes to reconsider the desirability of allowing for proposals for paid advertising under the orders, he may conduct further formal rulemaking. Indeed, Petitioners may petition the Secretary to conduct such formal rulemaking hearings. However,

Petitioners' contention that the marketing order requires additional formal rulemaking regarding the desirability of an advertising program every fiscal year is clearly disproved by examination of the formal rulemaking record."

38. The Respondent relies solely upon Joint Exhibits 31, 32 and 33 to support its denial of the following:

That an assessment based on a per carton basis rather than per acre, discriminates against some varieties of fruit which produce more cartons per acre at a lower F.O.B. price compared to those other varieties which produce fewer cartons per acre at a higher F.O.B. price.

39. The Respondent admits: For each of the years starting with 1980 through the present, with respect to Peaches, Plums, and Nectarines, the Commodity Committees retained the same advertising agency account executive to engage in advertising without competitively bidding that work to other advertising agencies.

40. The requested admission was that the Secretary of Agriculture for each harvest season from 1980 through the present season, failed to engage in reasoned decision-making in establishing regulations authorizing the imposition of forced assessments; further, he failed to engage in any notice and comment, and made no provision for notice and comment, regarding:

(a) Whether the tree fruit industry benefits from a generic advertising program;

(b) Whether the tree fruit industry should continue year to year with the generic advertising program;

(c) Whether pro rata credits from the forced advertising assessments should be provided to handlers engaging in direct specific brand name advertising programs;

(d) In what manner advertising programs should be conducted;

(e) What, if any, limitations should be placed on the committees in regard to the monetary level allowed to be expended on a "generic" advertising program;

(f) How advertising money, if any, should be spent; and

(g) What public relations firm, if any, should be retained.

In support of its denial, Respondent would rely upon joint Exhibits 31, 32, and 33, and all subparts thereto, as well as reserving the right to reference the formal rulemaking records of 1965 and 1971.

41. Joint Exhibits 31, and 32, constitute the entire rulemaking record upon which Respondent bases its contention that the regulation of Nectarine and Peach sizes was appropriate for the 1988 and 1989 harvest seasons.

42. The entire budget, and all, and the only, supporting documents thereto, which the Nectarine Committee submitted to the Secretary of Agriculture for the harvest seasons from 1980 through 1989 are stipulated into evidence as Exhibit 297 and all of its subparts.

43. The entire budget, and all, and the only, supporting documents thereto, which the Plum Committee submitted to the Secretary of Agriculture for the harvest seasons from 1980 through 1989 are stipulated into evidence as Exhibit 297 and all of its subparts.

44. The entire budget, and all, and the only, supporting documents thereto, which the Peach Committee submitted to the Secretary of Agriculture for the harvest seasons from 1980 through 1989 are stipulated into evidence as Exhibit 297 and all of its subparts.

45. The *entire budget approval documentation*, as to Peaches, Plums, and Nectarines, is set forth and stipulated

into evidence as being incorporated within Exhibit 297, and all its subparts.

46. Joint Exhibit 33, and its subparts, contain the proposed assessments (including expense, advertising and all other assessments) which the Nectarine Committee, for the harvest seasons 1980 through 1989 provided to the Secretary of Agriculture for his approval.

47. Joint Exhibit 33, and its subparts, contain the proposed assessments (including expense, advertising and all other assessments) which the Plum Committee, for the harvest seasons 1980 through 1989, provided to the Secretary of Agriculture for his approval.

48. Joint Exhibit 33, and its subparts, contain the proposed assessments (including expense, advertising and all other assessments) which the Peach Committee, for the harvest seasons 1980 through 1989, provided to the Secretary of Agriculture for his approval.

49. Joint Exhibits 31, 32, and 33, and all their subparts, contain all Minutes of the Nectarine Administrative Committee meetings from 1980 through 1989.

50. Joint Exhibits 31, 32, and 33, and all their subparts, contain all Minutes of the Plum Commodity Committee meetings from 1980 through 1989.

51. Joint Exhibits 31, 32, and 33, and all their subparts, contain all Minutes of the Peach Commodity Committee meetings from 1980 through 1989.

52. The Respondent admits with respect to Peaches, Plums and Nectarines, that no other State in the United States of America, other than California, has an advertising assessment program under a Federal Marketing Order.

53. The Respondent admits that Peach, Plum and Nectarine growers in the State of Georgia do not have a United

States Department of Agriculture/Agricultural Marketing Service advertising assessment Program.

54. The Respondent admits that the Peach, Plum and Nectarine growers in the State of Colorado do not have a United States Department of Agriculture/Agricultural Marketing Service Program.

55. Respondent's reliance on Joint Exhibits 31, 32, and 33 and all subparts thereto, furnished the basis of its denial of the following: "Does the Secretary of Agriculture admit that it is a violation of Petitioners' constitutional and civil rights for AMS to contend during 15(A) proceedings that the Administrative Law Judge is not entitled to award any post-taking of fruit monetary relief, while arguing against pre-taking equitable relief in federal court, and arguing against pre-taking interim relief from the Judicial Officer?"

56. Respondent could not produce the "pink slips" of all non-personally owned automobiles driven by California Tree Fruit Agreement employees while "on duty" from 1980 through the present, because no such documents exist because the California Tree Fruit Agreement [and the Commodity Committees] do not hold any pink slips nor any other title documents with respect to automobiles driven by the California Tree Fruit Agreement since such titles have always been held by the Tree Fruit Reserve.

57. Respondent admits that the Peach Commodity Committee, the Plum Commodity Committee and the Nectarine Administrative Committee, acting through the California Tree Fruit Agreement, rent most of their furniture and equipment from the Tree Fruit Reserve, a California private, not-for-profit corporation.

58. The entire legislative history, all United States Department of Agriculture Departmental communications and all other documents relating, in any manner whatsoever, to the amendments to the Agricultural Marketing Agreement

Act, and particularly section 608c(6)(I), which allowed the Secretary of Agriculture, upon due consideration and exercise of discretion, to implement advertising assessment programs for Peaches, Plums and/or Nectarines are contained in Exhibit 297, and its subparts. The Respondent reserved the right of referring to the formal rulemaking records of 1965 and 1971.

59. The Respondent relies on Exhibit 297, and its subparts, as well as the formal rulemaking records of 1965, and 1971 as being the entire rulemaking record regarding the implementation of the advertising program with respect to Peaches, Plums and Nectarines (which occurred approximately six (6) years after the Act was amended.) Other than as stated there are no internal Departmental documents discussing and relating to the subject of whether or not advertising programs should be implemented with respect to Peaches, Plums and/or Nectarines.

60. Exhibit 302 (radio 1988-1989) and Exhibit 303 (scripts used throughout the U.S. 1986, 1987) are the scripts used on all California Tree Fruit Agreement — "California Summer Fruits" advertising promotions on radio and television stations throughout the United States when such advertising occurred during 1988 and 1989 and throughout the United States during the harvest season of 1986-1987. See also Exhibit 301 and 301(A) p. 8, 301(B) p. 9, 301(C) p. 10, 301(D) p. 11 as to script.

61. Respondent's response to the last paragraph [Paragraph No. 60] and, Exhibits 301, 302, and 303, constitute the advertising scripts (i.e. the words used during all advertisements, with respect to advertisements) paid for by either the Peach, Plum and/or Nectarine Committees or with respect to advertisements for which any of those Committees contributed any funds whatsoever for all advertisements conducted during the harvest seasons 1980 through and including 1989.

62. Exhibits Nos. 349 and 350, represent an agreed upon chart of all public relations firm billings and financial records relating to or in any other manner relevant to an inquiry of how money was spent on each different script for radio, TV, newspaper, magazine and other print media.

63. No notice and comment has been provided in the Federal Register with respect to the creation, existence, maintenance or delegation of any authority to the California Tree Fruit Agreement. The Respondent admits: "The Administrative staff hired by the Control Committee has not been delegated rule making authority."

64. The Respondent admits that setting the assessment rate is rulemaking but maintains that the approval of expenditures is not rulemaking and that to the extent compliance with the Administrative Procedure Act is required, it is reflected in Exhibit 297, and all its subparts. Through the data contained therein, Respondent contends that the Secretary of Agriculture has legally approved, to the extent he was required to comply with the Administrative Procedure Act, the expenditure of Peach, Plum and/or Nectarine Committee Assessments on (1) California Tree Fruit Agreement salaries and (2) California Tree Fruit Agreement expenses.

65. Respondent relies on the 1965 and 1971 formal rulemaking records and Exhibit Nos. 31, 32, and 33, and all subparts thereto, as furnishing the basis in support of Respondent's contention that the Secretary of Agriculture has considered, or not, the problems encountered by an East Coast consumer differentiating or distinguishing between a Georgia or Colorado Peach (which is not subject to United States Department of Agriculture/Agricultural Marketing Service advertising assessments) from that of a generically advertised California Peach; and, as such, the aforesaid data constitute the entire rulemaking records and Departmental documents, if any, with respect to studies and analyses of

the discrimination that California Peach, Plum and Nectarine handlers suffer by paying for a nation-wide advertising program that benefits growers and handlers in other states who are not so assessed.

66. The Respondent admits that on or about April 18, 1988, the Secretary of Agriculture issued Proposed Rules with respect to the proposed regulation of Nectarine and Peach sizes, maturity determinations, color chip procedures, and, variances from maturity determinations. (See 53 Federal Register 12690, regarding Nectarines; and see 53 Federal Register 12694, regarding Peaches.) A fifteen-day comment period was provided. Respondent now contends that a "good cause" exception to the thirty-day effective date existed but there was no good cause exception regarding the comment period because the Administrative Procedure Act "has no requirement of a particular 30-day comment period." Respondent relies on Exhibits 31, 32, and 33.

67. Respondent relies on Exhibit 31, and its subparts, as being the full text of any and all reports and studies considered, and the entire rulemaking record, with respect to the regulation of Nectarine size, the maturity standard, the designation of color chips, and the color chip variance procedures for the Interim Final Rules of May 27, 1988.

68. With respect to the May 27, 1988 Interim Final Rules issued regarding Peaches, Plums and Nectarines, Exhibit 31 constitutes any and all rulemaking documents.

69. Exhibit 31 contains the report of Edwin D. Thuerk as relied upon by the Secretary of Agriculture in the May, 1988, Interim Rules for Peaches, Plums and Nectarines.

70. Between the time of the proposed rule issued in April, 1988, and the Interim Final Rule issued in May of 1988, the Federal-State Inspection Service sent a letter to the Secretary of Agriculture/Agricultural Marketing

Service regarding the Federal-State Inspection Service's comments to the proposed rulemaking. That letter is contained in Exhibit 31.

71. Regarding the May, 1988 Interim Rules, Exhibit 31 constitutes the entire rulemaking record and any and all other Department of Agriculture documents and communications involving the Secretary's regulation of Plum size, and the regulation of Nectarine and Peach sizes.

72. Respondent admits, regarding the May, 1988 Interim Rules for Peach, Plum and Nectarine maturity, color chips, and size regulation, that the Secretary did not allow 30 days after publication in the Federal Register before implementing the change, but instead claimed a "good cause" exception. Exhibit 31 constitutes any and all rulemaking records and other documents upon which the Secretary of Agriculture may rely for a "good cause" exception to a 30-day notice.

73. Regarding the April and May, 1988 Federal Registers with respect to Peaches, Plums, and Nectarines, Exhibit 31 constitutes all the rulemaking records.

74. Respondent denies that the current (15)(A) proceeding does not provide Petitioners with adequate and timely relief with respect to assessments.

75. The Respondent admits that there are no documents evidencing either a written lease or a rental agreement between California Tree Fruit Agreement and the owner/landlord, which is Tree Fruit Reserve for the building which California Tree Fruit Agreement's uses as its headquarters, located at 701 Fulton Avenue, Sacramento, California. However, Respondent refers to the Management Services Minutes of various meetings which show rental amounts being charged.

76. No documents exist evidencing trademarks, registrations, copyrights, etc. for the "ripening bowl" sold and/or marketed by the California Tree Fruit Agreement.

77. Premised upon Respondent's assertions of *pending investigation*, Respondent did not adduce "all written reports of Shipping Point Inspection Inspectors regarding alleged violations of the California Tree Fruit Agreement color chip maturity requirements by Kash, Inc., during the month of June, 1989."

78. Premised upon Respondent's assertion of *pending ongoing investigations*, the Respondent produced some, but did not adduce, "all notes or reports of interviews with Shipping Point Inspection Inspectors conducted by Gary Van Sickle, California Tree Fruit Agreement field agent, relating to alleged California Tree Fruit Agreement 'color chip' maturity violations at Kash, Inc., in June, 1989."

79. Respondent admits that no documents exist, such as receipts, invoices, and vouchers relating to the purchase by Gary Van Sickle of a refrigerator and couch to be placed in the California Tree Fruit Agreement office in Reedley.

80. No documents exist, such as rental agreements, between the California Tree Fruit Agreement and the Tree Fruit Reserve relating to the rental of the refrigerator and couch by the California Tree Fruit Agreement from the Tree Fruit Reserve during the calendar year 1989.

81. Respondent admits that no documents exist, including, but not limited, to expense sheets, vouchers, cancelled checks, etc., relating to any and all expenses paid by the California Tree Fruit Agreement with regard to Mr. Jonathan Field's and/or Karen Jackson's (or any other California Tree Fruit Agreement personnel) attendances at the Tree Fruit Reserve corporate meetings (meals, travel, hotel rooms, etc.).

82. With respect to the Tree Fruit Reserve's activities, the Respondent knows of no other documents in existence, other than those adduced and stipulated to at the oral hearing.

83. No documents exist which show notices, issued to the tree fruit industry, announcing the "open and public" Management Services meetings prior to the Commodity Committee meetings each season, for every year from 1980 through the present.

The foregoing Findings of Fact consist, for the most part, of stipulations and/or stipulated responses, and vast amounts of documentary evidence which were stipulated into the record.

In addition to the facts derived from the consolidation with this proceeding of *Wileman/Kash I* by the Judicial Officer, the aforesaid stipulations, stipulated responses, testimony and Exhibits, and the record as a whole, support the following Findings of Fact numbered consecutively from Finding 83. Although in *Wileman/Kash I* the Judicial Officer regarded many like findings as "irrelevant or based on improper legal conclusions," and, the Respondent's position is that such facts are beyond the scope of this proceeding, I believe that such findings are relevant, material, and permissible in order to: (1) ascertain the extent of legal obligations, if any, of the Petitioners herein and to determine whether the Order obligations are in accordance with law; (2) to assist the Judicial Officer and a reviewing Federal Court; (3) to highlight those areas where the evidentiary facts reflect circumstances different from *Wileman/Kash I*, and, (4) to emphasize the thoroughness of the pleadings herein so as to avoid preclusion of issue because of failure to plead or to adduce evidence.

84. The administration, regulatory interpretations, regulatory implementation, actions, or non-actions of the Com-

mittee members and/or the Secretary, through his subordinates, have a direct, substantial, and ascertainable economic impact upon Petitioners.

85. In 1937, Congress enacted a revised Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq.*). The Agricultural Marketing Agreement Act, in its declaration of policy, conferred upon the Secretary of Agriculture the authority to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce, to establish and maintain parity prices for farmers, to protect the interest of the consumer, to establish and maintain production research (added in 1947), marketing research, maintain standards of quality, maturity and grading, as well as establishing inspection requirements, to establish and maintain such marketing conditions as will provide, in the interests of producers and consumers, an orderly flow of commodities to the market through its normal marketing season (added in 1954), and to avoid unreasonable fluctuations in supplies and prices. (Title 7 U.S.C. § 602). Additionally, Congress specifically conferred upon the Secretary the power to " * * * establish and maintain such production research, marketing research, and development projects, * * * as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest." 7 U.S.C. § 602(3).

To achieve that goal, the Agricultural Marketing Agreement Act permits the Secretary of Agriculture to issue Marketing Orders and Agreements applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product. (Title 7 U.S.C. § 609c). Section 608c of 7 U.S.C. directs the Secretary of Agriculture to issue Marketing Orders after notice and a hearing conducted whereby any interested party is given the opportunity to testify and after the Secretary finds that the order's terms "will tend to effectuate the declared

policy of the Act." 7 U.S.C. § 608c(4). Marketing Orders 916 and 917 (7 C.F.R. §§ 916 and 917) could not become effective until the respective Orders had been approved by two-thirds of the affected producers. 7 U.S.C. §§ 608c(8), (9). Amendments to Marketing Orders are promulgated in the same manner. 7 U.S.C. § 608c(17).

In 1954, Congress found that there was a need to provide for yet "greater stability in the products of agriculture." H.R. Rep. No. 1927, 83d Cong., 2d Sess. 1, *reprinted in* 1954 U.S. Code Cong. & Admin. News 3399. Congress concluded that the remedy should include a program "to protect the income of the farmers while comprehending the interests, needs and security of all segments of the economy and of all our people." *Id.*, *reprinted at* 1954 U.S. Code Cong. & Admin. News 3403. Congress therefore adopted a bill which implemented a means to "encourage the expansion of markets and consumption at home and abroad." *Id.*

Toward that end, Congress amended the Agricultural Marketing Agreement Act authorizing the Secretary of Agriculture to promulgate Marketing Orders "[e]stablishing or providing for the establishment of marketing research and development projects designed to assist, improve or promote the marketing, distribution, and consumption of any such commodity or product, the *expense of such projects to be paid from funds collected pursuant to the marketing order.*" (Emphasis added). Agricultural Act of 1954, Pub. L. 83-690, § 401, 68 Stat. 906, 907 (1954), *codified at* 7 U.S.C. § 608c(6)(I). Authority to conduct "production research" and development projects designed to "assist, improve or promote . . . efficient production," was added in 1970. Pub. L. 91-292, 84 Stat. 333, June 25, 1970. Authority for projects providing "for any form of marketing promotion including paid advertising" for a specified commodity (cherries) was added in 1962. Pub. L. 87-703, 76 Stat. 632, Sept. 27, 1962. Plums and Nectarines were

included in this category in 1965. Pub. L. 89-330, 79 Stat. 1270, November 8, 1965. California-grown Peaches (and *only* California-grown Peaches) were included in this category in 1971. Pub. L. 92-120, 85 Stat. 340, August 13, 1971. In making such amendments, Congress granted the Secretary of Agriculture permission and discretion to impose, if he deemed it proper, "any form of marketing promotion including paid advertising for Nectarines and Plums." (Petitioners' Exhibit AB No. 18). At that time it was advised that the Department had not had any experience in the operation of an advertising program under marketing agreements and orders. Such authority was deemed proper if advertising were to benefit the growers and meet the objectives of the Act and that the inclusion of the stated commodities, " * * * would serve in providing experience now lacking in the [advertising] operation of Federal" Marketing Agreements and Orders.

86. When the Secretary promulgated the Nectarine Marketing Order in 1958, he made the following findings as to the Nectarine Administrative Committee, the agency that works with the Secretary in administering the order locally (23 Fed. Reg. 3007, 3010-12 (1958)):

(b) It is desirable to establish an agency to administer the order locally under and pursuant to the act, as an aid to the Secretary in carrying out the declared policy of the act. The term "Nectarine Administrative Committee" is a proper identification of the agency and reflects the character thereof. It should be composed of 8 members. The members and alternates should be growers, or employees of growers. . . . Some growers of nectarines are corporations. These corporations and some of the larger individual growers have employees who are in complete charge of growing and marketing nectarines. Such employees would be qualified from the standpoint of knowledge and personal experience for service on the

committee, and it would not be in the interest of the industry to deny them the opportunity to be nominated and to serve on the committee. . . . (23 Fed. Reg. 3010 (1958))

The committee should be given those specific powers which are set forth in section 8c(7)(C) of the Act. Such powers are necessary to enable an administrative agency of this character to function.

The committee's duties, as set forth in the order, are necessary for the discharge of its responsibilities. These duties are generally similar to those specified for administrative agencies under other programs of this character. It is intended that any activities undertaken by the members of the committee will be confined to those which reasonably are necessary for the committee to carry out its responsibilities as prescribed in the program. It should be recognized that these specified duties are not necessarily all inclusive, and that it may develop that there are other duties which the committee may need to perform. (23 Fed. Reg. 3011-12 (1958))

87. On April 5, and 6, 1965, a hearing was held in Fresno, California, pursuant to a notice published in 30 Fed. Reg. 3542 (March 17, 1965). Among the purposes was whether to add a new provision to Marketing Order 917 authorizing marketing research and development projects. A recommended decision was published at 30 Fed. Reg. 13063 (October 14, 1965) which recommended adding such a provision. As a result thereof the Secretary determined that the proposed amendment would "tend to effectuate the declared policy of the Act." 30 Fed. Reg. 15990 (December 23, 1965). This was subsequently ratified by referendum whereby at least two-thirds of the producers, who also produced at least two-thirds of the volume of Plums and Peaches produced in the production area, indicated that they favored the adoption of the aforesaid amendment to the

Order. 30 Fed. Reg. 15990, 15991 (December 23, 1965). Thus, section 917.39 (7 C.F.R. § 917.39) was adopted which stated:

The committees, with the approval of the Secretary may establish or provide for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of fruit. The expense of such projects shall be paid from funds collected pursuant to § 917.37. (30 Fed. Reg. 15990, 15995)

Formal rulemaking conducted in 1971, resulted in amending section 917 to include authority for "production research" for Peaches and "production research" and "paid advertising" for Plums. (36 Fed. Reg. 5614 (March 25, 1971)) Formal rulemaking conducted in 1976 resulted in amending section 917.39 to include authority for paid advertising for Peaches. (41 Fed. Reg. 14375 (April 5, 1976)) Thus, section 917.39 (7 C.F.R. § 917.39) was amended to read as it does today:

The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of fruit. Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid from funds collected pursuant to § 917.37. (41 Fed. Reg. 14375, 14382)

88. The Secretary concluded at 41 Fed. Reg. 14375, 14375, 14376-77 (April 5, 1976) that:

The record shows that a wide consensus among the peach... industr[y] that promotional activities have been beneficial in increasing demand and should be continued.... The evidence indicates that provisions for paid

advertising activities for peaches and pears and vesting authority therefor in the Peach and Pear Commodity Committees would place the peach and pear industries in a better position to advance the provisions of the Act and the Order.... Spot radio or TV commercials in the principal markets during peak movement periods have proved to be successful. It has been found in many fresh promotional programs that spot announcements, particularly when developed with a "dealer tag" at the end of each spot have considerable influence in triggering retail promotions. The previous success of advertising efforts referred to here are in regards to advertising conducted under State Marketing Orders. *See*, 41 Fed. Reg. 14376 (April 5, 1976).

89. Thus, the basic authority of the Secretary to implement the promotional programs, including advertising, were published at 36 Fed. Reg. 14381 (August 5, 1971) (Plums), 41 Fed. Reg. 14375 (Peaches) and 31 Fed. Reg. 6371 (May 19, 1966) (Nectarines).

90. The Petitioners do not challenge the *authority* of the Secretary to impose advertising programs on the tree fruit industry. He has had that authority as early as 1965, but he declined to exercise same until 1971. The Petitioners maintain that this is a discretionary function of the Secretary and, although discretionary, does have its limitations.

The Committees met on January 13, 1971 (36 Fed. Reg. 4055) and thereafter recommended to the Secretary that "generic" advertising programs for Nectarines and Plums be put into place. At that time, without considering available alternatives, including declining to implement any advertising programs whatsoever, at the request of the Commodity Committee a forced "generic" advertising program was created for Nectarines and Plums.

The Secretary published his intention to institute a "generic" advertising program for Nectarines and Plums in the Federal Register. (Petitioners' AB No. 19 (Plums), Petitioners' AB No. 20 (Nectarines)). At the time that he issued his proposed rulemaking, the Petitioners contend the Secretary allowed only a ten-day notice and comment period, which the Petitioners maintain was a violation of the Administrative Procedure Act. Petitioners contend that the failure of the Secretary to provide for an appropriate thirty-day notice and comment period nullifies the Secretary's rules. For every year since that time, the Secretary's regulations with respect to forced "generic" advertising programs, 7 C.F.R. sections 916.45 and 917.39 have been the "law."

91. Although 7 C.F.R. sections 916.45 and 917.39 set forth the authority for the Secretary to implement "all forms of advertising," these sections, however, do not make the implementation of an advertising program mandatory.

92. Although one might not be impressed with the extensiveness or persuasiveness of evidence in support of the need for advertising (i.e., a searching inquiry into the desirability thereof, the cost, the kind of advertising, the anticipated expenditure of funds, any limitations thereon, etc.) as set forth in the amendments to the Orders, nevertheless, there does exist some testimony and documentary evidence with respect to the proposed amendments which would include advertising. An example of such is set forth in the initial authorization for paid advertising contained in the hearing record as a result of a one day hearing in Fresno, California, on December 10, 1975. The person advocating the inclusion of paid advertising as it pertains to Peaches was Mr. Charles H. Sanderson, the Promotional Director of the California Tree Fruit Agreement, headquartered in Sacramento.

Mr. Sanderson's testimony, and, the questions with respect thereto, consumed approximately eleven pages of the

hearing transcript. Among other things noted by Mr. Sanderson was that advertising and promotion is an art, it is not a science and therefore doesn't lend itself to precise measurement. (Tr. 53 of that hearing). His testimony also sets forth the California Tree Fruit Agreement's promotional objectives. Other than his testimony in support of permitting advertising with respect to Peaches, through Mr. Sanderson, there was admitted into evidence the 1974 California Tree Fruit Agreement annual statistical report. (Exhibit 5 to that hearing record). Also, official notice was taken of the Federal Register (Volume 36) published May 12, 1971, pp. 8745-8738. (Exhibit 7 to that hearing record). Other than the general statements made by Mr. Sanderson and the aforesaid Exhibit 7 and the Federal Register officially noticed, there were no additional substantiating factual data with respect to the needs and objectives to be forthcoming from the authorizations of advertising for Peaches. [Note: This hearing also covered pears which are not involved in this proceeding.]

After the Secretary held the aforesaid public rulemaking hearing he issued proposed amendments to Order 917 and in response thereto he received comments from the California Citizen Action Group which, in letter dated March 8, 1976, indicated among other things:

Our most strenuous basis for objection is that the hearings themselves were a shame. There was no adequate notice given to many persons and organizations known by proponents of the amendments and by the U.S.D.A. itself to be likely opponents of the proposal. As a result, only proponents of the amendments testified at the hearing and none of their testimony was subject to cross-examination on the public record. Thus, the hearing record on which the recommended decision is based is fatally defective and biased. The recommended decision itself reflects this critical bias by running rough shod over

the interest of consumers to protect the interest of Agribusiness.

The state marketing orders were managed by the same organization that proposed the amendments to the federal orders, namely the California Tree Fruit Agreement. The leadership of the California Tree Fruit Agreement knew full well that Citizen Action was not only an interested party at the Fresno proceedings but would also be a likely opponent of the proposal. Yet no effort was made to provide notice of the hearing.

In addition, the U.S.D.A.-AMS office in San Francisco that issued the press release announcing the hearings failed to send a copy of the release to either Citizen Action or to me personally. This is extremely peculiar given that both the organization and I are on the mailing list of that U.S.D.A. office and regularly receive their releases. Further, I am known by name as the director of an organization which has vigorously opposed supply control activities of marketing orders. Failure of the U.S.D.A.-AMS office to send notice of the hearing was at best a serious breakdown in their responsibility to provide notice to all interested persons and at worst part of an effort to avoid controversy at the hearing.

There are numerous examples of the inadequacies of the hearing record that had resulted from the failure to give proper notice and which have allowed gaping holes in the proposed amendment to go unnoticed. These include:

1. *Promotional Activity* * * *

C. Prohibitions of tying advertising which puts the government in the position of subsidizing promotion by private companies.

D. Prohibitions against the use of the promotional authority for political and public relations purposes.

In light of the obvious defects in the hearing record based on inadequate notice of the hearing, Citizen Action hereby formally requests that the recommended decision be held in abeyance, that the hearing be reopened, that certain witnesses in support of the amendments be made available for cross-examination and that evidence of opinion opposed to the amendments be heard.

Another comment to the recommended decision was received from Director L. T. Wallace, Department of Food and Agriculture, State of California. The Director was generally in agreement with the proposed recommended decision but did indicate some of the concerns with respect to the State of California:

* * * Developing of direct marketing programs may require regulations somewhat different from those commonly established for regular commercial shipments of fresh fruits both intra-and interstate. This would be especially pertinent with respect to grade, size, maturity, pack, and container issues applicable to local markets or under special shipping procedures. We hope that if regulations are made effective under the amended California Tree Fruit Agreement which are not compatible with this Department's programs for direct marketing, exceptions can and will be granted without undue delay.

It is noteworthy that Director Wallace reflected a sentiment that there was coamalgamation or blending of the State Marketing Orders, coming under the jurisdiction of California Tree Fruit Agreement, and the Federal Marketing Orders. For instance Director Wallace stated among other things in the aforesaid document: " * * * we state our concern primarily to encourage continuation of the coopera-

tion that we had experience in the past in the joint administration of Federal and State Marketing Orders."

After having considered the aforesaid exceptions to his recommended decision, the Secretary issued his final decision on April 5, 1976, 41 Fed. Reg. 14375. Among other things he found: "The evidence in the record of the hearings supports each proposal as set forth in the recommended decision."

It is interesting to note that with respect to the Order amending Order 917 [Docket No. AO-90-A6, signed on April 21, 1976, and effective April 29, 1976 (41 Fed. Reg. 17528, April 27, 1976)], the expense and assessment provisions set forth that the Committees were authorized to incur such expenses "as the Secretary finds are reasonable and are likely to be incurred" and that with respect to the *pro rata* share of the expenses to be incurred by each handler the same were to be amounts "which the Secretary finds are reasonable and are likely" to be incurred. Such statements, obviously, were not directed to situations where the expenses had already been incurred.

93. A hearing on whether there was a need for a Marketing Order relating to handling of Nectarines Grown in California, Docket No. OA-303, on March 19, 1958, and March 20, 1958, Mr. LeRoy Giannini appeared and testified in support of having an Order regulating Nectarines. He appeared as Chairman of the proponent Committee, namely the Nectarine Order Promulgation Committee. (Tr. 33 of that hearing record). Among other things to which he testified was the following: "The assessment rate for any fiscal period will be recommended by the committee, and it *should be approved by the Secretary each year prior to harvest.*" (Tr. 371 of that hearing). (Emphasis added).

Mr. Giannini confirmed that it was contemplated by the proponents of the Order that the Secretary would approve

and determine the initial assessment rate prior to the harvest season and should that prove to be faulty, then the Secretary was to be given special powers to make adjustments at or during or after the harvest season. In fact, Mr. Giannini testified, among other things: "If the assessment rate recommended by the committee and *fixed by the Secretary prior to harvest* is later found to be too low the committee should be authorized to recommend, and the Secretary to fix, a higher rate, even though some or all of the fruit has been shipped. Any such increase in rates should be applicable to all Nectarines shipped during the fiscal period. However, *the use of this authorization is considered by the proponents as an emergency measure not to be invoked unless all other methods of financing the season's operations are impractical.* Ordinarily, such a situation would be met by the use of reserve funds. (Tr. 372, 373 of that hearing record). (Emphasis added).

During other parts of his testimony Mr. Giannini joined others who testified as proponents of the proposed Order in seeking to assure that the Order procedures would be equitable to all concerned. In his testimony Mr. Giannini indicated that the proponents visualized the handling of assessment income, with a reserve permitted, to be in such fashion that it might never be necessary either to borrow money during the pre-harvest fiscal period or to return excess funds at the end of the fiscal period. This was, according to the proponents due to the fact that those who would undoubtedly pay the assessments, namely the growers, were engaged in a life time occupational pursuit; that there was not a frequent chance in the identify of the persons involved; and that it was known that the orchards were not frequently sold. Accordingly, Mr. Giannini indicated that the proponents believed that if the reserve fund tended to exceed the amount considered adequate, the assessment rate for the following year could be reduced; on the other hand if the reserve fund were to fall to a level

considered to low, the assessment rate could be slightly increased for the following year (Tr. 375, 376 of that hearing record)

Mr. Giannini in speaking for the proponents of the proposed Nectarine Order was concerned that it would be *inequitable to charge off purchases such as office equipment on a cash basis as opposed to depreciating same over a number of years*. In fact, his testimony was to the effect:

For instance, in the first year it's going to require a purchase of office equipment, space, desk, typewriters and so forth, and on a cash basis where you spend and refund at the end of the year, those items are expensed off during that year, and that is an expense that would go to the producer of that particular year, whereas if its — if you would put this on a business like basis and you were able to depreciate out over a number of years, certainly he [grower] would be able to benefit also. (Tr. 388 of that hearing record)

Mr. Giannini testified that in general, it was the intent of the proponents, with regard to administrative matters, to insure that the administration of its affairs by the Committee should be conducted in accordance with sound and usual commercial business practices. (Tr. 391 of that hearing)

94. Petitioners Wileman Bros. & Elliott, Inc., and Kash, Inc. (sometimes referred to as "Wileman/Kash"), are regulated pursuant to the Nectarine, Plum and Peach Marketing Orders (7 C.F.R. § 916.1, *et seq.* (Nectarines), and 917.1, *et seq.* (Plums and Peaches)).

95. The Secretary of Agriculture pursuant to Title 7, U.S.C. § 610b, is authorized to establish Committees and associations of producers "for the more effective administration of functions vested in [the Secretary] by this chapter" (Committees are "agencies," pursuant to 7 U.S.C. § 608c(7)(C)).

96. Thus, the Secretary's decisions to implement the promotional programs, published at 36 Fed. Reg. 14381 (August 5, 1971) (Plums), 41 Fed. Reg. 14375 (Peaches) and 31 Fed. Reg. 6371, 31 Fed. Reg. 8176, 8177 (1966) (Nectarines), were the Secretary's decisions on the record evidence presented at the formal rulemaking hearings cited therein.

97. Wileman/Kash are required to pay assessments pursuant to Marketing Orders 7 C.F.R. §§ 916. 1, *et seq.* (Nectarines) and 7 C.F.R. §§ 917. 1, *et seq.* (Plums and Peaches). The assessment rates are, theoretically, recommended by the Nectarine Administrative Committee for Nectarines and by the Control Committee of the California Tree Fruit Agreement for Plums and Peaches. These Committees are expected to determine the rates by dividing anticipated expenses by estimated shipments of the particular commodity. The Committees are organized on a fiscal year basis which begins on March 1 of each year (7 C.F.R. § 916.7 and § 917.9). The Committees are required to develop and submit to the Secretary for approval, a budget of their anticipated expenses for each fiscal year (7 C.F.R. 916.31(c) and 917.35(f)). Each particular budget is expected to be discussed and established at Committee meetings generally held in May and then forwarded to the Secretary of Agriculture for review and adoption. However, Committee meetings are not a source of reliance for meaningful participation by those who may be affected thereby or who have an interest therein.

For instance, the nominations meetings, conducted by Mr. Field, are regarded as a real pain (Tr. 4725) and a "dog and pony" show (Tr. 4727) but it is there that the growers are entitled to nominate and elect those whom they wish to represent them on the Committees. (Tr. 4727). When there are research meetings and presentations on research projects a different group of people show up — such as more grow-

ers. (Tr. 4728). At the promotion meetings there are more sales people and shippers.

98. On or about May 5, 1988, the Nectarine Administrative Committee met and recommended an 18-cents per carton assessment against each 25-pound net weight container of Nectarines packed by each handler. The Nectarine Administrative Committee adopted a budget of \$3,123,908 for the 1988 season, of which \$867,000 was allocated for inspection (\$.05 per carton), \$89,153 for research projects, approximately \$298,869 for salaries, employee benefits, travel, business meals, equipment, supplies, insurance, utilities, postage, paper, envelopes, special enforcement activity, credit insurance, etc. Other expenses included rent for their offices, telephones and other miscellaneous audit expenses amounting to approximately \$67,000. However, more than half of the Nectarine budget was to be directed to market development.

99. The Nectarine Administrative Committee approved a 1988 Nectarine Market Development Budget of \$1,801,886, which included: \$858,146 for television advertising; \$306,390 for radio advertising; \$114,750 for retail advertising incentives, plus another \$112,000 for field staff activities relating to the same; \$80,000 for Canadian advertising; \$27,200 for trade communications; \$22,500 for retail projects; \$35,600 for point of sale materials; \$59,100 for publicity, education activities; \$32,500 for food service activities; \$22,500 for promotion expense; \$6,950 for Hispanic promotion; and, \$13,250 for advertising research. This combined total amounted to approximately \$.10 per 25-pound net weight container towards the "generic" advertising budget.

100. On or about May 4, 1988, the Plum Commodity Committee met and recommended a 19-cents per container assessment against each 28 pound net weight carton of Plums packed by each handler. The Control Committee

adopted a budget for the Plum Commodity Committee of \$3,510,878 for the 1988 season, of which \$1,085,960 was allocated for inspection (\$.06 per carton), \$80,052 for research projects, approximately \$373,407 for salaries, employee benefits, travel, auto operation, equipment supplies, insurance, utilities, postage, paper, envelopes, special enforcement activity, credit insurance, etc. The other Committee expenses included rent for their offices, telephones and other miscellaneous audit expenses amounting to approximately \$87,350. However, more than half of the Plum budget was to be directed to market development.

101. The Plum Committee approved the Plum Market Development Budget of \$1,971,459 which included: \$850,719 to television advertising; \$306,390 for radio advertising; \$189,750 for retail advertising incentives, \$112,000 for field staff activities relating to the same; \$27,200 for trade communications; \$22,500 for retail projects; \$35,600 for point of sale materials; \$59,100 publicity, education activities; \$32,500 for food service activities; \$22,500 for promotion expense; and, \$6,950 for Hispanic promotion. This combined total amounted to approximately \$.10 per 28-pound net weight container towards the "generic" advertising budget.

102. On or about May 4, 1988, the Peach Commodity Committee met and recommended an 18-cents per carton assessment against each container of Peaches packed by each handler. The Control Committee adopted a budget for the Peach Commodity Committee of \$2,562,089 for the 1988 season, only \$896,000 of which was for inspection (\$.06 per carton), \$55,402 for research projects, and approximately \$330,352 for salaries, employee benefits, travel, auto operation, equipment supplies, insurance, utilities, postage, papers, envelopes, special enforcement activity, credit insurance, etc. Other Committee expenses included rent for their offices, telephones and other miscellaneous audit expenses

amounting to approximately \$52,350. However, more than half of the Peach budget was to be directed to market development.

103. The Peach Commodity Committee approved the Peach Market Development Budget of \$1,280,435, which included: \$456,135 to television advertising; \$220,000 for radio advertising; \$98,000 for retail advertising incentives; \$96,000 for field staff activities relating to the same; \$80,000 for Canadian advertising; \$27,200 for trade communications; \$22,500 for retail projects; \$25,300 for point of sale materials; \$59,100 for publicity, education activities; \$32,500 for food service activities; \$22,500 for promotional expense; \$6,950 for Hispanic promotion; and \$13,250 for advertising research. This combined total amounted to approximately \$.09 per container towards the "generic" advertising budget.

104. The term "Market Development" as used by the Committees, includes field staff activities, retail advertising incentives, trade communications, retail projects, point of sale materials, publicity, education activities, food service activities, TV and radio production, television and radio advertising, outdoor advertising, Canadian promotion, promotion research, merchandising research, promotion expense, Hispanic promotion and miscellaneous related expenses.

105. Thus, over \$4,800,000 was being directed by the Nectarine, Plum and Peach Committees to conduct "generic" advertising, while approximately \$4,378,000 was being used for actual Committee expenses, including research projects.

106. Subsequent to the filing of a Petition in a prior 7 U.S.C. § 608c(15)(A) proceeding (AMA Docket Nos. 916-1, 916-2, 917-2, 917-3), the Secretary of Agriculture, on April 8, 1988, issued for the first time, a proposed rule to incorporate the term "well-matured." This proposed rule

intended, with respect to Plums, to regulate out smaller-sized Plums, to incorporate a procedure for requesting variances from the proposed "well-matured" maturity standard which was to be determined by the use of color chips, which were to be applied by the Federal-State Inspection Service. (53 Fed. Reg. 11669); Petitioners' Appendix to Brief (hereafter "A.B." No. 2). This proposed rule provided that interested persons could file comments through April 25, 1988. Subsequently, the time period for filing written comments on the proposed rule was extended to May 2, 1988 (53 Fed. Reg. 13413; Petitioners' "A.B." No. 3).

107. On April 18, 1988, the Secretary issued proposed rules (virtually identical to those above-mentioned relating to Plums) with respect to eliminating smaller-sized Nectarines and Peaches, incorporating a variance request procedure and implementing the "well-matured" maturity standard to be determined by the use of color chips, which were to be applied by the Federal-State Inspection Service. (53 Fed. Reg. 12687 (Nectarines); 53 Fed. Reg. 12691 (Peaches); Petitioners' "A.B." Nos. 4 and 5, respectively). The proposed rule provided that interested persons could file comments through May 3, 1988. In his proposed rule for Nectarines, the Secretary set forth the following reasons for not providing a 30-day notice and comment period as required by the Administrative Procedure Act:

A comment period of less than 30 days is deemed appropriate for this proposal. The harvest and shipment of the 1988 nectarine crop is expected to start April 22, 1988, and growers and handlers should be given as much notice as possible of any changes, if adopted to permit the industry to plan accordingly. Moreover, the Department already has received fetters in opposition to the proposed nectarine size changes indicating the industry is aware of

the Committee's recommendation. (53 Fed. Reg. 12690).²

108. On May 27, 1988, the Secretary issued Interim Final Rules, purportedly binding on Wileman/Kash, which substantially altered the maturity determinations and the procedure for requesting variances from the new maturity determinations. The Interim Final rules, as published, were substantially different than those set forth in the proposed rules issued approximately five weeks earlier. In said Interim Final Rules, the Secretary rejected the Plum Committee's proposal to eliminate small-sized Plums, but at the same time, the Secretary adopted the respective Committee's proposals to eliminate small-sized Nectarines and Peaches (53 Fed. Reg. 19218 (Plums); 53 Fed. Reg. 19226 (Nectarines); 53 Fed. Reg. 19234 (Peaches); Petitioners' "A.B." Nos. 6, 7 and 8, respectively).

109. Wileman/Kash, through their attorney, submitted comments in opposition to the proposed rule modifications regarding Plums, Nectarines and Peaches. Subsequent to the issuance of the Interim Final Rules, Wileman/Kash, through their attorney, submitted comments in opposition to the Interim Final Rules as published.

110. Consequently, on or about June 3, 1988, Wileman/Kash filed the present 7 U.S.C. § 608c(15)(A) Petition to modify, terminate or to be granted an exemption from various provisions of the Nectarine, Plum and Peach Marketing Orders and any obligations imposed in connection therewith that are not in accordance with law.

111. In conjunction with the filing of the 7 U.S.C. § 608c(15)(A) Petition, Wileman/Kash filed an Application for Interim Relief, pursuant to the Rules of Practice

² The explanation given by the Secretary (except for the fruit harvest start-up dates) for his failure to comply with the requirements of the Administrative Procedure Act and his own departmental policy read identically, with respect to Plums and Peaches, as the above-cited statement regarding Nectarines.

Governing Administrative Petition Proceedings, Title 7 C.F.R. § 900.70.

The United States Department of Agriculture responded and opposed the Application for Interim Relief, claiming that the Secretary had no authority to grant interim relief, to which Wileman/Kash responded. The Judicial Officer agreed with the position of the United States Department of Agriculture, indicating that jurisdiction did not exist to grant interim relief. The Judicial Officer, on July 8, 1988, signed an order denying Wileman/Kash's Application for Interim Relief. Wileman/Kash, on or about July 29, 1988, filed a Motion for Reconsideration of the Order Denying Interim Relief, which Motion was denied on August 3, 1988.

112. On June 16, 1988, for the first time this decade, the Secretary issued a proposed rule regarding the estimated assessment rates. This rule was published in the Federal Register (53 Fed. Reg. 23243) on June 21, 1988 (Petitioners' "A.B" No. 9). The proposed rule provided that interested persons could file comments through July 1, 1988. On July 19, 1988, the Secretary issued a final rule with respect to the assessment rates (53 Fed. Reg. 27151; Petitioners' "A.B" No. 10). In his final rules the Secretary set forth the following reasons for not providing a 30-day notice and comment period as required by the Secretary's own "Departmental Regulation," 1512-1, and by the Administrative Procedure Act:

The budgets are formulated and discussed in public meetings. Thus all directly affected persons have an opportunity to participate and provide input. . . .

Approval of the expenses, assessment rates, and operating reserves should be expedited because the committees need to have sufficient funds to pay their expenses which are incurred on a continuous basis. In addition, handlers are aware of this action which was recommended by the

committees at public meetings. Therefore, the Secretary also finds that good cause exists for not postponing the effective date of this action until 30 days after publication in the Federal Register. (53 Fed. Reg. 27152).

The Secretary further stated:

While this section will impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be significantly offset by the benefits derived from the operation of the marketing orders. Therefore, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities. (53 Fed. Reg. 23244, 27152).

113. A significant portion of the monies being levied against Wileman/Kash are being utilized by the various Committees and the California Tree Fruit Agreement for research projects to which Wileman/Kash do not subscribe. These research projects include paying individuals and firms for writing reports ostensibly showing that "generic" advertising is beneficial to the industry.

114. Only 5-to-6 cents per container is being levied against Wileman/Kash in assessments to provide for inspection services to inspect the fruit. Whereas, approximately 10 cents is levied per container to generically advertise fruit. Wileman/Kash are vehemently opposed to spending their money to advertise other handlers' fruits.

115. As a result, Wileman/Kash paid their 1987 assessments into an attorney client trust fund account, held by their attorney of record. The Department of Agriculture then threatened to bring an action to recover the 1987 assessments.

116. Wileman/Kash through their counsel, attempted, on several occasions, to negotiate a settlement of the

Marketing Order issues in dispute in order to avoid suit being filed. Wileman/Kash offered various alternatives: (1) a stipulation that the money would be returned in the event Wileman/Kash prevailed in the administrative Petition proceeding; (2) the assessment funds would be deposited with the Secretary of Agriculture pending the outcome of the administrative Petition proceeding, to be returned to Wileman/Kash if Wileman/Kash prevails; and (3) maintain the assessments in an interest bearing client trust account with or without the Department of Agriculture (at its option) being cosignatory to said client trust fund account. The Department of Agriculture refused all proffered options.

117. On October 28, 1988, the United States Department of Agriculture, through the U.S. Attorney's Office, filed a collection action for the 1987 and 1988 assessments levied against Wileman/Kash. Subsequently, a First Amended Complaint was filed (Petitioners' "A.B." No. 11), to which Wileman/Kash filed an Answer (Petitioners' "A.B." No. 12), a Counter-Claim, a Third Party Complaint against Richard Lyng, who was, at that time, the Secretary of Agriculture and a Cross-Motion for a Stay of the Government's First Amended Complaint (Petitioners "A.B." No. 13), along with the Declaration of Thomas E. Campagne, in Support of the Motion for a Stay (Petitioners' "A.B." No. 14).

118. On January 31, 1989, counsel for Wileman/Kash, Thomas E. Campagne, and counsel for Plaintiff in the assessment collection action, U.S. Attorney Mark E. Cullers, attended a Status Conference before U.S. Magistrate Allan D. Christensen. At that time Mr. Cullers requested that the Status Conference be continued until April 25, 1989, to allow the Ninth Circuit Court of Appeals to rule on related issues, pending before that Court, regarding the instant parties. Mr. Cullers indicated the Ninth Circuit

decision might be dispositive of the collection action. However, rather than waiting for that decision to be issued, Mr. Cullen wrote and filed a Motion for Summary Judgment.

119. On June 12, 1989, argument was scheduled before the Federal Judge for the Eastern District of California, the Honorable Edward Dean Price. Judge Price limited argument solely to Wileman/Kash's Motion to Stay the First Amended Complaint (the collection action) (Petitioners' "A.B." No. 13).³ In his Decision, issued July 6, 1989, Judge Price ordered the United States Department of Agriculture's assessment collection action "stayed until such time as the validity of the marketing orders may be finally determined." Judge Price's ruling encompassed not only the 1987 and 1988 assessments, but all future assessments levied against Wileman/Kash and such assessments were ordered placed in Wileman/Kash's attorney client trust account pending the final determination of the validity of the Marketing Orders (Petitioners' "A.B." No. 16). The Administrative Law Judge is without current knowledge of the attorney-client trust fund administered by the Court.

120. During the course of the summer, 1989, Wileman/Kash became aware of the existence of a "private" corporation entitled the Tree Fruit Reserve. Any prior awareness of the name Tree Fruit Reserve certainly did not encompass what was brought out at the oral hearing and it was only through the issuance of Subpoena Duces Tecum did such data become available. Under date of July 7, 1989, Jonathan W. Field (Manager of the California Tree Fruit Agreement), as the *Secretary-Treasurer of the Tree Fruit Reserve*, issued a letter to a segment of the tree fruit industry eliciting support for the Law firm of Heron, Burchette,

³The transcript of the Motion's hearing is attached to Petitioners' Post Hearing Brief as "A.B." No. 15.

Ruckert & Rothwell to intervene on behalf of the United States Department of Agriculture before the Judicial Officer in an attempt to overturn the decision of Administrative Law Judge Dorothea A. Baker in the Wileman Bros. & Elliott, Inc. and Kash, Inc., 1987 — 7 U.S.C. § 608c(15)(A) Petition Hearing (AMA Docket Nos. F&V 916-1, 916-2, 917-2, 917-3). In that letter, Mr. Field made reference to the Tree Fruit Reserve as being "a non-profit corporation established in 1957 to represent the tree fruit industry in these matters, [which] along with many industry leaders is proceeding to intervene on behalf of the industry." (Attachment to Petitioners' Post Hearing Brief as "A.B." No. 17).

121. After becoming aware of the existence of the Tree Fruit Reserve, Wileman/Kash made efforts to determine the composition of and the purpose for the existence of the Tree Fruit Reserve. What Wileman/Kash found, and what was proved at the hearing, is that the Tree Fruit Reserve is the "alter-ego" of the Commodity Committees, and the California Tree Fruit Agreement. The Agricultural Marketing Agreement Act, the Marketing Orders and various United States Department of Agriculture guidelines strictly regulate how assessment monies, mandatorily collected from handlers, may be spent by Commodity Committees, and further, strictly regulate the subjects upon which such expenditures may be made.

122. The Tree Fruit Reserve, acting with the identical Board that controls the California Tree Fruit Agreement, has expended, and continues to expend amounts derived from handler-assessment funds mostly in the form of "rents," in a manner and on projects strictly prohibited to the Secretary of Agriculture. Wileman/Kash proved that the Officers and members of the Tree Fruit Reserve are also the Chairmen and members of the various Tree Fruit Committees. Further, the Tree Fruit Reserve owns the

buildings, automobiles, and the office equipment used by the California Tree Fruit Agreement. The California Tree Fruit Agreement then rents their office space, their automobiles and their office equipment, at rates which can be considered excessive from the Tree Fruit Reserve.

123. The Tree Fruit Reserve was incorporated in 1957, as a non-profit California corporation, which obtained tax exempt status from the Internal Revenue Service as a 501(c)(6) organization. Its initial funding came from excess assessments not needed by the Committees at that time, to further promote the legitimate purposes of the Marketing Orders and the Agricultural Marketing Agreement Act.

124. In 1957, refunds could have been obtained by handlers with respect to excess assessments and some handlers did receive assessment refunds. However, those excess assessments which were not refunded became the "seed" money for the formation of the Tree Fruit Reserve, which was accomplished through a Tree Fruit Reserve Trust Account.

The Respondent's contention is that the "seed money" did not come from excess assessments because:

"* * * The Act and the order as it was written at that time provided they had to make refunds to people if, you know, they didn't spend the money during the year. So everybody was offered a refund and if they chose to send it somewhere else, it's their business. (Tr. 2715)."

This contention is fallacious because such "seed" money came from tax deductible amounts.

125. The purpose of the Tree Fruit Reserve's existence is to engage in acts which are illegal and beyond the authority for the Secretary of Agriculture to engage in. The collection and expenditure of assessments are subject to the jurisdiction, revision and approval of the Secretary of Agriculture.

The Tree Fruit Reserve has been, and is being, used to divert assessment monies, resulting in higher handler assessments than would otherwise be required to achieve the legal and legitimate objectives of the Agricultural Marketing Agreement Act and the Marketing Orders. This is not a circumstance where one is unduly scrutinizing every penny spent for rents as well as the other activities of the Committees. The Tree Fruit Reserve was established, and, admittedly, continues to operate, in a manner to avoid proscriptions, limitations and restrictions placed upon the Secretary of Agriculture, the Commodity Committees and their agents by the Agricultural Marketing Agreement Act and the provisions of the Orders.

The record is replete with acknowledgements and admissions of the role played by Mr. Kurt Kimmel and the Tree Fruit Reserve and although it did concern Mr. Kimmel, the Agricultural Marketing Service representative, that the Tree Fruit Reserve was being used as a vehicle "to avoid prohibition on the expenditure of assessments by commodity committees." (Tr. 2711), nevertheless, he acknowledged the Tree Fruit Reserve corporation as a vehicle to accomplish acts which are illegal for the Secretary or his appointed Committeemen to do:

Because they can do things as Tree Fruit Reserve trustees or executive committee members that they cannot do as California Tree Fruit Agreement chairmen. (Tr. 2700. 2701). (Emphasis added).

This included spending money on private lawyers, and spending money on lobbying. (Tr. 2701). The Tree Fruit Reserve acquired useable assets which had been fully depreciated ("expensed") by the California Tree Fruit Agreement at "salvage" value (or \$1.00) which it subsequently rented back to the California Tree Fruit Agreement. (Tr. 2728). By making contributions through the Food and

Fiber alliance, the Tree Fruit Reserve obtained a seat on the Board of Food and Fiber. (Tr. 3478, 3479).

The role played by the Tree Fruit Reserve was no secret to the Department of Agriculture, but may not, and probably wasn't known to growers and handlers. (Tr. 2699, 2711). There was a 1988 meeting where the Chief of the Marketing Order Administrative Branch from Washington, D.C., expressed Agricultural Marketing Service's concern with the relationship between the Tree Fruit Reserve and the Committees and the Chairmen which meeting was held in the California Tree Fruit Agreement's office. (Tr. 2697). At that meeting the Washington representative was concerned that the California Tree Fruit Agreement was doing certain services for the Tree Fruit Reserve for which it was not receiving any spelled out remuneration. (Tr. 2703, 2704).

126. Because the Tree Fruit Reserve was being used as a subterfuge to accomplish ends not available to the Secretary of Agriculture, an examination of its operations as they may pertain to matters of the present case, casts substantial doubt as to whether it should be regarded as a private, tax exempt, non-profit corporation at all. If so, piercing of the corporate veil, for the purposes of this proceeding, is warranted.

127. The Petitioners have noted, and the Respondent has not disagreed (although it has not directly addressed such facts) that the California Corporations Code requires that the Bylaws shall set forth the number of Directors of a corporation unless such provision is contained within its Articles of Incorporation. The Bylaws may not change the number of Directors other than through an amendment to the Bylaws adopted by the membership of the corporation. The Bylaws may not conflict with the Articles of Incorporation (California Corporations Code §§ 7151(a), (b) and (c)).

The Bylaws of the Tree Fruit Reserve Corporation directly conflict with its Articles of Incorporation. The Bylaws specify that the corporation shall have 25 Directors, comprised of 12 tree fruit handlers/shippers and 13 tree fruit growers. However, the Articles of Incorporation, in direct conflict with the Bylaws, state that "the number of Directors shall be three." (Exh. No. 30). No reasonable explanation has ever been provided to explain this glaring discrepancy.

Regardless of the reasons for the discrepancy in the number of authorized Directors, there is no question that drafting the Bylaws in conflict with the Articles of Incorporation fails to satisfy the due care requirements mandated by the California Corporations Code.

128. Added to this discrepancy is the Tree Fruit Reserve's complete failure to comply with California corporate law. The California Corporations Code at § 7220(a) states that: "Directors shall be elected for such terms . . . as are fixed by the Articles or Bylaws."

The Bylaws of the Tree Fruit Reserve specify that the terms of office for each Director *shall* be one year and that the Directors *shall* be nominated and elected by the members at the annual meeting. The Tree Fruit Reserve has failed to conduct an annual meeting for the last ten years. In fact, the President of the Tree Fruit Reserve, Mr. Al Peterson, has no recollection of ever having conducted either an annual meeting of members and/or a meeting of the full Board of Directors. (Tr. 1538). Mr. Peterson stated that by virtue of his having been elected to the Control Committee of the California Tree Fruit Agreement, he was automatically placed on the Board of Directors of the Tree Fruit Reserve, he was not elected. Everyone who is a member of the Control Committee of the California Tree Fruit Agreement automatically sits in the dual capacity as a Director of the Tree Fruit Reserve. (Tr. 1535).

129. "A regular meeting of members *shall* be held on a date and time, and with the frequency stated or fixed in accordance with the Bylaws" (California Corporations Code § 7510(b)). The Bylaws of the Tree Fruit Reserve specify that meetings will be held annually. As stated above, the Tree Fruit Reserve has failed for the last decade to comply with the requirement that an annual meeting of the members of the corporation be conducted.

130. Shortly before the oral hearing herein, Mr. Jonathan Field, as the Secretary-Treasurer of the Tree Fruit Reserve, on January 4, 1990, sent a letter to the alleged Directors of the Tree Fruit Reserve which stated, among other things:

"The Law Firm of Thomas E. Campagne, which represents Wileman Bros. & Elliott and Kash, Inc. in their lawsuits and petition involving the California Tree Fruit Agreement, has recently directed their legal attack on the industry and Marketing Orders by attacking Tree Fruit Reserve. Campagne has also alleged that the Tree Fruit Reserve has been the body which has made quality decisions rather than Tree Fruit Agreement. They have alleged that Tree Fruit Reserve has laundered assessment money to be spent on actions/activities contrary to the industry and the Marketing Act.

It has been discovered that the Executive Committee of Tree Fruit Reserve has been making decisions on behalf of the Board of Directors under their authority as outlined in the bylaws in recent years. It is necessary that the present Board of Directors of Tree Fruit Reserve convene to review and possibly ratify the decisions of the Executive Committee. For your preparation and review, a listing of the recommendations of the Executive committee is attached along with a summary of the Tree Fruit Reserve activities from 1957 to the present." (Exh. 169(A)). (Emphasis added).

Mr. Field's letter had attached a synopsis of the history and background of the Tree Fruit Reserve. This was to inform the letter's recipients, who might not have known that they were Directors of the Tree Fruit Reserve, just what the Tree Fruit Reserve was. The letter called for a "very important meeting" on January 17, 1990, as "*It is necessary to bring the corporate records of Tree Fruit Reserve into compliance with technical corporate procedure.*" (Emphasis added). As Wileman/Kash alleged, there is evidence that the industry was not aware of the operation of the Tree Fruit Reserve and its relationship to the California Tree Fruit Agreement. This letter confirms that fact and seems to indicate that not all the "Directors" of the Tree Fruit Reserve were aware of its existence. Mr. Field's "history and background" sets forth the formation and the purpose for the existence of the Tree Fruit Reserve. Mr. Field's request for an emergency meeting was to ratify previously *ultra vires* conduct. (Exh. No. 169(A)).

131. Subsequent to the issuance of Mr. Field's letters, on January 17, 1990, a meeting of the Board of Directors of the Tree Fruit Reserve was conducted at the Red Lion Inn, in Sacramento, California. Eleven persons designated as Directors were in attendance and three others attended pursuant to telephone tie-in. Also in attendance at this meeting was Mr. Bill Thomas and Mr. Mike LeLouis, attorneys for the Law Firm of Heron, Burchette, Ruckert & Rothwell. Mr. Thomas explained to those present that the activities of the Tree Fruit Reserve were presently being scrutinized. He advised that Administrative Law Judge Dorothea A. Baker had ordered production of the records, including corporate records of the Tree Fruit Reserve to include the Board Minutes. Mr. Thomas went on to explain that:

"In assembling the documents [pursuant to Judge Baker's Order], it became apparent that *attention to some of the corporate details had not been fully satisfied.* Prior

to 1982, there were annual Board meetings as well as Executive Committee meetings. It had been a practice consistent with the Bylaws that the corporation would be generally run by the Executive Committee. In the past, CTFA decisions were made by the Control Committee and many of the same members of the Control Committee were on the Reserve Board of Directors. Because of this, it was convenient to hold meetings for both on the same day. By 1982, the operation of CTFA was delegated by the Control Committee to the Management Services Committee which represented all programs managed by CTFA. The Tree Fruit Reserve Bylaws fully empower the Executive Committee to make corporate decisions and no actions have been taken or approved in an improper manner. He said the only problem has been the routine corporate meeting requirements." (Exh. No. 169(B)).

132. The Tree Fruit Reserve did not have any members, and the President of that corporation was unaware how one would become a member.

133. Although the validity of the Tree Fruit Reserve's tax exempt status is not an issue herein, certain factors became pertinent as to the *bona fides* of the Tree Fruit Reserve. The evidence shows that the Tree Fruit Reserve filed annual IRS Forms 990. (Tax Return Of An Organization Exempt From Income Tax). Mrs. Dawn Rau, a CPA with Grant Bennett Associates in Sacramento, testified that she has been personally involved in the preparation of the tax returns and the yearly financial audits of the California Tree Fruit Agreement, the Nectarine Committee, the Plum Committee, the Peach Committee and the Tree Fruit Reserve, since 1983. (Tr. 59-62). Mrs. Rau testified that she has the responsibility of verifying, as part of the audit, that the corporate responsibilities of the corporation are met, Minutes are kept, etc. In her opinion, the records of the

organizations have been normally and properly maintained (Tr. 63-65).

Although Respondent argues that the Tree Fruit Reserve is a private corporation which is unrelated to the Commodity Committees and/or the California Tree Fruit Agreement, Mrs. Rau has specifically found, in her preparation of the financial statements on behalf of the Tree Fruit Reserve that: "The Tree Fruit Reserve and the California Tree Agreement are affiliated non-profit organizations; the Tree Fruit Reserve receives all of its operational revenue from the CTFA in the form of rent on buildings, automobiles, office equipment These amounts arise from related party transactions with the CTFA" (Ex. No. 204).

134. In spite of her acknowledgement, in the Tree Fruit Reserve financial statement, of the interrelationship between the Tree Fruit Reserve and the California Tree Fruit Agreement, the evidence does not show that Mrs. Rau provided this same information to the Internal Revenue Service. For example, with respect to page 4 of the IRS Form 990, submitted on behalf of the Tree Fruit Reserve, several discrepancies exist which to date go unexplained. Although Mrs. Rau states that ". . . The Tree Fruit Reserve and the California Tree Fruit Agreement are affiliated non-profit organizations," she denies on the IRS Form 990 that the Tree Fruit Reserve is interrelated with any other organization. (Ex. Nos. 272-296).

135. Although on the financial statement of the Tree Fruit Reserve for the fiscal year ending February 28, 1989, there is acknowledged a contribution to the California Grape and Tree Fruit League to support the Alliance for Food and Fiber to counter pesticide legislation (Exhibit No. 204), Mrs. Rau denies on the IRS Form 990 that any amounts were spent in attempts to influence public opinion about legislative matters or referendums. (Ex. No. 272). This directly contradicts the entry in the financial statement.

136. Although the 1988-1989 financial statement of the Tree Fruit Reserve, as prepared by Mrs. Rau, sets forth \$5,437.00 as unrelated income generated during the 1988-89 fiscal year (Exhibit 204), Mrs. Rau denies on the IRS Form 990 that the Tree Fruit Reserve generated in excess of \$1,000.00 in unrelated income during this time frame. (Ex. No. 272).

137. Although it was testified that the computer and press purchased by the California Tree Fruit Agreement in 1986 was transferred to the Tree Fruit Reserve for little or no remuneration in 1987 (Tr. 3463), the IRS Form 990s prepared by Mrs. Rau, fail to reflect that the organization received donated services or the use of materials, equipment or facilities at no charge or substantially less than fair rental value. (Ex. Nos. 272-275).

In addition, the Tree Fruit Reserve was regarded as an instrument for tax diminishment:

* * * Mr. Rasmussen confirmed that it was the industry's intention to provide Mr. Geller with the trip, not a tax liability, and that *Tree Fruit Reserve* should reimburse for any additional expense created. (Emphasis added). (Exh. 157, p. 3).

The manner of handling the Tree Fruit Reserve's "reimbursement" to Mr. Geller, is not as important as the fact that Tree Fruit Reserve was being used for personal, private considerations. When it would be regarded as inappropriate for the California Tree Fruit Agreement to fund a trip to Washington, it " * * * could be funded through Tree Fruit Reserve. * * * (Ex. 157, p. 9).

138. As for the fiscal years ended February 28, 1988 and 1989, the Tree Fruit Reserve Balance Sheets reflect Insurance coverage (fire and extended) on its building of \$378,000; \$83,000 coverage on its business property and \$36,000 coverage on other business assets. Said Balance

Sheets (Exh. 214) further reveal that its building and land were carried on its books as:

	1988	1989
Building	\$117,766	\$121,161
Land	16,769	16,769

with a reserve for depreciation of \$149,023 in 1988 and \$165,564 in 1989. The accumulated surplus was:

1988: \$270,802
1989: \$238,338

139. Another instance of where the "unity" between the California Tree Fruit Agreement and Tree Fruit Reserve tended to enhance handler assessments is that of the "ripening bowl," a plastic bowl into which the consumer places fruit and the ripening process is accelerated by the trapped ethylene gas emitted from the fruit. This was profitably marketed through the California Tree Fruit Agreement since 1978, but the profits generated therefrom now go to the Tree Fruit Reserve.

Exhibits Nos. 129 through 156 chart the progress and profitability of the ripening bowl (being the Minutes of the Management Services Committee). At the November 12, 1985, Management Services meeting, Mr. Sanderson, the then manager of California Tree Fruit Agreement mentions that the industry was becoming bored with the ripening bowl; sales were down; it was therefore decided to discontinue production of the bowls. (Tr. 4707-4708). Exhibit 156 reveals that in the 6-7 year period, the bowls had generated in excess of \$300,000.

140. A review of the joint Minutes of the Management Services Committee and the Executive Committee of the Tree Fruit Reserve, dated December 7, 1987 (Exhibit No. 163), shows that, without discussion, the California Tree Fruit Agreement casually referenced that it was considering re-introducing the ripening bowl. Then, at the very

next meeting, on May 3, 1988, the ripening bowl was voted back into existence. However, this time not by the California Tree Fruit Agreement, instead, the Tree Fruit Reserve would thereafter market the bowl. (Ex. No. 164).

141. In a separate set of Minutes, also dated May 3, 1988, which references a meeting of the Executive Committee of the Tree Fruit Reserve, Mr. Jonathan Field discusses the ripening bowl. The May 3, 1988, meetings of Management Services and the Executive Committee of the Tree Fruit Reserve, are in actuality one meeting that is reflected in separate Minutes. This was done as a result of the United States Department of Agriculture indicating that there should be more separation between the entities. So, rather than have separate meetings, they merely created separate minutes of the same meeting. Mr. Jonathan Field stated that the California Tree Fruit Agreement did not desire to re-enter the ripening bowl business and suggested that the Tree Fruit Reserve handle the sale of the bowl, as there was reduced consumer interest in the ripening bowl. (Ex. No. 164A).

Jonathan Field in his testimony, sought to justify the transfer of the ripening bowl from the California Tree Fruit Agreement to the Tree Fruit Reserve because of the amount of staff time spent by the California Tree Fruit Agreement which wasn't reflected in its "profit" although this was not documented. In essence he stated that there was a minimal profit, if any, made on the ripening bowls. (Tr. 4708-4709). Mr. Field testified that all remaining inventory and/or supplies relating to the ripening bowl were purchased by the Tree Fruit Reserve from the California Tree Fruit Agreement. He stated that there wasn't very much because the California Tree Fruit Agreement had been out of the ripening bowl business "for so many years" (one year). (Tr. 4709-4710). A review of the Tree Fruit Reserve's Summary of Income and Expenses attached to the Minutes of the

Executive Committee of the Tree Fruit Reserve, dated May 2, 1989 (Ex. No. 167), points out that ripening bowl income (before estimated expenses of \$112,000) for the first year after its reintroduction exceeded One Hundred Twenty-Five Thousand Dollars (\$125,000).

142. Respondent's contention that the Tree Fruit Reserve "purchased" the rights to the ripening bowl from the California Tree Fruit Agreement cannot be substantiated. Neither the financial statements of the California Tree Fruit Agreement nor those of the Tree Fruit Reserve show any transfer of funds from the Tree Fruit Reserve to the California Tree Fruit Agreement for materials, product or the right to market the product.

143. The wishes of the California Tree Fruit Agreement could be carried out anonymously through the use of the Tree Fruit Reserve, as can be discerned from Minutes such as contained in Exhibit 157 being "MANAGEMENT SERVICES COMMITTEE, MINUTES EXECUTIVE COMMITTEE, TREE FRUIT RESERVE."

* * * * *

* * * The All Programs Statement includes estimates for all expenses for the fiscal year ending February 28, all payments by CTFA to Tree Fruit Reserve including equipment and rent and payment in full of all Shipping Point Inspection charges for the 1985 season. * * *

* * * * *

Tree Fruit Reserve

Mr. Sanderson then reviewed the *Tree Fruit Reserve Income Statement* (copy attached) projected to February 28, 1986. *Cash on hand March 1, 1985, was \$138,519.27.* During the year income was received for

rent, interest, sale of furniture, rent on furniture and equipment, and usage of company cars in the amount of \$58,130.02. Expenses included \$4,868.08 to build new office space, two new cars at \$20,466.06, the premium on the bankruptcy insurance at \$11,225 and additional new office furniture purchased for new employees Deborah Beall and Ray Pisciotta. Total expenditures were \$55,071.09 leaving a projected balance on hand of \$141,578.20. In response to Mr. Giannini, Mr. Field pointed out that the philosophy of CTFA in its investment practices is to be very conservative. Mr. Field stated, however, that all available monies are invested in interest bearing accounts and, within the conservative guidelines and requirements of the Federal Government for collateral, are invested to generate as much income as possible. (Emphasis added).

*** In response to a question, Mr. Muck pointed out that CTFA cannot hire agencies or bill collectors to pursue delinquent accounts. It was also pointed out that the major area of difficulty with bankruptcy insurance is the U.S.D.A. requirement on confidentiality of grower and shipper records.

Mr. Sanderson stated that due to the Tax Reform Act of 1985, *he decided after much deliberation that personal use of employer-provided vehicles should be reported.* Hence, 1099s for personal use of company vehicles have been issued to employees based on 30% of lease value or mileage logs in Sacramento and 15% of lease value or mileage logs for field personnel. (Emphasis added).

Mr. Sanderson stated that he had been advised Mr. Geller is to be reimbursed for any tax liability incurred due to issuance of 1099s, including that issued in connection with Mr. Geller's trip. *Mr. Rasmussen confirmed that it was the industry's intention to provide Mr. Geller with the trip, not with a tax liability, and that Tree Fruit Reserve should reimburse for any additional expense created.* Mr. Sanderson stated that although he does not necessarily agree with IRS reporting policies, he feels it is inconsistent for organizations involved in the enforcement of regulatory provisions not themselves to observe such laws.

Computer

*** The total cost of hardware and software under three pricing systems available is as follows: retail, \$78,118; GSA, which does not involve sales tax, \$51,039; and state, which includes sales tax, \$55,127. The items to be purchased, with both the Sacramento and Dinuba offices in mind, would include IBM System 36 hardware, software, two IBM XT's, two printers and five display stations. The additional cost of first year maintenance, warranty, education and installation would be approximately \$11,122.

Mr. Muck noted that CTFA was an instrumentality of the Federal Government, not an agency, and that other marketing orders had tried to get GSA prices without success. Mr. Sanderson stated that the CTFA office nonetheless would attempt to purchase the system at GSA prices to save the \$4,000 sales tax and accordingly pay for the computer out of CTFA funds. The consensus of the committee was to proceed to purchase the computer system and to make sure the system was adequate to meet the present and future needs of CTFA.

*** In response to Mr. Giannini, Mr. Muck stated that the three branches of the AMS have been combined into a single branch, with those branches being divided by function — one to review quality control programs, one to review volume control programs and another program to review regulations and advertising. Mr. Giannini asked if these separate sections were autonomous. Mr. Muck replied in the affirmative, *although final approval still lies with the Director of AMS.* ***

*** Mr. Giannini stated that he would not be going to Washington but asked whether CTFA might finance the trip for a Committeeman. Mr. Muck stated that the trip *could be funded through Tree Fruit Reserve.* It was moved by Mr. Petersen, seconded by Mr. Pinkham and unanimously passed for Tree Fruit Reserve to finance a trip to Washington for Mr. Micky George to review the protocol for Japan and Pacific Rim countries. ***

Mr. Sanderson reported that he recently attended a meeting concerning the Alliance for Food and Fiber at the Sacramento airport. Ms. Pam Jones is the director of this effort and at the meeting the Table Grape and Lettuce Commissions offered funding in the amount of \$20,000 and \$13,000, respectively, to try to counter adverse public opinion on the use of chemicals. Mr. Sanderson has been advised by Mr. Durando that the Grape and Tree Fruit League would soon request a contribution from the California Tree Fruit Agreement to support the Alliance. Mr. Sanderson characterized the request as a "sticky wicket" and said he is troubled by the implication of a marketing order program contributing to this organiza-

tion. *** Mr. Rasmussen stated that the Table Grape Commission is not providing money directly to the Alliance but has arranged to contribute through the Grape and Tree Fruit League. Mr. Muck stated that marketing order programs cannot fund the Alliance.

Mr. Rasmussen suggested that each commodity fund the project at \$5,000 but not be committed beyond one year. It was moved by Mr. Pinkham, seconded by Mr. Petersen and unanimously passed that Tree Fruit Reserve contract with the Grape and Tree Fruit League to provide \$20,000 to fund the Alliance for one year based on adequate reporting of the activities and that CTFA not be named directly as a sponsor of the program.

144. Pursuant to the Agricultural Marketing Agreement Act, both Marketing Orders 916 and 917, have "termination" provisions whereby the *Committee* becomes trustee for the purpose of liquidating the affairs of the Committees, including such duties as *accounting to the Secretary* and to dispose of funds not required to defray the expenses of liquidation in such manner as the Secretary may determine, *Provided, that to the extent practical, such funds shall be returned pro rata to the persons from whom such funds were collected.*

145. The Tree Fruit Reserve, a non-profit corporation, has no such obligations to abide by provisions of the Orders upon termination, and has made provisions to have its assets go to the University of California, at Davis. Thus, in the event of termination, the growers and handlers will never recover the excess amounts which they have paid as a result of the activities and close relationship of the Tree Fruit Reserve to the California Tree Fruit Agreement — a result contrary to the provisions of the Marketing Orders.

146. During the course of the *Wileman/Kash I* and *Wileman/Kash II* cases, the Department has defined the California Tree Fruit Agreement in various ways both at the hearings and on brief which has resulted in inconsistency of position. In the instant proceeding, Respondent contends that the California Tree Fruit Agreement is a lawful entity. However, in Federal District Court Case No. CV-F-87-392-EDP, Respondent argued successfully, that, among other things, the California Tree Fruit Agreement was not a legal entity — which the Honorable District Court Judge Edward Dean Price found after his review of the U.S. Attorney Carl Blackstone's Declaration in that record filed July 11, 1987.

In addition to the record evidence relating to the California Tree Fruit Reserve in *Wileman/Kash I*, which is incorporated herein by reference, the oral hearing in *Wileman/Kash II* revealed an abundance of additional facts of further corroboration and substantiation of matters, related directly or indirectly, to those set forth in *Wileman/Kash I*, which are briefly mentioned hereinafter and which elaborate on the thorough understanding of the California Tree Fruit Agreement, by the Honorable Judge Tashima, who rendered an opinion for the U.S. Court of Appeals for the Ninth Circuit (*Wileman Bros. & Elliott, Inc., et al. v. Leroy Giannini*, July 12, 1990) which emphasizes that "authorization to apply standards is far different than a standard setting role which was accomplished through the committees established by the Secretary, an Agency established by the committees (the California Tree Fruit Agreement), employees of the committees, and, the Federal-State Inspection Service. * * *

147. The activities of the California Tree Fruit Agreement were described more fully in the Administrative Law Judge's Initial Decision filed May 19, 1989, applicable to Nectarines and Plums for the years there involved, and are

appropriate with regard to this decision in *Wileman/Kash II*:

The California Tree Fruit Agreement is composed of State personnel, *who carried out functions in a manner determined by them*. They publish led from time to time Bulletins which were relied upon by the Federal-State Inspection Service and the Secretary's Committee and Subcommittees. An example of such a Bulletin is contained in Exhibit 15 wherein it is set forth among other things, that that particular Bulletin was the 53rd Annual Report of the California Tree Fruit Agreement, an organization established in 1933 when Secretary of Agriculture Wallace issued the Nation's first Federal Marketing Order for Fruit Crops. It is further stated that the original programs were regulatory and applicable to interstate shipments of fresh Bartlett Pears, Plums and Peaches. Additionally, it stated that over the years, peach activity was for sometime confined to the Elberta variety but in 1972 revised again to include all varieties, Regulation of interstate commerce was undertaken and promotion in advertising of all fruits authorized. "Nectarines, a separate Federal Order, joined the organization in 1958 and processing pears, a California marketing program, in 1967 so that CTFA today comprises five programs"

The California Tree Fruit Agreement personnel have been operating under a vague sense of discretion as to *Federal Marketing Orders*. Even if CTFA had been delegated authority by the Committees, such authority has never been published in the Federal Register, there has never been any notice and comment period with respect to CTFA being delegated said authority, and there has never been any substantial basis and purpose stated by the United States Department of Agriculture for said CTFA's alleged authority. CTFA has been granted authority by the Nectarine Administrative Committee and the Plum

Commodity Committee to cut off handler and grower requests for specific color standards and specific maturity standard variations and changes. However, this does not comply with the Administrative Procedure Act. CTFA's authority for making laws or for adjudicating laws has never been published in the Federal Register, nor has it been subjected to rule making requirements.

There is evidence of record to indicate that SPI Inspectors and California Tree Fruit Agreement personnel treated some Committee members with favoritism, and California Tree Fruit Agreement discriminated against the Petitioners. The color standards and maturity tests are not applied equally to all handlers and said color standards have been more onerous on the Petitioners than members of the Committees and some of the Committee members' friends.

Mr. Gary Van Sickle is the Field Director for the California Tree Fruit Agreement. He has never grown Nectarines, nor Plums, except for a tree or two of Santa Rosa Plums in his backyard. Prior to becoming a CTFA agent he was a packing shed employee for seven or eight years. During that seven or eight years, he worked at several packinghouses, all in Northern California. He has never been a buyer of Nectarines and Plums. He has never been a wholesale seller of Nectarines and Plums. When the "well-matured" standard was first implemented, Mr. Van Sickle received his instructions and authority from the Committee. He did as he was instructed by the Committee. He also took his directions from the Manager. Mr. Van Sickle also takes orders from the Chairmen of the Committees and considers himself an employee of the Committees. At one time when Mr. Charles Sanderson, the Manager of the California Tree Fruit Agreement was in poor health, Mr. Jon Field and Mr. Van Sickle were both candidates for the position

of Manager of the California Tree Fruit Agreement. Mr. Van Sickle is the Supervisor for CTFA Field Agents, Mr. Al Black and Mr. Dale Janzen. The CTFA Agents make Field Notes or Field Reports which were internal documents to keep the staff in the Sacramento Office apprised of the growing and production area managed by the Dinuba Office. It is basically used to keep Mr. Jon Field apprised of what is going on. The Field Agents, including Mr. Van Sickle, fill out the reports they come to the Sacramento Office on a daily basis and then Mr. Field distributes them to the staff in the Sacramento Office.

Mr. Jon Field is the Manager of the California Tree Fruit Agreement. He was the Assistant Manager beginning in 1981 and when Mr. Sanderson, the Manager, developed poor health, Mr. Field acted in a management capacity but was still the Assistant Manager. He acted in the capacity of Manager of CTFA beginning in March of 1987. Mr. Van Sickle is a subordinate of Mr. Field. Mr. Field being in charge of the CTFA is basically responsible for putting together all of the paperwork, all of the forms, and having all of the material ready for all of the commodity meetings, preparing the booklets, and is the management for all of the committees. The management umbrella of CTFA is for State Marketing Orders and the Federal Marketing Orders. The expenses of CTFA are paid for by assessments: 23.4 percent is paid for by peaches, 23.4 percent is paid for by Plums, 23.5 percent is paid for by Nectarines, 17.9 percent is paid for by pears, and 11.9 percent for the pear zone (canned pears). California Tree Fruit Agreement does not have the power to establish law.

Even though the California Tree Fruit Agreement was under contract with respect to the performance of its duties, the evidence herein fails to show that the CTFA

had any delegated authority from the Secretary of Agriculture. CTFA did in fact exercise regulatory authority over the fruits that were being grown, harvested and shipped out of California, and such fruits included Plums and Nectarines. As previously noted, CTFA was an establishment which began in 1933, and its authority and powers have grown with the years. Although CTFA's efforts to promote the tree fruit industries are commendable, this does not replace the necessity for proper delegation and publication of the functions and duties which they were performing, perhaps unknowingly, on behalf of the Secretary of Agriculture.

The CTFA was never delegated legislative and/or judicial authority. Even if there had been such a delegation, there were violations of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

At no time has the Secretary of Agriculture, or, CTFA ever published in the Federal Register or made known its authority or any other requirements listed in section 552(a) of the Administrative Procedure Act. The only publication in the Federal Register which even mentions the California Tree Fruit Agreement is section 917.110 of the Plum Marketing Order which states that reports, applications, submittals, requests and communications "in connection with a Marketing Agreement and Order shall be addressed as follows: 'Control Committee, California Tree Fruit Agreement, 701 Fulton Avenue, Sacramento, California 95825.'" Mr. Van Sickle testified that as far as he knew, there was no CTFA operating manual. He takes oral direction from the Committees and their Chairmen, and Mr. Field represented that the only reason the CTFA agents received "certifications" from Mr. Brader was to permit CTFA agents to check license plates through the law enforcement computers in California. The certifications referred to relate to the testimony of Mr. Brader,

Director of the Fruit and Vegetable Division, wherein he indicated that there was a certification of Mr. Van Sickle as a Compliance Investigator. Nowhere in the Federal Register is there publication relative to CTFA's "statements of the general course and method by which its functions are channeled and determined," and other requirements of the Administrative Procedure Act. Neither CTFA nor the Committees can determine their own authority, nor the constitutionality thereof. *Transp. Inc. v. United States*, 629 F.2d 467 (1980), *cert. denied*, 101 U.S. 941; *United States v. Frontier Airlines Inc.*, 563 F.2d 1008 (1977). The CTFA Bulletin published every year does not suffice to accord with the requirements of the Administrative Procedure Act. *There is a strict command in section 552 that a body's authority must be published in the Federal Register. Otherwise, there can be unknown persons making unknown decisions without any accountability.*

The Secretary issued an amendatory regulation in 1980 which merely provided that maturity should be determined by color standards or other tests deemed appropriate by the Federal-State Inspection Service. At once, CTFA's "authority," was *deemed* expanded to an area never before stated in the Federal Register, never subject to rule making, and never subject to scrutiny. They issued Decisions, Opinions, Concurrences and Orders without ever complying with section 552(ii) of the Administrative Procedure Act. CTFA assumed unspecified enforcement power, unspecified judicial power, and, unspecified legislative powers. The CTFA agents' powers, duties, as well as their bulletins, were never subject to scrutiny through any public rule making, yet their decisions held the fate of the handlers in their hands.

There was no more powerful regulator nor adjudicator, during the times pertinent herein, than CTFA, which at

the conclusion of the season, would gather with SPI, and purportedly discuss the maturity regulations for the past seasons, and implement changes or set new standards, or reestablish the same standards for the next harvest season. That was not preceded by rule making. CTFA's authority to do that was never preceded by rule making, and their authority to do it was never published in the Federal Register. CTFA's authority during the season to change "color chips" on the spot, to overrule or override SPI's recommendations (particularly in light of the fact that Plum Regulation 19 and Nectarine Regulation 14 required SPI to determine the standards) and CTFA's red tagging fruit that does not meet the standards, and ordering the repacking of fruit, are legislative and adjudicatory functions in their purest sense, and none of it was preceded by proper delegation or rule making, and their authority to even propose, and in substance enact, legislation in the first place has never been made known or published. *A citizen wishing to know what the law was, who made it, and how to comply with it encountered a baffling situation.*

Only SPI was granted authority by the Secretary to determine and set standards. This authority was either relegated or taken over by CTFA and the Committees.

The testimony of Mr. Brader, Mr. Hirata, and Mr. Botkin is further substantiated by that of other witnesses. Mr. Jonathan Field, the Manager of CTFA since March of 1987 described the workings thereof including, the making of reports, and the tracking of pack outs, and the sending out of notices for assessment and the collection of assessments. Mr. Field further described the method whereby the inspection costs were determined for the coming year based partially upon the anticipated fruit that was to be shipped and based thereon, the ability to anticipate personnel requirements and the costs

associated therewith. In addition, Mr. Field described the promotion meeting which was also held during the month of March. CTFA works primarily in the unregulated media and considers itself an "in house public relation agency." Also, CTFA regards itself as an "in house fruit service." (Tr. 1892-1893). The total program for promotion in 1987 was approximately 4.8 million dollars.

That Mr. Field viewed the Inspection Service as sort of a bystander is reflected in his testimony commencing at Transcript 1911 through 1915. * * *

The findings of this paragraph were arrived at from the testimony and documentary evidence of the *Wileman/Kash I* hearing, and additionally have been corroborated by evidence adduced at the present hearing.

148. In an effort to thwart the Petitioners' assertions of lack of delegated authority as required by the Administrative Procedure Act, the Department has assumed varying postures as to the California Tree Fruit Agreement, none of which provides guidelines as to who does what. The latest is contained in the Judicial Officer's Decision of July 9, 1990, in *Wileman/Kash I* wherein he adopted, to a great extent, the statements of the Intervenor and Respondent in that case. The Judicial Officer has determined that the California Tree Fruit Agreement is anything you want to make or call it. The following excerpts are from his decision in *Wileman/Kash I*:

The term "California Tree Fruit Agreement" (CTFA) is a term that had different meanings, depending on the context in which it is used. The term is variously used by different people, or even the same people at different times, to refer to any or all of the various groups of people associated with Marketing Orders 916 and 917, or to Marketing Order 917 by itself. To growers, handlers, and others associated with the industry, "CTFA

requirements" may mean, at times, explicit USDA regulations under Order 916 or Order 917, or specific maturity tests either as determined by the Inspection Service or as determined by changes and variances made by the administrative committees. Inspection Service personnel use the term to refer to any Committee members or staff personnel or to requirements under the two Marketing Orders, as distinct from Inspection Service personnel and the requirements in the U.S. Standards. The Committees' members and the hired staff personnel tend to use the term "CTFA" to mean the hired staff employees, and use "CTFA requirements" to mean any Marketing Order requirements, although *such usage is not consistent*. (See, e.g., Tr. 2631-32).

The term CTFA is nowhere defined in Marketing Orders 916 and 917, and is used just once in the regulations for Order 917, where there is a reference to sending reports, requests, etc., to the "Control Committee, California Tree Fruit Agreement" (7 C.F.R. § 917.110). The term "Control Committee," is defined as the overall administrative committee for Order 917 (7 C.F.R. § 917.16-.35), which also has individual Commodity Committees for each of the three fruits covered by the Order (plums, peaches, and pears). The Control Committee consists of a number of handlers and a number of growers from each of the commodities, and it has the ultimate authority to hire the Chief Executive Officer of the CTFA staff.

In a 1977 memorandum of agreement between the Control Committee of CTFA (i.e., the Control Committee of Order 917), the Nectarine Administrative Committee, and the Pear Program Committee, the term CTFA is defined to mean Order 917, and it is agreed that the Control Committee of Order 917 will provide all paid staff services and facilities for Order 916 and a California

State Processed Pear Marketing Order through a somewhat complicated arrangement where by the latter two Marketing Order Committees have input into the staff hiring and other expenditures (through a joint Management Services Committee)¹¹ (Ex. 1, CTFA 4-A). The staff employees paid under this arrangement are *sometimes* referred to as the CTFA, or the CTFA staff.

149. *The Wileman/Kash I* evidence shows that a meeting of the Maturity Subcommittee could not and did not take place *unless both* the California Tree Fruit Agreement fieldman and an Inspection Service employee agreed thereon. The same was true of California Tree Fruit Agreement's participation in granting variances. Also, the utilization of "supervising discretion," in changing the color chip requirement and granting variances partook of unilateral, subjective determinations.

150. The evidence in *Wileman/Kash II*, reveals that the California Tree Fruit Reserve was a troubled office, beset with internal conflicts (Tr. 4821-23, 4819-4866), all of which increases the need for Administrative Procedure Act compliance so that the growers/handlers can achieve certainty as to their everyday business affairs. Mr. Field acknowledged that the California Tree Fruit Agreement was not running smoothly including people being fired (Mrs. Tulley) and (Mr. Pisciotto) or under the threat of being fired (Mr. Van Sickle), the manager's wife being hired to do art work for the California Tree Fruit Agreement (Tr. 4882, 4897), Mr. Van Sickle's wife working for the California Tree Fruit Agreement (Tr. 4883), California Tree Fruit Agreement employees while on official time attending the Tree Fruit Reserve meetings (Tr. 4915-4917);

¹¹The Management Services Committee is made up of the Chairman of each of the four Commodity Committees (Bartlett pears, peaches, plums, and nectarines). Also, the Chairman of the Control Committee is on the Management Services Committee. * * * (Emphasis added).

the Tree Fruit Reserve receiving gratuitous services from the California Tree Fruit Agreement — but all that is not Petitioners' fault — they certainly were paying enough in assessments.

151. These internal conflicts spilled over to Committeemen. Chairman Giannini threatened to withhold his assessments unless the Sacramento office was closed. (Tr. 4863, 4873). Mr. Field did not want to butt heads with Mr. Giannini. (Tr. 4863-4867). A prior manager of the California Tree Fruit Agreement had done so and found himself without a job. (Tr. 4867).

152. Notwithstanding that the determination of the amount of the assessments, and the collection thereof, is a responsibility of the Secretary of Agriculture, the California Tree Fruit Agreement, through the Tree Fruit Reserve, would have a handler in this highly regulated industry, look to the Tree Fruit Reserve. Nowhere, in any publication, is there any direction, or delegation, to the California Tree Fruit Agreement or the Tree Fruit Reserve, to carry out the functions described in the August 12, 1988, Minutes. (Ex. 164A):

Q. I'd like to read you a sentence out of these minutes, Mr. Field. "It is also the consensus that Tree Fruit Reserve move forward, through its attorney, Mr. Thomas, to aggressively enforce collection of CTFA assessments." Mr. Field, whose job is it to collect assessments against any client, Tree Fruit Reserve or CTFA?

A. It's the USDA, the USDA, * * * (Tr. 4902).

The California Tree Fruit Agreement need not abide by normal accounting practices of capitalizing assets and depreciating them (as originally contemplated in promulgation proceedings) but rather the California Tree Fruit Agreement "expensed" assets on an annual basis. The authority of the Shipping Point Inspection was relegated to that of a

neutral body, merely observing and sometimes making recommendations.

153. The Department's views as to whether the actions of the California Tree Fruit Agreement are consistent with the Administrative Procedure Act and the Marketing Order's requirements cannot prevail as to these Petitioners. In this regard the testimony of Mr. Brader in *Wileman/Kash I* is highlighted because it showed there, and testimony and evidence in *Wileman/Kash II* strengthens Petitioners' position, as to lack of delegation, instruction, and/or knowledge on the part of the Secretary's employees, delegatees, and the California Tree Fruit Agreement, as to their duties and responsibilities yet they are the ones to whom the handlers must look for proper administration of the provisions of the Orders.

154. The active role and determinations of the California Tree Fruit Agreement, involved not merely operational determinations, but those of standard making and policy judgments, and adjudications having the force of law which go to the very core of the Orders, and belie any contention that adherence to the Administrative Procedure Act was not required. It was. Even if the California Tree Fruit Agreement is an "employee" of the Committees there still was lacking authority for the California Tree Fruit Agreement to operate in the manner which the evidence of record shows occurred. This is particularly true in the instant case which reveals the intertwinement of the California Tree Fruit Agreement with the Tree Fruit Reserve. No Secretary of Agriculture nor any Committee, nor Chairman thereof, had the authority, to allow the California Tree Fruit Agreement to create and utilize an *alter ego*, the Tree Fruit Reserve, to accomplish ends and purposes specifically contrary to the Agricultural Marketing Agreement Act and the Orders' provisions.

155. The Committees, through their employee, the California Tree Fruit Agreement, could not legally, be delegated, to do that prohibited to the Secretary. It is no wonder that the California Tree Fruit Agreement's and the Tree Fruit Reserve's roles, actions, meetings, discussions, were never subject to rulemaking, nor any alleged delegation ever published in the Federal Register.

156. Notwithstanding lack of authority from the Secretary or the Committees, the Petitioners have had to pay assessments to the California Tree Fruit Agreement, to maintain various types of books and records and to prepare and make detailed regular reports to the California Tree Fruit Agreement; to engage in various "generic" advertising programs formulated by the California Tree Fruit Agreement, and with which Petitioners disagreed and to be subjected to a system fought with favoritism and unequal treatment. The record evidence herein shows a difference in treatment as to the Serimians Bros. and Petitioner Kash, Inc. and the explanation of Respondent therefor is not credible. In addition, the record evidence herein, and in *Wileman/Kash I* revealed other instances of favoritism.

The determination of what to do with one in apparent violation (i.e., make a personal visit, put a note in the file, refer to Agricultural Marketing Service, submit for prosecution, etc.) was made by the California Tree Fruit Agreement without published and known Guidelines.

Mr. Field's description of why a certain handler was treated differently included reliance on Agricultural Marketing Service's Regional Attorney, Mr. Will Jennings. The handling of this matter may well have been proper, but it highlights what Petitioner Kash regards as improper as to him. With respect to the Serimians, who had shipped in violation, Mr. Field sent them "a letter to formalize that they were in violation and formalize that it should not occur again." (Tr. 4802).

157. Also, as a result of the California Tree Fruit Agreement determinations the "generic" advertising program "tilts" toward those handlers chosen by the California Tree Fruit Agreement, i.e., forty to sixty percent of the varieties are handled by one handler and shipped under one label (Tr. 4888, 4890-92) thus benefiting certain handlers over others, to these Petitioners' detriment.

The evidence and record show, factually, that the advertising promotion money is not on the basis of varieties that cross over the breath of the industry and not specific to any one handler, but more likely is based on volume — even if no other shipper sells the same fruit. (Tr. 4894-4895).

158. The California Tree Fruit Agreement could not legally assume powers and functions which the Commodity Committees did not have. The fact that the California Tree Fruit Agreement employees usurped legislative and adjudicatory powers with respect to persons regulated under the Orders, does not comport with either the Agricultural Marketing Agreement Act or the Administrative Procedure Act. Their activities far transcended ministerial rules and regulations.

The California Tree Fruit Agreement has received no delegated authority by the Secretary of Agriculture pursuant to the Administrative Procedure Act, nor ever been recognized in the Federal Register, nor has a substantial basis and purpose ever been issued by the United States Department of Agriculture setting forth the bounds of their employment and/or authority. At best it was used by the Committees in an employee relationship. There are no standards by which to judge the California Tree Fruit Agreement's actions when it sets color standards, makes assessments or collects assessments. Nor does it have the authority to require Shipping Point Inspection. That is derived from the provisions of the Orders. Although the California Tree Fruit Agreement may have "run" the Orders (see *Wileman/Kash I* Decision) it

was doing so in a manner not in accordance with law and the Marketing Order provisions.

159. As regards color chips, in *Wileman Bros. v. Gianini*, *supra*, the Ninth Circuit of the U.S. Court of Appeals under its standard of review, and with respect to the Defendants therein, stated, among other things that they:

*** substituted heightened standards for the "maturity" required of each variety² of plums and nectarines before it could be picked. They issued and enforced a "well-matured" standard, without authorization from the Secretary, to improve their own profitability and diminish the earnings of plaintiffs [petitioners herein]. Pursuant to this standard, a system of color chips (ranging from fairly green to bright yellow) and descriptive tables, enabled defendants [the California Tree Fruit Agreement employees and Committee Chairmen] to require some varieties to remain on the tree longer. This was accomplished through the committees established by the Secretary, an agency established by the committees (the California Tree Fruit Agreement), employees of the committee, and the Federal-State Inspection Service. In addition to discriminating against the varieties of nectarines and plums grown by plaintiffs [Petitioners herein], defendants [the California Tree Fruit Agreement employees and Committee Chairmen] discriminated against plaintiffs [Petitioners herein] by refusing to grant color variances which were granted to producers favored by defendants (the California Tree Fruit Agreement employees and Committee Chairmen). By requiring yellower colors, defendants [the California Tree Fruit Agreement employees and Committee Chairmen] constricted supply during certain

²Santa Rosa plums, for instance, are one variety. There are over 95 varieties of plums and over 80 varieties of nectarines subject to these regulations.

parts of the season, capturing for themselves the "marketing windows" in which tree fruit commanded premium prices, and causing significant losses to plaintiffs [Petitioners herein] in wasted fruit and reduced revenues.

In May, 1980, the Secretary published Nectarine Regulation 12 and Plum Regulation 16, amending the respective marketing orders. Both provided that the fruit must grade at least U.S. No. 1 and, for the first time, that "maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service." Nectarine Reg. 12, 45 Fed. Reg. 32,308 (1980) (to be codified at § 916.35(b)(1)); Plum Reg. 16, 45 Fed. Reg. 33,596 (1980) (to be codified at § 917.45(a))⁶ *This new language governing standards and tests is ambiguous as to whether the maturity*

⁶Assuming that there was authority for the establishment of higher maturity standards, plaintiffs argue that such authority was in the inspection service and not in the committees. Because the regulation does not speak of establishing standards, but only of determining the propriety of tests to determine maturity, the express delegation of those tasks to the inspection service does not resolve the question. The regulations do not support the view that a standard-setting role was assigned to the inspection service.

The committees are empowered to "make such rules and regulations . . . as may be necessary to effectuate the terms and provisions of (the marketing order)." 7 C.F.R. § 917.35(b); 7 C.F.R. § 916.30(c). Such rules and regulations need not be approved, but may at any time be declared null and void by the Secretary. 7 C.F.R. §§ 916.62, 917.30. Conversely, the inspection service certifies that fruit complies with regulations issued by the Secretary. 7 C.F.R. §§ 916.55, 917.45. Based on the limited role of the inspection service in the scheme of the marketing orders, the 1980 regulations should not be interpreted to place standard-setting authority in those services. The revised regulation merely authorizes the inspection services to apply the maturity standards developed by other actors.

standards themselves were being or would subsequently be modified and, if so, by whom. No other language in the regulations supports departing from the basic maturity standard: that stage of growth at which, after picking, the fruit will ripen properly. *E.g.*, 7 C.F.R. §§ 2851.1530, 2851.3153 (1980).

The regulations amending the marketing order did not remove existing limits on the authority of committees to change maturity standards. The marketing order provides that the Secretary may issue regulations upon the recommendation of the administrative committees:

Such regulations may: (1) Limit, during any period or periods, the shipment of any particular grade, size, quality, *maturity*, or pack, or any combination thereof, of any variety or varieties of nectarines grown in the production area; (2) Limit the shipment of nectarines by establishing, in terms of grades, sizes, or both, minimum standards of quality and *maturity* during any period when season average prices are expected to exceed the parity level

7 C.F.R. § 916.52(a) (emphasis added); 7 C.F.R. § 917.41(a) (plums). The provision for committee recommendations provides that: "Whenever the committee deems it advisable to regulate the handling of any variety or varieties of nectarines in the manner provided in § 916.52, it shall so recommend to the Secretary." 7 C.F.R. § 916.51(a); 7 C.F.R. § 917.40(a). These sections require that "whenever" the committee seeks to impose particular maturity standards, it does so only through recommending standards to the Secretary.⁷

⁷Higher maturity standards are not the type of ministerial or facilitative regulations that "effectuate the terms and provisions" of the marketing orders. The requirement that changes in maturity standards be recommended to the Secretary forecloses the interpretation that the

The "supplementary information" published with the regulations in the Federal Register may support defendants' position. The findings accompanying the Plum Regulation state that "[The grade and size regulation specifies a minimum grade of U.S. No. 1 for all varieties of plums except that provision is made for a higher maturity standard." 45 Fed. Reg. at 33,596. A similar finding was made with respect to the Nectarine Regulation. 45 Fed. Reg. 45,252 (1980) (first amended order). The phrase "provision is made" is, unfortunately, less than precise. Arguably, it suggests activity beyond merely the determination of tests for maturity, and envisions decisions by actors to whom the Secretary has delegated authority since he would not have to make any such provision for regulations he intended to issue himself. As demonstrated above, however, the regulations do not effectuate this supposed intent. The court cannot rely on this vague suggestion of intent to rationalize or disregard the clear language of the regulation. "The language of a regulation or statute is the starting point for its interpretation.[] The plain meaning governs unless a clearly expressed legislative intent is to the contrary, [] or unless such plain meaning would lead to absurd results." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987). Here there is neither a clearly expressed contrary regulatory intent nor an absurd result.

[3] Defendants were not authorized by these regulations to promulgate and enforce higher maturity standards. Absent authorization in some other form, defendants are not immune from suit under section 608b with respect to this activity.⁸ [Footnote omitted]

160. Based on the evidence of record, it is found that the establishment and enforcement of color standards through

provision for administrative regulations was intended to embrace such changes.

use of color chips by the California Tree Fruit Agreement are not ministerial and administrative functions, but rather substantive rules which must be formulated in accordance with the Agricultural Marketing Agreement Act and the Administrative Procedure Act.

161. The whimsically nature of color chips as not being a true determinative of maturity was emphasized in evidence adduced at the *Wileman/Kash II* oral hearing. In early 1988, it was decided to obtain "new" color chips, which allegedly were to reflect the same color as the old. Repeated attempts were made to achieve that end. *During the process, chips differing in color from the old ones were used, along with the "old" ones but they were not alike.* If one were shipping fruit he could have used either set — the old or the new color chips.

162. Subsequent to the oral hearing in *Wileman/Kash I* and prior to the issuance of a decision by the Administrative Law Judge therein, the Secretary, on April 8, 1988, issued for the first time, a proposed rule to incorporate the term "well matured." This proposed rule intended, with respect to Plums, to regulate out smaller sized Plums, to incorporate a procedure for requesting variances from the proposed "well matured" maturity standard which was to be determined by the use of color chips, which were to be applied by the Federal-State Inspection Service. (53 Fed. Reg. 11669). This proposed rule provided that interested persons could file comments through April 25, 1988. Subsequently, the time period for filing written comments on the proposed rule was extended to May 2, 1988. (53 Fed. Reg. 13413).

163. On April 19, 1988, the Secretary issued proposed rules (virtually identical to those above mentioned relating to Plums) with respect to eliminating smaller-sized Nectarines and Peaches, incorporating a variance request procedure, and implementing the "well matured" maturity standard to be determined by the use of color chips, which

were to be applied by the Federal-State Inspection Service. (53 Fed. Reg. 12687 (Nectarines); 53 Fed. Reg. 12691 (Peaches)). The proposed rule provided that interested persons could file comments through May 3, 1988.

164. In his proposed rule for Nectarines, the Secretary set forth the following reasons for *not providing a thirty-day notice and comment period as required by the Administrative Procedure Act*: "A comment period of less than thirty days is deemed appropriate for this proposal. The harvest and shipment of the 1988 nectarine crop is expected to start April 25, 1988, and growers and handlers should be given as much notice as possible of any changes, if adopted to permit the industry to plan accordingly. Moreover, the Department already has received letters in opposition to the proposed nectarine-size changes indicating the industry is aware of the Committee's recommendation." (53 Fed. Reg. 12690).

165. The explanation given by the Secretary (except for the fruit harvest start up dates) for his failure to comply with the requirements of the Administrative Procedure Act and his own Departmental policy, read identically, with respect to Plums and Peaches, as the above cited statement regarding Nectarines. Although Petitioners refer to the Departmental policy, it is denied by Respondent that this is, in fact, a Departmental policy.

166. It is Respondent's position that the Administrative Procedure Act and the Departmental regulation 1512-1 do not require a comment period of thirty days. The Respondent's position is mostly accurately contained in its brief, as follows: "As previously discussed, the Administrative Procedure Act has no such requirement. The only comment period required is one which will provide interested persons with a reasonable opportunity to respond. *Phillips Petroleum Co. v. United States EPA*, 803 F.2d 545, 559 (10th Cir. 1986). Also as previously discussed above, departmental regulation 1512-1 provides no support for Petitioners'

contentions. The departmental regulation is merely an internal directive which sets a goal 'to improve internal management.' Further it only recommends a thirty-day comment. It does not require one. The directive provides no right on which Petitioners may rely. *See, Brennan v. Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974). Petitioners may not attempt to burden the Department with rulemaking requirements beyond the structure of the Administrative Procedure Act. *See, Vermont Jencke*, 435 U.S. 524. * * *"(Emphasis added).

167. On May 27, 1988, the Secretary issued Interim Final Rules, purportedly binding on Wileman/Kash, which substantially altered the maturity determination and the procedure for requesting variances from the new maturity determinations. The Interim Final Rules, as published, were substantially different than those set forth in the proposed rules issued approximately five weeks earlier. In said Interim Final Rules, the Secretary rejected the Plum Committee's proposal to eliminate small-sized Plums, but at the same time, the Secretary adopted the respective Committee's proposals to eliminate small-sized Nectarines and Peaches. (53 Fed. Reg. 19218 (Plums)); 53 Fed. Reg. 19226 (Nectarines); 53 Fed. Reg. 19234 (Peaches)).

168. Petitioners, through their Attorney, submitted comments in opposition to the proposed rule modifications regarding Plums, Nectarines and Peaches. Subsequent to the issuance of the Interim Final Rule, Wileman/Kash, through their Attorney, submitted comments in opposition to the Interim Final Rules as published.

169. With respect to utilizing color chips as a test for maturity the 1988 regulations were arbitrary and capricious and without substantial basis.

The internal maturity of Peaches, Plums and Nectarines can be determined accurately and objectively by different

types of tests other than through the application of color chips and/or spring tests. The surface color of Peaches, Plums and Nectarines and the spring of Plums does not objectively nor rationally determine whether or not those varieties are of good consumer quality and good marketable quality.

The color chips and spring tests were imposed upon Petitioners prior to the conducting of any meaningful scientific studies whatsoever. And the few studies which were conducted by the Commodity Committees were not made part of the rulemaking record because those studies, themselves, demonstrate that the color chips and spring tests imposed by the Secretary do not bear any rational or reasoned relationship to the internal maturity of Peaches, Plums and Nectarines.

170. It is clear that the proposed, Interim Final, and Final Rules issued by the Secretary for the 1988 and 1989 harvest seasons relating to the determination of maturity by color chips were not based on a substantial record, are arbitrary and capricious, and are not binding on these Petitioners.

171. In addition to not providing a 30-day notice and comment period as set forth in the Secretary's own Departmental regulation 1512-1, and the Administrative Procedure Act, the Secretary further stated: While this action will impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be significantly offset by the benefits derived from the operation of the Marketing Orders. Therefore, the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities." (53 Fed. Reg. 27152).

172. The Departmental Regulation to which reference is made regarding decision-making requirements, states that:

The Department is committed to providing the public reasonable opportunity to participate in rulemaking. For rules that have a substantial effect, it is recommended that comment periods on proposed regulations be thirty-days or more.

[U.S.D.A. regulatory decision making requirements, 1512-1, p. 9, December 15, 1983.]

173. The decision of the Secretary with respect to assessments, which include those for "generic" advertising, impact every handler of tree fruit in the State of California, and costs in excess of \$9,000,000 a year.

174. There is evidence in this case to indicate that the referenced "public committee meetings" do not provide the requisite atmosphere for a careful study and inquiry into the matters which are important to the handlers and growers. There is also evidence to show that those in control of the Tree Fruit Reserve, which included the Commodity Committee Chairmen, members of the Commodity Committees, and employees of the California Tree Fruit Agreement, in non-public meetings, which are not open to the public, with notice thereof not generally given, exert an undue amount of control and influence over the tree fruit industry. They do not believe themselves subject to the "Sunshine Laws" discussed *infra*. What remains to be accomplished at the "open" and "public" Commodity Committee meetings is that of *pro forma* acceptance and adoption of what has previously been agreed upon. The Administrative Procedure Act contains no provision to indicate that Committee meetings are a substitute for required rulemaking hearings and the provisions regarding same. Other than the Committee Chairmen and Committee members, there is no evidence to indicate the numbers, if any, of other growers/handlers and

their percentage to the total thereof who might attend such Committee meetings. The requirements of section 553 of the Administrative Procedure Act must be followed when an agency is exercising its legislative function in order that its rules have the force of law. There are only two exceptions to this requirement applicable herein and they are discussed hereinafter.

175. A review of the Secretary's rulemaking record clearly establishes that the Secretary has unilaterally determined that the 30-day notice and comment period has no application in the tree fruit industry.

176. Sections 917.460 (Plum Regulation No. 19), 917.459 (Peach Regulation No. 14) and 916.356 (Nectarine Regulation No. 14), and their respective tables, showing the specific "maturity tests" or other "color standards," of the Nectarine, Plum and Peach regulations issued in 1988, and the obligations imposed therewith, as written and/or as applied, are not in accordance with law;

177. The Secretary's imposition of size restrictions as to Nectarines and Peaches for the 1988 and 1989 harvest seasons were in violation of the notice and comment requirements of the Administrative Procedure Act.

178. The imposition of the "well-matured" maturity standard for the 1988 and 1989 harvest seasons was in violation of the notice and comment requirements of the Administrative Procedure Act.

179. The Nectarine, Plum and Peach Committee members, through their "alter ego" corporation, the Tree Fruit Reserve, have intentionally failed to comply with either the "Sunshine" laws, or the Federal Advisory Committee Act.

CONCLUSIONS

Prologue

In an effort to expedite this matter to the extent available to the Administrative Law Judge, I have briefly summarized the contentions of the parties, which contentions are more fully set forth in their briefs and respective pleadings, and, to the extent applicable, are incorporated herein.

As was noted earlier, the Petitioners herein have constitutionally vested property rights at issue. Likewise, they are granted the right, under the enabling statute to have the Secretary hear and decide the legality of their claims that they should be relieved of the obligations of the Orders' provisions. In fact, they must do so. This is a statutory mandate.

Congress has explicitly furnished a handler an expert forum for contest. The doctrine of exhaustion of administrative remedies, enacted for the principal purpose of allowing the affected agency to pass and rule upon the questions involved prior to judicial review, has been a doctrine constantly before the Federal Courts. *Cf., Coit Independence Joint Venture v. FSLIC* 109 S. Ct., 1361 (1989) where there was no statutory exhaustion requirement and where it was recognized that exhaustion requirements might be waived for discretionary reasons by courts. The relevant regulations in the *Coit* case provided that creditors of failed savings and loan associations had to file their claims with FSLIC. The Petitioner therein brought suit on a state law claim against a savings and loan association in a court without exhausting the administrative claims procedure. The court ruled that exhaustion was not required because the regulations setting up the claims procedure did not place a clear and reasonable time limit on FSLIC's consideration of claims. The lack of such a reasonable limit rendered the claims procedurally inadequate, because it allowed the agency to delay the

administrative processing of claims indefinitely, which would deny litigants their day in court, while the statute of limitations ran; and because it could enable FSLIC to coerce unfair settlements because the receiver's assets could be depleted by interim distributions before the claimants got to court; and because FSLIC itself was often the main creditor and consequently could well have had an incentive to delay decisions on claims. Other cases involving situations where Petitioners sought to go directly to a court for a *de novo* determination on the merits of state law claims are set forth in such cases as *ABC Plumbing and Vernon S&L*, 257 Cal. Rptr. 139 (Ct. App. 1989). For other exhaustion cases, see, *Rafeedie v. Immigration and Naturalization Services*, 880 F.2d 506 (D.C. Cir. 1989) (constitutional claim); *Ben Lomond, Inc. v. Anchorage*, 761 P.2d 119 (Alaska 1988) (both constitutional and nonconstitutional issues raised). It will be noted that the procedure before the United States Department of Agriculture contains neither statutory nor procedural time limits, but nonetheless exhaustion of administrative remedies is required under the Act.

These Petitioners have presented cogent and persuasive evidence to the effect that they have been illegally discriminated against in the administration and application of Marketing Orders 916 and 917; that arbitrary and capricious actions and abuse of discretion, have resulted in substantial economic losses; that provisions of the Administrative Procedure Act have not been followed; and, other Constitutionally protected interests have been affronted. This being so, the provisions and obligations imposed in connection therewith are not "in accordance with law." The Equal Protection Clause requires that those similarly situated be treated similarly. *Peyote Way Church of God v. Thornburgh*, (5th Cir. No. 88-7039, February 6, 1991).

The Petitioners' proof transcends inquiries of policy, desirability, or effectiveness of Marketing Orders 916 and 917

and, instead, deals with the legality thereof and the actions taken thereunder. They seek not a repudiation of Marketing Orders, but rather, a quest for fair, equitable treatment and formulation and administration of the Orders according to law. This, indeed, is not a proceeding to redraft regulatory language or to otherwise perform legislative functions. Nor is it our attempt to second-guess the Secretary's administrative and rulemaking functions.

The Respondent's position in this proceeding is to foreclose the Petitioners from raising and pursuing many of the issues which they have set forth in their Petition and which are premised upon evidence adduced at the hearing. This position substantially ignores the requirements of both the Administrative Procedure Act and the Constitution of the United States.

Fundamentally, many of the Petitioners' arguments are premised around the simple principle that any time the Secretary issues a regulation prohibiting handlers (and/or their growers) from receiving economic value for their crops, for which they have spent large sums of money in cultivating, harvesting and packing, a "taking" has occurred which requires just compensation. Such taking can only be justified for "public use" and not for private use. There can be no doubt in this case that there has been a "taking" in that Petitioners have been deprived of the full value of their crops. The question for resolution is whether or not such taking can be justified. The Constitution of the United States protects economic liberties no less than civil rights.

The Supreme Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113 (1972), held that the right to own and enjoy property is a fundamental aspect of personal liberty, not a privilege dependent on the whim of the sovereign. In *Nollan v. California Postal Commission*, 107 S.Ct. 3141 (1987), the Supreme Court held that whenever there is a "permanent physical occupation" of the

property by the government itself or by others, there has been a taking.

This proceeding differs from *Wileman/Kash I* in that different issues, circumstances, pleadings, dissimilar facts and time periods are involved, as well as an additional different fruit. First, the *Wileman/Kash II* record evidence expands and explains in further detail the operations of the California Tree Fruit Agreement. Second, *Wileman/Kash II* involves Peaches, which were not passed upon in *Wileman/Kash I*. Third, the relationship of the California Tree Fruit Agreement and the Tree Fruit Reserve was not brought up in *Wileman/Kash I*. The Ninth Circuit's decision in *Wileman Bros. & Elliott, Inc. et al. v. Leroy Giannini Packing Corporation, Virgil Rasmussen, Ballantine Produce Co., Inc., Patrick Pinkham, and Gary Van Sickle* (No. 88-15731 (July 10, 1990)), reflects the considered analysis that personnel of the California Tree Fruit Agreement are considered employees of an agency established by the Committees and that one must search for those elements which constitute conduct within the confines of Committee members' official Committee obligations as defined by the terms of the Marketing Orders and regulations issued pursuant to the Agricultural Marketing Agreement Act. Conduct that falls outside the range of activities authorized by the Federal Marketing Order regulations may partake of illegality.

Although the Judicial Officer has indicated a "consolidation" of *Wileman/Kash I* and *Wileman/Kash II*, the latter must be decided on the basis of the record herein as it would be inappropriate to presume that the Judicial Officer, in issuing *Wileman/Kash I*, sought to adjudicate *Wileman/Kash II* without considering the nineteen days of hearing, and thousands of pages of transcript and exhibits. Moreover, it is not known at this time whether the Court of Appeals may decide *Wileman/Kash I* before the Judicial Officer decides *Wileman/Kash II*.

As noted in an earlier part of this decision, great deference has been given to the Judicial Officer's final decision in the *Wileman/Kash I* case.

The subordinate role of the Administrative Law Judge before the Department of Agriculture was set forth by the Judicial Officer in his Ruling on Certified Questions in a number of cases, including that of *In re: David Harris*, May 1, 1991:

" * * * In my latest decision in this series of cases (*In re All-Airtransport, Inc.* 50 Agric. Dec. ____, slip op. at 2, * * * I stated:

" * * * This matter has been settled within this Department by the decisions of the Judicial Officer, and the ALJ is required to follow the policy set forth in the decisions of the Judicial Officer, whether it is correct or not * * *.

* * * * *

The Judicial Officer need satisfy only the reviewing courts — not the ALJ's."

However, in order to give him an opportunity to specifically rule upon Findings of Fact, there have been set forth herein those findings which, for a substantial part, were the subject of stipulation or whose contents, from the evidence, can not seriously be disputed, which findings encompass the surrounding circumstances of this case and the grievances from which these Petitioners wish to be relieved. Also, in order to assist the Judicial Officer, and consonant with his prior decision in the *Wileman/Kash I* case, it is recognized that when a court defers to an agency on *statutory interpretation*, it also may ancillary defer on questions of law and not necessarily fact. Thus, it may become necessary to determine if facts discarded as irrelevant or immaterial should be so regarded. The Federal Court review process can determine where it is inappropriate to assess undue deference to agency decisions and in particular, to those

situations where the agency's power and actions may be dependent upon findings involving statutory interpretation. The Department's power to act, through its Marketing Orders, is dependent on *findings* involving the interpretation and application thereof. Where an agency misapplies the statute upon which its power rests, it may be acting beyond its authority. When subordinates of an agency knowingly or otherwise act beyond their authority, the *proper interpretations* of the regulatory format is not a defense thereto — their conduct has already exceeded that. By misinterpreting a statute, an agency may be tempted to discard Findings of Fact which might otherwise be applicable. Ensuring that agencies remain within the limits of their delegated powers and that they have not misconstrued the laws, has been considered a judicial function. By misinterpreting a statute, an agency may seek to legitimize action which might otherwise be *ultra vires*. Decisions of the United States Supreme Court do not always compel deference to an agency's interpretation of its own statutes and regulations and, sometimes, a different and more independent, judicial attitude is appropriate. The simple fact that the agency has a position has been said to be of only marginal significance. *Mayburg v. Secretary of HHS*, 740 F.2d 100 (1st Cir. 1984). However, I am mindful of the well established principle that a Federal Court will uphold an agency's fact findings if the Court finds that they are supported by substantial evidence. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986). Also, a reviewing Federal Court has the capacity to consider facts disregarded by the Agency. This is to forestall an Agency from picking and choosing only those facts which support its position. Although this standard is deferential to the agency, the Court must review the record as a whole, weighing evidence that supports, as well as detracts from, the agency's determination. *Burhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). Findings of law are subject to *de novo* review with deference to an agency's reasonable

construction of statutes. *Mester Mfg. Co. v. INS*, 879 F.2d 561, 565 (9th Cir. 1989). Also, in the subject case, the Department is not entitled to be accorded deference as to the application of the provisions of the Administrative Procedure Act or the tenets of the Constitution of the United States because those are not areas recognized to be within its expertise. Also, it is well established that without ambiguity the Courts need not accord deference. *Maislin Industries, U.S. Inc. v. Primary Steel Inc.*, 110 S.Ct. 2759 (1990); *Sullivan v. Strop*, 110 S.Ct. 2499 (1990). These principles take on a substantial importance in the subject case because, as noted above, there exists very little controversy with respect to the aforesaid recited Findings of Fact. Therefore, their rejection or acceptance by the Judicial Officer will be forthcoming from his interpretation of the law which is subject to judicial review. Moreover the Judicial Officer has indicated that when the legality of Order provisions is in question, facts should be alleged and proven. *In re: Conesus Milk Producers*, 88 AMA Docket No. M-2-75 (Dec. 21, 1989). This was done here.

The importance of careful analysis as to who benefits from the assessments, and consequently the Findings of Fact surrounding same, becomes apparent. *See, United States v. Maryland*, 471 F. Supp. 1030 (D.C. Md. 1979).

Inherent in Respondent's argument is that of preclusion of consideration of a number of the issues raised by the Petitioners in their Petition in this proceeding, and the maintenance of the position that the Judicial Officer's decision in *Wileman/Kash I* is *res judicata*. However, a recent case dispels this contention of the Respondent. For instance, the Respondent maintains that by virtue of the Judicial Officer's decision in *Wileman/Kash I*, and the publication for the first time since 1981, of any proposed rule/final rule, there has been created a situation where examination of the basic provisions of the Orders may not be examined prior to

the 1988 rulemaking procedures. In this regard note has been made of *Public Citizen v. Nuclear Regulatory Commission*, (D.C. Cir. April 17, 1990) 3 AdL.3d 1219. Essentially what was decided in that case concerned an agency's action which showed that it was not merely republishing an existent rule in order to propose minor changes to it, but rather was reconsidering the rule and decided to keep it in effect. Thus, challenges to the rule were deemed proper. It was held that if an agency has opened the issue up to a possible new rule, even though not explicitly, its renewed adherence is substantially reviewable. Among the factors which the Circuit Court deemed relevant, but not exhaustive, were the following: Where the agency may have reopened a previously decided issue in a case: (1) the agency proposes to make some changes in its rules or policy; (2) calls for comments only on renewed or changed provisions; (3) but at the same time explains the unchanged, unpublished portion; and (4) responds to at least one comment aimed at the previously decided issue.

In the aforesaid Nuclear Regulatory Commission case the Court of Appeals indicated that the court must look to the entire context of the rulemaking, including all relevant proposals and reaction of the agency, to determine whether an issue was in fact reopened. If, upon such review, it is determined that in proposing a rule the agency uses language that can reasonably be read as an invitation to comment on portions the agency does not explicitly propose to change, or, if, in responding to comments, the agency uses language which shows that it did, in fact, reconsider an issue, a renewed challenge to the underlying rule of policy will be allowed.

When an agency relies on factors, which Congress did not intend that it consider, its decision thereto is flawed and arbitrary and capricious. Moreover, an agency cannot insulate a decision from review by embedding it in a decision on

other matters. *Motor Vehicles Mfrs., Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *MCI Telecommunications Corp. v. Federal Communications Commission* (D.C. Cir. October 23, 1990) (3 AdL3d 757).

In the latter case the Court of Appeals had occasion to state:

“ * * * An agency does not automatically have to reach every issue whose importance it had noted and on which it had conducted a hearing. See, e.g., *Wisconsin v. FPC*, 303 F2d 380, 386 (DC Cir 1961), *aff'd*, 373 US 294 (1963). But when it opts not to reach such an issue, the agency must provide an acceptable explanation for its decision — it cannot simply decline to resolve an issue after it holds a hearing. See *Minneapolis Gas v. FPC*, 294 F2d 212, 215 (DC Cir 1961). In this case, the only justification the FCC offered for its decision not to reach many of the issues which it had designated for investigation was that it had held the Tariff 12 options unlawful due to the geographic restrictions. See *Reconsideration Order*, 4 FCC Rcd at 7930; FCC Br. at 52. [Footnote omitted]. This justification is inadequate: everyone involved knew, and as the FCC conceded at argument if knew, see Tr. at 43, that AT&T would shortly thereafter eliminate the geographical restrictions. It is one thing for the FCC to decline to investigate a tariff in the first place; that decision is entrusted to its unreviewable discretion. It is quite another for it to note the importance of a question concerning a tariff, request and take evidence from the parties, and hold a hearing on the matter, and then “at that point change its mind, wiping out the hearing as though it had never occurred, and in effect decide that it will not enter upon a hearing.” *Minneapolis Gas*, 294 F2d at 215. On remand, then, the FCC must reach the issues it designated for investigation unless it provides an adequate explanation for not doing so. (Emphasis added).

We have the impression that there is a certain air of unreality about this case. The FCC (one way or another) will undoubtedly permit AT&T to compete effectively against its competitors in the large user market (if that is what is really involved here). But we are obliged to insist that it do so by turning square corners of administrative law. We accordingly reverse and remand for proceedings not inconsistent with this opinion.”

The assessments levied upon Petitioners result from statutory authority given the Secretary of Agriculture. The term “Secretary,” as used herein, refers to the Secretary or to any person delegated authority to act for the Secretary. The Petitioners do not challenge this capability. What they do contest are the amounts, methods of ascertainment and approval thereof, and the lack of Administrative Procedure Act adherence, in that:

(1) The assessment process is flawed, and not in accordance with law, because the Secretary of Agriculture does not abide by the Administrative Procedure Act and makes arbitrary, capricious, and unreasoned decisions not premised upon persuasive, substantial evidence available to him;

(2) The assessments levied against them are done, in fact by persons to whom no known delegation has been made and are pro-forma adopted by the Secretary of Agriculture without meaningful systemic or programmatic review and without the opportunity for meaningful input from interested and/or affected parties;

(3) Such assessments are impermissibly retroactive; and

(4) Such assessments are excessive, and beyond the needs of the Marketing Orders, because:

(a) Over fifty percent thereof goes for generic advertising which Petitioners maintain violates their First Amendment rights; and,

(b) Amounts are expended, via an *alter ego*, the Tree Fruit Reserve, which are illegal for the Secretary of Agriculture to make, and thus his decisions with respect to the amount of assessments were unreasonable and arbitrary and capricious.

Activities of California Tree Fruit Agreement

The many decisions, functions, and activities under the Marketing Orders are carried out by the California Tree Fruit Agreement, but as to such personnel-employees there is no published prescription of a course of action for them to follow so as to ascertain if they are acting within the scope of their duties.

The Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, specifically § 552, requires that each Agency:

Shall separately state and currently publish in the Federal Register for the guidance of the public —

(A) descriptions of its central and field organization and the established places at which the employees... from whom, and the methods thereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to scope and contents of all papers, reports or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy of interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

"Except to the extent that a person has actual and timely notice of the terms thereof, *a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.* (Emphasis added).

At no time has there been publication of the California Tree Fruit Agreement's existence, its authority, or any of the other requirements listed at § 552(a) of the Administrative Procedure Act, in the Federal Register. This appears to be not unintentional. The only reference ever published in the Federal Register which mentions the California Tree Fruit Agreement is § 917.110 of the Plum Marketing Order, which states that reports, applications, submittals, requests and communications in connection with the Marketing Agreement and Order shall be addressed as follows: "California Tree Fruit Agreement, 701 Fulton Avenue, Sacramento, California 95825."

Nowhere is it published in the Federal Register concerning the California Tree Fruit Agreement's "statements of the general course and methods by which its functions are channelled and determined, including the nature and requirements of all formal and informal procedures available" or the "rules of procedure... and contents of all papers, reports or examinations," or its "substantive rules of general applicability adopted as authorized by law, and statements of general policy of interpretations of general applicability formulated and adopted by the agency," or any other requirements contained in Title 5, U.S.C. § 552(a)(1).

Neither the California Tree Fruit Agreement nor the Committees can determine their own authority. *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467 (1980), *cert denied*, 101 S.Ct. 941; *United States v. Frontier Airlines, Inc.*, 563 F.2d 1008 (1977).

Respondent cannot argue that the California Tree Fruit Agreement Bulletin published every year would suffice. It does not. The growers and handlers do not have input into said Bulletins. In fact, they don't see it until it is published.

There is a strict command in § 552 that an entity's authority must be published in the Federal Register. The California Tree Fruit Agreement issues decisions, opinions, concurrences and orders without ever complying with § 552(ii) of the Administrative Procedure Act, which requires actual and timely notice of the terms thereof. The California Tree Fruit Agreement and its "authority" has never been set forth in the Federal Register, has never been subject to rulemaking, and never subject to scrutiny. As the testimony of record reveals in both *Wileman/Kash I* and *Wileman/Kash II*, those associated with the California Tree Fruit Agreement were somewhat hazy as to the source of their authority and functional basis. Yet, the California Tree Fruit Agreement has taken upon itself to determine assessment levels, notification to handlers of assessments owed and, then, proceeded to collect those assessments. Although sometimes regarded as a non-entity, the California Tree Fruit Agreement imposes upon all handlers subject to Marketing Orders 916 and 917 expense assessments and "generic" advertising assessments. As a matter of fact, the California Tree Fruit Agreement's expenses for running its operation are paid from the expense assessments collected from tree fruit handlers. They have usurped unspecified enforcement power, unspecified judicial power, and unspecified legislative power. Their authority, and their acts, except for routine, ministerial functions, not involving policy

making or substantive administrative determinations lack the force of valid law. *National Labor Relation Board v. Wyman Gordon Co.*, 394 U.S. 759 (1969); *Buschmann v. Schweiker*, 676 F.2d 352 (9th Cir. 1982). The California Tree Fruit agents' powers, duties, as well as their bulletins, have never been scrutinized through any public rulemaking.

There has been an absence of authorization to the California Tree Fruit Agreement. Even if there were some tacit approval or delegation of authority to the California Tree Fruit Agreement, by either the Secretary or by the various Committees, (which there isn't) the Administrative Procedure Act has not been complied with and the California Tree Fruit Agreement's power, authority and actions are without legal basis, except to the extent that the assessments are attributable to inspection and administrative functions.

If one were to adopt the premise that the California Tree Fruit Agreement personnel were acting within the scope of the Secretary's and/or Committee's instructions, directions, and control, then, *the Secretary must be held responsible for their actions, including the utilization of their alter ego, the Tree Fruit Reserve*, the latter of which engaged in conduct which *admittedly* was illegal for the Secretary to perform.

Respondent would negate the above view principally on the basis that the Secretary's power to approve or disprove of actions of the Committees and their staff is all that is required and that retention of ultimate authority in the Secretary is sufficient to ignore the mandate of the Administrative Procedure Act. Such contention is also premised upon the faulty premise that, "No rulemaking authority has been delegated to or undertaken by the CTFA." The evidence clearly shows that, from a realistic viewpoint, this is not so. The "running" of the Orders is and was left by the Committeemen to the California Tree Fruit Agreement, whose decisions, judgments, determinations, and rules became the law to the extent that the filing of a

§ (15)(A) Petition — a right given handlers by Congress — could be viewed as an attack on the California Tree Fruit Agreement! Subordinates acquired and/or assumed policy level discretion. The California Tree Fruit Agreement has no statutory duties under either the Agricultural Marketing Agreement Act or the Administrative Procedure Act. The Secretary of Agriculture and the Committeemen do. It is incumbent upon them to assure that the Orders are applied, construed and functioning in accordance with law and that the Secretary's delegates or employees are acting within the scope of their duties and not beyond carefully defined limits. The California Tree Fruit Agreement's functions transcended the "operational" aspects into the realm of substantive, discretionary acts.

The Federal Advisory Committee Act

"Open meetings" statutes, also called Sunshine laws, are designed to make the governmental process open to public inspection. When Congress enacted the Sunshine Act in 1976, it reflected the feeling that greater accountability would increase the public's confidence in the understanding of the decisionmaking process (5 U.S.C. § 552(b)).

The Sunshine Act parallels open meeting provisions that are currently in force in all fifty (50) states. California has such an Act, called the Brown Act (California Government Code § 54950, *et seq.*) but the scope and/or applicability of that Act will not be the subject of determination herein.

The Sunshine Act requires the agency to be headed by a "collegial body" of not less than two (2) members, the majority of whom are appointed by the President and confirmed by the Senate. The Nectarine, Plum and Peach Commodity Committees, as they are not appointed by the President or confirmed by the Senate cannot be considered as governed by the Sunshine Act. However, *Blackwell College of Business v. Attorney General*, 454 F.2d 928

(1971), applied the Sunshine Act to the I.N.S., which also did not fit within the category declared by the provisions of the Sunshine Act.

Congress enacted the Federal Advisory Committee Act (FACA) in 1972, after it was determined that there were numerous Committees, boards and similar groups that had been established to advise Officers and agencies in the executive branch of the Federal Government. Congress felt that although these Committees and boards were frequently used and beneficial in furnishing expert advice, there was a need to put their determinations "in the Sunshine" as well. In order to fall within the provisions of the Federal Advisory Committee Act, the term "Advisory Committee" relates to any Committee, subcommittee or sub-group thereof which is ". . . (C) established or utilized by one (1) or more agencies." The term "agency" has the same meaning as in 5 U.S.C. § 551(i).

Although the Federal Advisory Committee Act is intended to apply to Advisory Committees, it is not intended to apply to all amorphous, *ad hoc* group meetings; only groups having some sort of established structure and defined purpose constitute "Advisory Committees" within the meaning of the Act. *Nador v. Barrody*, 396 F. Supp. 1231 (1975). The Nectarine Administrative Committee, the Plum Commodity Committee, the Peach Commodity Committee, and the California Tree Fruit Agreement (were it a viable legal entity — which it is not) are Committees and bodies that fit within the parameters of the Federal Advisory Committee Act. *Aviation Consumer Action Project, et. al. v. Washburn*, 535 F.2d 101 (D.C. Cir. 1976). It is upon data and information that is gathered by the Committees that they base their recommendation to the Secretary.

Pursuant to § 10(a) of the Federal Advisory Committee Act: (i) each Advisory Committee meeting shall be open to the public, (ii) there must be timely notice of each such

meeting and it shall be published in the Federal Register, and they shall also provide other forms of notice to insure that all interested persons are notified of such meetings prior thereto; and, (iii) interested persons shall be permitted to attend, appear before, or file statements with any Advisory Committee.

The function of each advisory Committee is that of an advisor only, and all matters under their reconsideration should be determined, in accordance with law, by the official, agency, or officer involved. (FACA § 9(b)). "Unless otherwise specifically provided, . . . advisory committees shall be utilized solely for advisory functions." (FACA § 9(b)):

"No advisory committee shall meet or take any action until an advisory committee charter has been filed with (i) the administrator. . . or (ii) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency."

As to the actual meetings taking place pursuant to the Federal Advisory Committee Act, detailed minutes of each such meeting must be kept and shall contain a record of the persons present, a complete and accurate description of the matters discussed and conclusions reached and copies of all reports received, issued or approved by the Advisory Committee. Further, the accuracy of all minutes shall be certified by the Chairman of the Advisory Committee. (FACA § 10(c)).

If the head of the agency to whom the Advisory Committee reports determines that certain portions of some meetings may be closed to the public, such determination shall be in writing and shall contain the reasons for such determination. The Advisory Committee shall not hold any

meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and with an agenda approved by such officer or employee.

Since § 2(6) of the Federal Advisory Committees can be advisory only, and that all matters under their consideration should be determined in accordance with law (similar to the recommendation to the Secretary of Agriculture for approval of a rule or regulation for the Nectarine, Plum or Peach Marketing Orders), any actions taken by the Committees changing the law are null and void. If the Federal Advisory Committee Act permits the Committees to only advise, their enactment of substantive law must be null and void. The Secretary, through inaction and non-disapproval cannot make legal that which has its roots in non-compliance in the first place. In the instant case, there was no intent to comply with the Federal Advisory Committee Act. Yet, these various Commodity Committees had their greatest impact on the handlers/growers through their proposals and recommendations to the Secretary since they did not participate on a day to day basis in the actual ministerial operations of the Orders, such as inspections, over-seeing staff personnel, collecting assessments, paying bills. Their advisory role took on paramount importance. It can be discerned that their status partakes of a hybrid situation. The Committee meetings were attended by the Department's representative, who, in turn, relayed information to the Secretary, apart from the Committees' advice and recommendations.

Wileman/Kash proved at the hearing that the Chairmen of the Nectarine, Plum and Peach Commodity Committees, along with their "friends" on the various Committees, as well as the personnel of the California Tree Fruit Agreement have attempted to avoid the provisions of the Federal Advisory Committee Act by conducting the business of the

Commodity Committees in private session. The Commodity Committee members use their "alter ego" private non-profit corporation to discuss and determine the future, each season, of the tree fruit industry.

All the issues which should be raised at the "open" and "public" commodity meetings, are instead discussed, evaluated and decisions made in clandestine meetings under the guise of corporate meetings of the Tree Fruit Reserve. Decisions are made affecting the entire tree fruit industry, without the necessity of complying with Federal law. Thus, when the Committees meet at the annual public meetings, a stage play is presented. The Committees go through the motions of appearing to discuss the issues. However, all decisions have previously been arrived at in the Tree Fruit Reserve corporate meetings. Although the meetings of the Executive Committee of the Tree Fruit Reserve were generally held in conjunction with the Management Services Committee meetings, which Respondent argues were "open," the industry was not advised that the meetings were scheduled. These meetings always took place the day before the annual Commodity Committee meetings conducted in the spring and fall. Oftentimes, the Minutes would only reflect that the meetings were of the Management Services Committee. However, a review of those Minutes clarifies that at each such commodity meeting, there were tie-ins with the Tree Fruit Reserve whether the Executive Committee of the Tree Fruit Reserve was referenced in the heading of that meeting or not. Each such meeting included discussion of the Tree Fruit Reserve. Each individual attending the Management Services meeting was a member of the Executive Committee of the Tree Fruit Reserve (see, Exhibit Nos. 132-168) (Appendix "A", Respondent's Stipulated Response). Controversial issues were raised and discussed at the Tree Fruit Reserve gatherings and those present would be advised not to raise those issues at the

annual commodity meetings, where unanimity of opinion was promoted.

It cannot be the law in the United States that Federal Committees, such as the Nectarine, Plum and Peach Committees, that ostensibly recommend rules to the Government, can meet "in the dark" and make laws that have a substantial impact upon people with whom Wileman/Kash and others compete.

Although in *Wileman/Kash I*, the Judicial Officer stated that the Federal Advisory Committee Act is not applicable to the Committees administering the Marketing Order programs, such assertion was *dicta*. Specifically, the Judicial Officer stated:

"Petitioners contend that the Committees and Maturity Subcommittees failed to comply with the Federal Advisory Committee Act, which requires that committee meetings be open to the public, with timely notice published in the Federal Register (Act of Oct. 6, 1972, Pub. L.No. 92-463, 86 Stat. 770 (1972), as amended, *reprinted in 5 U.S.C. app. at 1175 (1988)*). However, no issue was raised in the petition or amended petition as to the Federal Advisory Committee Act and, therefore, the issue cannot be considered in this proceeding (§ II(A)). But even if the issue could be raised, that statute applies to advisory committees — not to committees with operational responsibilities. * * * " (Emphasis added).

The Judicial Officer's *dicta* was premised upon his finding that the role of the Committees was that of day to day operations which included crop estimation, monitoring seasonal production; contracting and interacting with inspection personnel; developing, reviewing and contracting for research and advertising; extensive recordkeeping and gathering and disseminating statistical material, etc. The Judicial Officer believed that the Committees' functions in making

recommendations to the Secretary " * * * is clearly something *secondary* that is incidental to and inseparable from their operational functions. It is for this reason that the administrative committees under Federal Marketing Orders are not subject to the Federal Advisory Committee Act." Clearly, the Judicial Officer's approach in this regard depends upon how one views the "operational" and "recommendational" aspects of the Committees. Although the Judicial Officer believed the issue was not presented in *Wileman/Kash I*, it is clearly presented herein, and, the extent to which the Judicial Officer will follow his own *dicta* in view of the record herein is not known. Whether or not the Federal Advisory Committee Act is applicable to the circumstances of the Commodity Committees is not a determining factor in this decision. It is noted, however, that if the Act is applicable to the Department, section 552b(h) requires that a suit must be filed in a Federal District Court within at least sixty (60) days of the meeting at which the alleged violation occurred.

When the Commodity Committees met during the period 1980-1987 to set the color chip standards for the following year, there was industry domination by a few and an economic concentration of power reflected in the conduct of the members of the Tree Fruit Reserve.

Wileman/Kash established, at the hearing, that the Maturity Sub-committees although they could, do not in actuality establish and recommend the color chip designations for each upcoming tree fruit season. Realistically those determinations are made by the California Tree Fruit Agreement and/or the Tree Fruit Reserve. As a matter of fact, all determinations relating to the tree fruit industry are made at the joint Management Services and Tree Fruit Reserve meetings.

A review of some of the Minutes of meetings held in the early 1980's sheds light on why the Committees failed to

seek the authorization of the Secretary prior to the implementation of the "well-matured" maturity standard. It is apparent that no studies or reports were ever conducted with respect to establishing guidelines for the implementation of the "well-matured" maturity standard. The Committees merely made up the rules as they went along. For example, an excerpt from the November 17, 1981, Minutes reads:

"Mr. Rasmussen [Chairman of the Plum Committee] asked whether a provision requiring 90% of the fruit to meet the standards would be acceptable. Mr. Van Sickle thought it would work on some varieties and that the industry could possibly try it for one year with committees appointed to set the standards which could be adjusted throughout the year. Mr. Giannini [Chairman of the Nectarine Committee] stated that in nectarines, 10% of the surface did not necessarily have to meet the color requirements and in addition, 10% of the fruit in the box can be under the maturity requirements. . . . If it proved that the maturity standards were too stringent, they could be reduced." (Exhibit No. 141).

These individuals, who ran the tree fruit industry, had no intention of conducting their business in "open" and "public" meetings. In fact, it is clear that they did not intend to advise the Secretary of Agriculture of their actions, at least while they continued to experiment in molding the industry to meet their objectives. A review of the Minutes of the May 4, 1982, Management Services Committee meeting exemplifies the intent of this experimentation and the Committee Chairmen's position that the Secretary had no "need to know":

"Mr. Rasmussen [Chairman of the Plum Committee] commented that he was recently criticized for the maturity standards in effect during 1981 and suggested that standards be locked into regulations with changes to be made by the full committee at the Fall meetings and

instituted in the following year. After additional discussion, Mr. Geller [Manager of CTFA] stated that *it may not be advisable to lock in color standards in the Bulletin as they would-be difficult to change in the future...* Mr. Giannini [Chairman of the Nectarine Administration Committee] commented that new nectarine varieties being regulated and others assigned of the number 24 (M) color chip, would need review during the season, and although he agreed that good communication is necessary, *he did not feel it is advisable to put specific color requirements in the Bulletin...*

Mr. Geller asked for additional comments to clarify a procedure for establishing and changing maturity standards. He suggested that when maturity is increased, a more formal procedure should be applied than if it were to decrease. Mr. Giannini suggested that the full committees handle changes up or down but that the standards must be flexible and recognize the individuality of each season. . . . Mr. Geller further suggested that Kim Botkin [Supervisor, SPI] and Mr. Van Sickle [Field Representative, CTFA] be authorized to observe the orchards and varieties in question and then determine if the full committees should be called. This would prevent the full committee from becoming a 'wailing wall.' (Exhibit No. 142).

It is apparent from the reading of the Minutes (Exhibit Nos. 132 through 167) that the Committees had no intention of discussing the implementation of their new "well-matured" standard with the Secretary of Agriculture. No reference is made to referring any of the rules and regulations, put in place by the Committees to control the tree fruit industry, to the Secretary of Agriculture. In fact, the above-referenced Exhibit No. 142 expressly points out that it was not their intent, at that time, to inform even the handlers and growers of their actions. The method established for advising the industry of regulation changes is

through the Bulletins and the "industry giants" determined that it was not in their best interests to publish the color standards in the Bulletins "as they would be difficult to change in the future." The Bulletins referred to are the Peach, Plum and Nectarine Bulletins published by the California Tree Fruit Agreement for distribution to the handlers and growers. These are *not* official government publications, but merely information devices.

In addition, there was testimonial evidence at the hearing that the Committees did not abide by the "Sunshine" laws because they did not believe them applicable.

It was indicated in *Pacific Legal Foundation v. Counsel on Environmental Quality*, 636 F.2d 1259 (1980) that requirement of application of the Sunshine's laws did not require the agency to hold meetings in order to function, but where deliberations and discussions among agency members in fact determined or resulted in joint conduct or disposition of official agency business, they were "meetings" to which open meeting rules applied, no matter how the agency might categorized them for its own internal purposes.

Certainly these Committees and/or the California Tree Fruit Agreement had day to day operational duties, carried out mostly by employees. However, inherent in their powers and duties was that of *reporting and recommending* to the Secretary. This *includes recommendations as to the rate of assessments* - few functions could take on greater importance to these Petitioners and others. Their functions and responsibilities fall within the parameters of the Federal Advisory Committee Act.

Application of the Administrative Procedure Act

Based upon the extensive evidence herein, I find that the Secretary's failure to provide an appropriate 30-day notice and comment period with respect to rulemaking was not justified; that nearly automatic approval of the Committee's recommendations without opportunity for participation by

interested persons deprived Petitioners of substantive rights; that failure to adequately review budget proposals and to allow meaningful participation by interested persons resulted in higher assessments than necessary and the expenditure of assessment funds for activities illegal to the Secretary. In addition there was unnecessary and impermissible retroactivity as to the assessments. Although the Department's procedures permitted the imposition of forced paid "generic" advertising monies which allegedly violate Petitioners Constitutional rights, this last contention is not necessary to decide herein because the Petitioners are entitled to prevail on administrative statutory grounds.

The Courts have repeatedly recognized that Congress authorized the Secretary of Agriculture to review initially all challenges by handlers to Marketing Orders including those raising Constitutional concerns. In fact, he must do so before handlers can seek Judicial redress. Whether or not an order, or its provision, is or is not in accordance with law involves questions of law, albeit formulated in Constitutional terms, arising out of, or entwined with, factors that call for an understanding of the industry regulated. Thus, the remedy, in the first instance derives from the Secretary and his ruling and the elucidation which he gives thereto.

Summarization of Constitutional Issues

The Petitioners herein have raised a number of Constitutional issues. Since, in my view, their pursuit of administrative remedies results in relief on non-constitutional grounds I shall follow the prudential consideration of not reaching the Constitutional questions.

However, if Petitioners were not to succeed on the merits of their Administrative Procedure Act posture, then further consideration must be accorded their claim for denial of First Amendment rights, which is discussed more fully hereinafter. Summarized, their position is that the Agricul-

tural Marketing Agreement Act permits the Secretary to collect assessments from handlers regulated under a Marketing Order for purposes of any form of advertising (7 U.S.C. § 608(6)(I)). The Secretary, adopting the preferences of the Nectarine, Plum and Peach Committees, through the California Tree Fruit Agreement, has opted for the use of "generic" rather than brand name specific advertising. Wileman/Kash assert that to compel them to provide financial support for the advancement of any economic, ideologic and/or commercial beliefs, particularly those with which they disagree, violates their Constitutional right of freedom of speech and association, both as individuals and in the commercial setting.

Approximately \$.09 to \$.10 per carton for Nectarines, Peaches and Plums is being assessed by the various Committees (through the California Tree Fruit Agreement) for the purpose of promoting "generic" advertising. This amounts to in excess of 50 percent of the assessments imposed and collected for funding the budgets of the respective Committees. These funds are then expended to promote philosophic, economic, ideologic and commercial beliefs to which Wileman/Kash do not subscribe.

Also, both parties have likewise addressed the issue of whether Congress has attempted to delegate to the Secretary of Agriculture unfettered discretion to impose taxes, thus involving Article 1, Section 8, Clause 1 of the United States Constitution which sets forth:

"The Congress shall have the Power To lay and collect Taxes . . . but all Duties, Imports, and Excises shall be uniform throughout the United States;"

The fees (assessments) which are imposed undisputedly benefit others than those from whom they are extracted. Whether they are more like a tax because they provide money for projects that benefit the general public is open to

question, although they benefit the foreign tree fruit industry and the industry nationwide, retailers and wholesalers. They also assist the general consumer nationwide in being able to select desirable tree fruits. In other words, Petitioners are forced to fund the activities and economic enhancement of others to their own detriment.

Again, this raises a Constitutional issue of whether there has been a forbidden delegation of legislative power, lacking established guidelines and limitations by which the person or body authorized to fix such rates is directed to conform. The Secretary's actions in imposing assessments must be "reasonable" and although this is a vague standard, a Federal Court would not necessarily shy away from the ascertainment thereof in an appropriate case. I shall not do so here because it is not required.

If it were, I would note with respect to the Judicial Officer's assertion in *Wileman/Kash I* that, " * * * petitioners rely on antiquated and in apposite cases involving delegations of authority to make law (e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)) * * *," that there is a recent case reflecting very careful and thoughtful study by the Tenth Circuit of what was found to be therein an unconstitutional delegation of legislative powers to the Attorney General. *United States v. Widdowson* (10th Cir. Oct. 15, 1990) (3 AdL.3d 536). Included in its opinion:

"Separation of powers as doctrine may appear to be moribund, but we do not agree with those who think it is dead. The Supreme Court recently relied on the separation of powers doctrine to strike down the one-House veto in *INS v. Chadha*, 462 US 919 (1983), and to hold Section 251 of the Gramm-Rudman-Hollings Act unconstitutional in *Bowsher v. Synar*, 478 US 714 (1986). Even more recently, the Court recognized that 'the integrity and maintenance of the system of government ordained

by the Constitution,' mandate that Congress generally cannot delegate its legislative power to another Branch. *Mistretta v. United States*, 109 S Ct 647, 654 (1989) (quoting *Field v. Clark*, 143 US 649, 692, 12 S Ct 495, 504, 36 L Ed 294 (1892)).

* * * * *

None of these limitations or safeguards is present in Section 811(h). The nation's chief law enforcement officer makes the law he is to enforce. In determining that a drug must be scheduled temporarily because it poses 'an imminent hazard to the public safety,' the Attorney General is charged to consider the drug's history and current pattern of abuse, the scope and significance of that abuse and potential risks to the public health. See 21 USC § 811(h)(1), (3). But he need not follow any scientific advice, he need not hold any hearings — just give thirty days notice in the Federal Register, *id.* Section 811(h)(1) — and his decision, by explicit statutory command, *id.* Section 811(h)(6), is not subject to judicial review. In other words, the Attorney General acts with unfettered discretion when making temporary scheduling decisions; he could add a substance as innocuous as aspirin to Schedule I and his decision could not be challenged.

* * * * *

Court decisions have given significant latitude to Congressional delegations to regulate complex, rapidly changing, important activities or products. Certainly harmful drugs is such an area. But we think the instant delegation goes beyond any that have been upheld. Although the authority of *Schechter* may be in doubt in many respects, it was surely correct in stating that although '[e]xtraordinary conditions may call for extraordinary remedies . . . [e]xtraordinary conditions do not create or

enlarge constitutional power.' *Schechter*, 295 US at 528 (footnote omitted). Like Judge Hutchinson, we believe that '[i]f this delegation is constitutional, . . . any individual protection provided by the constitutional prohibition against a general delegation of legislative power is a relic of the past.' *Touby*, 909 F2d at ____ (Hutchinson, J., dissenting). Like him, we are 'unwilling to consign it to the museum until the Supreme Court so decides.' " *Id.*

Assessments, the California Tree Fruit Agreement and the Tree Fruit Reserve

Actually, the nexus between the Tree Fruit Reserve and the Marketing Orders is found in the approval process of the Secretary of Agriculture as to the amount of needed and reasonable expenditures, and the need for him to comply with the Administrative Procedure Act as to his determination of the amount and purpose of expenditures and assessments. In his oversight capacity he, indeed, was aware of the Tree Fruit Reserve and condoned and fostered that entity's engaging in acts which were illegal to him. There was never any notification in the Federal Register or in the Marketing Orders of the relationship between the Tree Fruit Reserve and the California Tree Fruit Agreement. Since the Committee Chairmen and the Secretary of Agriculture knew of the Tree Fruit Reserve and its activities, then it must follow that he (the Secretary) failed to determine whether the assessments were excessive or not. If they were beyond the reasonable needs of the Committees they would be unauthorized. There is no such determination in the approval process. (Ex. No. 297). Mr. Kimmel, certainly a knowledgeable witness as to the Secretary's practices, and what he expects, clearly demonstrated the shallowness of the approval for expenditures, upon which the assessments are

based and paid. For instance, he testified, among other things, that:

"A. I really don't believe that the secretary engages in the decision of how the committees will finance their purchases. Whether or not those purchases are made by CTFA or by the Tree Fruit Reserve and rented or what. If they are determined to be necessary and appropriate expenditures, the secretary would approve. * * *" (Tr. 2728).

There is much documentary evidence reflecting surplus funds available to the Tree Fruit Reserve to pay for lobbying efforts and attorney's fees. Except for those associated with the Tree Fruit Reserve, others affected had no opportunity for input.

The Respondent would have consideration of the operation of the Tree Fruit Reserve precluded supposedly because it is an alleged separate non-profit corporation, but then argues that the relationship between the Tree Fruit Reserve and the Marketing Orders is in accordance with law. The basic thrust of the Respondent is that the Petitioners have cited no authority that:

"* * * provides that a handler need not pay his lawfully levied assessments *merely because there is found to be some misfeasance by those responsible for administering or spending such funds*. When taxpayer funds are illegally spent or lost through misfeasance or incompetency by the Defense Department or the Interior Department, every taxpayer does not suddenly get a refund, or receive a dispensation from paying taxes. Petitioners never prove why their position would be any different.

In addition, petitioners fail to consider that it is undisputed that the Tree Fruit Reserve received only \$77,522 from the marketing orders in the year ending February 28, 1989, (Exhibit 204, pages 3 and 7). The amount in prior

years was much smaller (Exhibits 176-203). This amount is less than 1% of the assessments of the marketing orders (Exhibits 255(C), (D), (E)). [Footnote omitted]. Therefore, even if all such funds were found to have been stolen or illegally spent, they would at most justify a less than 1% reduction in petitioners' assessment bill."

Among Respondent's admission are those of:

"* * * The Tree Fruit Reserve apparently has on its own also engaged in activities which the committees are unauthorized to do (e.g., lobbying Congress regarding import legislation). * * *

* * * * *

It is also undisputed that many, at least, of the officers and Board of Directors of the Tree Fruit Reserve are members of one or more of the marketing order committees. Because of this fact, Tree Fruit Reserve meetings have been held in conjunction with committee meetings and, for a period of years, joint minutes were kept." (Exhs. 149-163).

Respondent maintains that the California Tree Fruit Agreement received value obtained from the rental arrangements of the Tree Fruit Reserve and that:

"* * * all of the funds are in the nature of rent for the Sacramento office, for automobiles, or for office equipment and furniture. (Exhs. 203-204). In total they constitute less than 1% of the budget of the marketing order committees. Even, *arguendo*, if all such payments were found to be unauthorized and reprehensible, they still are of such minor impact on the marketing orders' budget that they cannot justify petitioners' failure to pay their assessments. * * *

Obviously, those concerned and associated with the Tree Fruit Reserve were reluctant to give testimony relating to its

activities. Much of the foregoing has been premised upon subpoenaed documentary evidentiary data, although Mr. Kurt Kimmel, Agricultural Marketing Services' field representative, stationed in Fresno since 1986, has, among his duties the reporting back, "from Washington to the Committees" regarding policy and communications in general (Tr. 2694) and he represents the Department of Agriculture at meetings of the Committees (Tr. 2693), and supervises Commodity Committee meetings. (Tr. 2702). He described how Washington was concerned that the California Tree Fruit Agreement was doing services for the Tree Fruit Reserve gratuitously. (Tr. 2703, 2704). Prior to early 1988, Mr. Kimmel attended the joint meetings with the Executive Board of the Tree Fruit Reserve. (Tr. 2705). He acknowledged the likelihood that had the California Tree Fruit Agreement bought its own building, the assessments could be less. (Tr. 2733-2734). Because the California Tree Fruit Agreement and the Tree Fruit Reserve were not treated as separate entities, it is difficult to find explanation for various discrepancies such as appear in the Tree Fruit Reserve's filing of their annual IRS Form 990 (Tax Return of An Organization Exempt From Income Tax). Mrs. Rau, a CPA with Grant Bennett Associates in Sacramento, testified that she has been personally involved in the preparation of the tax returns and the yearly financial audits of the California Tree Fruit Agreement, the Nectarine Committee, the Plum Committee, the Peach Committee and the Tree Fruit Reserve, since 1983. (Tr. 59-62). Mrs. Rau testified that she has the responsibility of verifying, as part of the audit, that the corporate responsibilities of the corporations are met, Minutes are kept, etc.. In her opinion, the records of the organizations have been normally and properly maintained. (Tr. 63-65).

Although Respondent argues that the Tree Fruit Reserve is a private corporation which is unrelated to the Commodity Committees and/or the California Tree Fruit Agree-

ment, Mrs. Rau has specifically found, in her preparation of the financial statements on behalf of the Tree Fruit Reserve that: *"The Tree Fruit Reserve and the California Tree Fruit Agreement are affiliated non-profit organizations: the Tree Fruit Reserve receives all of its operational revenues from the California Tree Fruit Agreement in the form of rents. These amounts arise from related party transactions with the California Tree Fruit Agreement."* (Ex. 204). In spite of her acknowledgement, in the Tree Fruit Reserve financial statement, of the interrelationship between the Tree Fruit Reserve and the California Tree Fruit Reserve, Mrs. Rau failed to provide this same information to the Internal Revenue Service. For example, with respect to page 4 of the IRS Form 990, submitted on behalf of the Tree Fruit Reserve, several discrepancies exist which to date go unexplained. Although Mrs. Rau states that "... The Tree Fruit Reserve and the California Tree Fruit Agreement are affiliated non-profit organizations," she *denies* on the IRS Form 990 that the *Tree Fruit Reserve is interrelated with any other organization.* (Ex. Nos. 272-296).

Although on the financial statement of the Tree Fruit Reserve for the fiscal year ended February 28, 1989, there is acknowledged a contribution to the California Grape and Tree Fruit League to support the Alliance for Food & Fibre of counter pesticide legislation (Ex. No. 204), Mrs. Rau denies on the IRS Form 990 that any amounts were spent in attempts to influence public opinion about legislative matters or referenda. (Ex. No. 272). This directly contradicts the entry in the financial statement.

Although the 1988-1989 financial statement for the Tree Fruit Reserve, as prepared by Mrs. Rau, sets forth \$5,437 as "other income" generated from disposal of assets, interest, and other income, during the 1988-1989 fiscal year (Ex. 204), Mrs. Rau denies on the Form that the Tree Fruit

Reserve generated in excess of \$1,000 in unrelated income during this time frame. (Ex. 272).

Although it was testified that the computer and press purchased by the California Tree Fruit Agreement in 1986 was transferred to the Tree Fruit Reserve for little or no remuneration in 1987 (Tr. 3463), the IRS Form 990 prepared by Mrs. Rau, fails to reflect that the organization received donated services or the use of materials, equipment or facilities at no charge or substantially less than fair rental value. (Ex. Nos. 272-275).

The financial statements of the Tree Fruit Reserve, for each season, when compared to the IRS Form 990 for the corresponding fiscal year, are inconsistent with one another.

There is an intertwinement between the California Tree Fruit Agreement personnel and the Tree Fruit Reserve and a dependency of operation that negates arms-length dealings. Both entities have been considered one and the same.

Even as late as February 28, 1989, the professional accounting firm, employed by both the California Tree Fruit Agreement and the Tree Fruit Reserve stated:

"Tree Fruit Reserve and California Tree Fruit Agreement (C.T.F.A.) are affiliated nonprofit organizations. Tree Fruit Reserve receives all its operational revenue from C.T.F.A. in the form of rent on buildings, automobiles, office equipment and furniture." (Ex. 204, p. 7).

There is a commonality, a sameness, attached to their Board of Directors, their meetings, to their Minutes, and their use of the same accounting firm. This coziness permitted the absence of the Tree Fruit Reserve's Board of Directors' Minutes for eight years; the lack of written rental arrangements, leases of cars, leases of furniture and apparent failure to comply with California law as to amendments to its Charter and/or By-laws. Discussions relating to the operation of the Tree Fruit Reserve and Marketing Order provi-

sions relating to the operation of each entity are mutually discussed within the framework of these common organizations.

In the absence of arms'-length dealings there are circumstances of potential and/or actual conflict of interests. The profits generated by the Tree Fruit Reserve, from the use of handler assessment monies, are used to promote special interests of the various Commodity Committeemen. The appointment of individuals, to Committees of the various Commodities, by the Secretary of Agriculture is a high calling. It is one of trust and responsibility, and the duties and responsibilities of Committee members and Committee Chairmen may not be viewed lightly because the Secretary of Agriculture has entrusted to such persons the lofty positions they occupy and he expects their authority to be exercised in a manner reflective of the Secretary's own responsibilities and judgment.

This was not done here, because it was illegal for the members of the Peach, Plum and Nectarine Commodity Committees to spend handler assessment monies through the Tree Fruit Reserve for activities which transcend the questionable to the illegal. Such "schemes" and "shams," maintained a facade under the color of law to avoid the Secretary's regulations and Congress' intent in establishing the Agricultural Marketing Agreement Act. It is doubtful that the various Committee Chairmen could have utilized a partnership arrangement, among themselves, to have operated in the same manner as the Tree Fruit Reserve, or to have so acted in their individual capacities. Uncertainty as to the capacity in which a Committeeman may have been acting at any given time became a guessing game. *The Chairmen of the respective Peach, Plum and Nectarine Committees and the Chairman of the Control Committee are automatically on the Board of Directors of the Tree Fruit Reserve and are one and the same.*

The Commodity Committee members had no official duty to be part of and/or to condone a little known (if known at all by industry members), alleged private non-profit corporation, the operations and actions of which were sought to be separated from the Department of Agriculture by achieving a cosmetic facade to create the illusion of separateness. Mr. Kimmel, Agricultural Marketing Services' representative testified that the Tree Fruit Reserve was no secret to the Department of Agriculture, but may not have been known to growers and others.

This duality of purpose of the Committeemen provides fertile ground for such persons to engage in tactics to restrain their competitors and, at the same time, increase production and marketing of their own produce or that of their friends. Little thought has been given to conflict of interest and less than *bona fide* arms'-length inter-related business transactions.

The Commodity Committee members, including their respective Chairmen, directly or by subterfuge, when acting in a dual capacity, one of which was contrary to the Agricultural Marketing Agreement Act and the Administrative Procedure Act, violate the laws and may not claim exemption from such liability. Some growers and handlers, particularly the smaller ones, may not be represented at all or, if represented, very poorly. Their property rights are not protected when the Committee members, on behalf of the Secretary, in the trusted position of a Committee member, subject to the Secretary's supervision, delegation and approval, dons the hat of a member of the Board of Directors of the Tree Fruit Reserve, who's interests may be, and often is, contrary to the interests of others in the same business.

Wileman/Kash proved that the annual Commodity Committee meetings required by law to be open and public, are a sham. The evidence showed that the Officers and members of the Tree Fruit Reserve (which includes the Commodity

Committee Chairmen, the members of the Commodity Committees and persons representing the California Tree Fruit Agreement) in non-public meetings (which remain unpublished), secretly controlled the tree fruit industry. Key issues were discussed, evaluated and voted on in private clandestine meetings obscured from public scrutiny. What remained to be accomplished at the "open" and "public" Commodity Committee meetings misled the remainder of the tree fruit industry into believing that decisions were being dealt with openly, honestly and fairly. Such was not the case.

However, overshadowing all other activities of the Tree Fruit Reserve, are those which strike at the very heart of the Agricultural Marketing Agreement Act: namely, knowing evasion of its prohibitions.

No attempt is made herein to pass upon the corporate affairs or determine the legal liability, if any, of the Tree Fruit Reserve's possible failure to report unrelated taxable income, its interlocking directorates, and the transfer of the computer and/or other assets from the tree fruit industry. The disinclination to pass upon corporate affairs of the California non-profit corporation is in accord with *RCM Securities Fund, Inc. v. Stanton*, (2nd Cir. No. 90-7047 (March 26, 1991)); *Burks v. Lasker*, 441 U.S. 471 (1979). The fact that the Tree Fruit Reserve supports and funds activities not authorized pursuant to the Agricultural Marketing Agreement Act, is a matter of concern to the Secretary of Agriculture.

The direction and purpose of the Tree Fruit Reserve could not be achieved by the Committee Chairmen as individuals. They could not have met together, as individuals, and decided to obtain handler assessment moneys for lobbying activities and attorneys fees.

Hiding from view, within the confines of the Tree Fruit Reserve corporation, does not alter the responsibilities and duties of the Secretary of Agriculture, nor his Committee members whom he appoints and their Chairmen. The cloak of Marketing Orders is not a shield to circumvent the Agricultural Marketing Agreement Act.

The California Tree Fruit Agreement acting through its "alter-ego," the Tree Fruit Reserve, has unlawfully spent assessments on lobbying.

The California Tree Fruit Agreement acting through its "alter-ego," the Tree Fruit Reserve, has unlawfully spent assessments on retaining attorneys to represent private individuals in direct conflict with the interests of Petitioners.

The Department of Agriculture frequently pierces the corporate veil. This should be done here. The corporate shell is not sufficient to shield the Committee Chairmen from their duties pursuant to the Marketing Orders nor is it strong enough to allow the Secretary of Agriculture to ignore the Administrative Procedure Act in the determinations pertaining to the approval process as to the amount of involuntary assessments which each handler must remit.

Although relating to the achievement of a monopoly position, the Courts have recognized that only the precise activities authorized or required by an Order are legal, and practices not literally legitimized by an Order or an activity carried out "under the cover" of Federal Marketing Orders are subject to scrutiny. See, *Marketing Assistance Plan, Inc. v. Associated Milk Producer, Inc.*, 338 F. Supp. 1019 (1972) where a discrete group of citrus growers owned three related cooperatives performing different marketing functions. The U.S. Supreme Court regarded all three essentially one entity, with any differences being *de minimis*. *Sunkist Growers, Inc. v. Winekler & Smith Citrus Products Co.*, 370 U.S. 19 (1962).

The 1988 Regulations

The Administrative Procedure Act was not followed with respect to implementing the "laws" through the publication, was for the first time in eight years, of Regulations. Petitioners' complaints and grievances illustrate the paradox in which they find themselves. The promulgation of the Interim Final Rules indicates that although the Secretary received quite a few comments from commentaries, nevertheless, the Secretary made findings and determinations either at odds with existing data, or he ignored or failed to elucidate on those comments which were not persuasive to his purposes. Although these Petitioners fall within the scope of the regulated handlers, nevertheless, unless they can find a legal avenue within which to contest these matters, they are essentially without a remedy. This is particularly true if one were to adopt the Respondent's position that one cannot question (as opposed to second guessing) the Secretary's determinations.

Because of the frustration resulting from the inherent immobility of the system whereby an aggrieved Handler/Petitioner can obtain an adjudication as to his grievance, these Petitioners have pursued various legal positions in their Petition filed with respect to the 1988 and 1989 harvest seasons — which positions overlap to a certain extent but not totally with the allegations and arguments set forth in the *Wileman/Kash I* proceeding.

However, as stated by Respondent:

"It is elementary that each rulemaking must be judged on the basis of its own administrative record. *In re: Sequoia Orange Co., Inc.*, et al., 47 Agric. Dec. 2 (1988); *In re: Sequoia Orange Co., Inc.*, 41 Agric. Dec. 1511 (1982).

Color Chips and Volume Control

Thus, it is appropriate to examine what impact the 1988 Regulations have on these Petitioners. With respect to the 1988 regulations as regards maturity regulations and 1988 size regulations, to which the Petitioners are subject, it must be asked whether same were promulgated in accordance with law and thus authority exists therefor, and whether Petitioners have proven that the requirements are incorrectly applied to them. Initially, with respect to this contention, the Respondent's position is noted as to Peaches. Unlike the Plum and Nectarine Committees, the Peach Committee did not propose to increase the minimum size requirements for listed Peach varieties in 1988. The Peach Committee did recommend "remov[ing] two varieties no longer produced in significant quantities from variety specific size requirements." (54 Fed. Reg. 12692).

Section 2 of the Agricultural Marketing Agreement Act (7 U.S.C. 602) states in part, that there is a policy to establish and maintain "such minimum standards of quality and maturity and such granting and inspection requirements * * *" as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest. (7 U.S.C. 602(3)), Section 8c(6)(A) of the Agricultural Marketing Agreement Act (7 U.S.C. 608(c)(6)(A) specifically provides that Marketing Orders may contain terms and provisions specifying the grade, quality or size of fruit that may be marketed or transported by handlers.

Both Order 916 and Order 917 contain such provisions. The Nectarine Order (7 C.F.R. 916.52(a)(1)) states:

The Secretary shall regulate, in the manner specified in this section, the handling of nectarines whenever he finds, from the recommendations and information submitted by the committee, or from other available information, that

such regulations will tend to effectuate the declared policy of the act. Such regulations may:

- (1) Limit, during any period or periods, the shipment of any particular grade, size, quality, maturity, or pack, or any combination thereof, of any variety or varieties of nectarines grown in the production area

The provisions of 7 C.F.R. 917.41(a)(1) are virtually identical with regard to Plums and Peaches. These Orders are not some new innovation. The Plum and Peach Order dates back almost to the enactment of the Agricultural Marketing Agreement Act (previously as 7 C.F.R. 936) and the Nectarine Order has been in existence for 30 years (previously as 7 C.F.R. 937). The above-quoted and cited provisions of 7 C.F.R. 916.52(a)(1) and 7 C.F.R. 917.41(a)(1) were promulgated on June 25, 1958 (23 Fed. Reg. 4616) and December 23, 1965 (30 Fed. Reg. 15990) respectively. The Petitioners do not contend that the Agricultural Marketing Agreement Act and Orders 916 and 917 do not provide *authority* for regulations limiting the handling of Nectarines, Plums and Peaches to those of a certain maturity and size level, but they contend such authority has not been properly implemented and exercised.

Prior to 1980, all Nectarines and Plums were required to meet a U.S. No. 1 grade and maturity level. The U.S. No. 1 maturity level is that the fruit is mature enough that it will continue to ripen after severing it from the tree. Prior to 1980, the Inspection Service would only require that the Nectarines and Plums reach a U.S. No. 1 maturity level and that they not have over a certain percentage of the fruit in the carton inspected, or in the lot inspected, that did not meet the U.S. No. 1 Standard.

The United States Standards for Grades of Nectarines provide (7 C.F.R. § 51.3147, .3150(a)(3), .3153):⁴

§ 51.3147 U.S. No. 1.

"U.S. No. 1" consists of nectarines of one variety which are mature but not soft or overripe, which are well formed, clean, and free from decay, broken skins which are not healed, worms, worm holes, and free from injury caused by split pit and free from damage caused by bruises, growth cracks, hail, sunburn, sprayburn, scab, bacterial spot, scale, scars, russetting, other disease, insects, or mechanical or other means.

- (a) At least 75 percent of the nectarines in any lot shall show some blushed or red color, except that there are no color requirements for nectarines of the John Rivers variety in this grade. (See § 51.3150.)

§ 51.3150 Tolerances.

In order to allow for variations incident to proper grading and handling in each of the foregoing grades, the following tolerances, by count, are provided as specified:

- (a) U.S. Fancy, U.S. Extra No. 1, and U.S. No. 1 grades —

- (3) For color —

- (ii) U.S. Extra No. 1 grade and U.S. No. 1 grade. Individual containers may contain not more than 10 percentage points less than the required percentage of nectarines showing the amount of color specified for the

⁴ The United States Standards have, at times, been designated by the same numbers, except preceded by "28, i.e., 7 C.F.R. § 51.3147 was previously designated as 7 C.F.R. 2851.3147.

respective grade: *Provided, That* the entire lot averages not less than the required percentage of nectarines showing the specified color for the grade.

....

§ 51.3153 Mature.

"Mature" means that the nectarine has reached the stage of growth which will insure a proper completion of the ripening process.

The United States Standards for Grades of Fresh Plums and Prunes provide (7 C.F.R. § 51.1521, .1530):

§ 51.1521 U.S. No. 1.

"U.S. No. 1" consists of plums or prunes of one variety which are well formed, clean, mature but not overripe or soft or shriveled; which are free from decay and sunscald, and free from damage caused by broken skins, heat injury, growth cracks, sunburn, split pits, hail marks, drought spots, gum spots, russeting, scars, other disease, insects or mechanical or other means.

....

§ 51.1530 Mature.

"Mature" means that the fruit has reached the stage of maturity which will insure a proper completion of the ripening process.

Wileman/Kash directly compete in marketing Nectarines, Plums and Peaches with the entire tree fruit industry, which includes the Chairmen and Committee members of the Nectarine, Plum and Peach Committees. Most, if not all, market their Nectarines, Plums and Peaches in California, as well as throughout the United States, and often compete for Wileman/Kash's buyers, brokers and growers. Because Peaches were not involved in *Wileman/Kash I*, it is

appropriate to review some of the evidence which is applicable thereto.

Prior to May, 1980, Nectarine Regulation No. 11, Plum Regulation No. 15, and Peach Regulation No. 11, required Nectarines, Plums and Peaches to meet the requirements of U.S. No. 1 grade, herein before set forth. Said regulations stated that when used therein [U.S. No. 1] shall have the same meaning as set forth in United States Standards for Nectarines, Plums and Peaches. U.S. No. 1 Standard means that point where the fruit has reached that stage in the maturity process that it will continue to ripen after being picked from the tree.

In 1980, proposed rules were issued for Nectarines, Plums and Peaches, which still required Nectarines, Plums and Peaches to meet the requirement of U.S. No. 1 grade, and went on to add (and it remained the same through 1987): "Provided, that maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service." Said provisions went on to state that U.S. No. 1 means the same as defined in the United States Standards for Grades of Nectarines, Plums and Peaches.

The Nectarine, Plum and Peach Committees, desiring a "higher" maturity standard, requested the Federal-State Inspection Service (SPI) (meaning, Shipping Point Inspection) to raise the maturity level. The Committees were advised by Shipping Point Inspection that they could not change the U.S. Standards because they applied to all States. The Committees were further advised that if they desire a "higher" maturity level for the fruit, they should get the Marketing Orders amended to require a "well-matured" standard. (Tr. 1155-1156 of prior hearing).

The Nectarine, Plum and Peach Committees, without any delegation or expressed authority from the Secretary of

Agriculture took it upon themselves to create a "higher" maturity level. Pursuant to the directions of the Commodity Committees, the California Tree Fruit Agreement (as employees of the Committees) issued new "regulations." In what was referred to as Nectarine Bulletin No. 1, the California Tree Fruit Agreement supplied to all growers and handlers of Nectarines, a bulletin which "sets forth everything you need to know about nectarine regulations for the 1980 marketing season." The Bulletin stated that all varieties of Nectarines will be U.S. No. 1 with the following exception: "*Maturity* — Nectarines shall be "well-matured" which means that they meet the color standard established for each variety. This maturity requirement is more advanced than the maturity requirement of the U.S. No. 1 grade."

The Bulletin went on to indicate the authority for the new "maturity" standards, and on page 3 stated:

"Your attention is directed to the new and advanced maturity requirement set forth on page 1 of this bulletin. This new maturity regulation was adopted by the *Nectarine Administrative Committee*. The new maturity level is based on color standards that have been developed and established by the Inspection Service and an industry maturity subcommittee. The color standards will be applied on a varietal basis and the maturity subcommittee will be available to deal with any maturity problems that arise."

Immediately following the release of Nectarine Bulletin No. 1, the California Tree Fruit Agreement, issued the Plum and Peach Bulletins which were substantially similar to that issued for Nectarines, except with regard to Plums the fruit was to not only be "well-matured" but was also to meet "spring" requirements applicable to each variety. It should be noted that these "well-matured" regulations were never, through the 1987 season, adopted by the Secretary of

Agriculture, nor did they ever go through the Administrative Procedure Act process, nor were they ever published in the Federal Register.

Subsequent to the institution of the "well-matured" standard, the Committees established "Maturity SubCommittees." They were to be comprised of members of the Committee. The purpose of the "Sub-committee" was to determine if a variance from a particular color standard should, or should not be, granted to a particular handler during each harvest season.

Commencing with the 1980 tree fruit season, the California Tree Fruit Agreement (employees of the Committees) would recommend to the Committees the particular color standards to be initially applied to each variety of Nectarine, Peach and Plum for the upcoming harvest season. Supposedly, the Committees would make the final determination. The Federal-State Inspection Service did not, and was not allowed, to determine what the color standard would be for any particular variety. They regarded themselves as "neutrals." (Tr. 1642-1644 of *Wileman I* hearing). The Committees, or their appointed Sub-committees (made up of members of the Committees), were the only persons allowed to establish, change, or allow a variance from, the color standard. At no time did the Committees or the California Tree Fruit Agreement personnel permit the Shipping Point Inspection to ignore a particular color standard or override a particular color standard even when the inspectors felt that the fruit was otherwise "well-matured". Even when the Shipping Point Inspection and the California Tree Fruit Agreement employee believed that the fruit was "well-matured" if it did not meet the particular color standard for that variety, it could not be shipped, unless the maturity Sub-committee voted to grant a variance or to change the particular color standard. If the particular Committee or Sub-committee refused to grant a variance, the Shipping

Point Inspection would not allow the fruit to be shipped. (Tr. 1687-1692).

When the color chips, representing the Committees' color standards for maturity, were first developed and used in 1980 as the "law," the Shipping Point Inspection felt that the designated color standard for a particular variety represented a "well-matured" piece of fruit. However, of the 79 varieties of Nectarines listed having color standards, 45 have increased in maturity requirements. Eventually 13 different color chips ranging from "A thru M" were established, ranging from "A" (green) to "M" (bright yellow). The higher the letter designation, the longer that piece of fruit would remain on the tree prior to being picked. For example, if a particular variety of Nectarine had a "G" designation for 1980 and the committee decided to raise that color chip designation to "L" in 1981, the 1981 fruit would be substantially more mature when picked than the 1980 fruit.

From 1980 to 1987, there was no uniformity between the varieties, as to the degree of advanced maturity required for each variety, through the use of the color standards. A piece of fruit can be "well-matured" and overripe and still not meet the color standard as determined by employees of the California Tree Fruit Agreement and members of the Commodity committees.

The specific color standards as imposed by the Commodity Committees did not objectively determine whether the fruit was of good consumer quality and good marketable quality. Further, the color standards and maturity requirements as imposed by the Commodity Committees discriminated against the yellow varieties of Nectarines (such as the Tom Grand, grown by Wileman Bros. and Elliott, Inc.) from those of the newer varieties, that are almost red, as the latter varieties reach and exceed the specific color standard prior to ever becoming "well-matured."

The Management Services Committee and the Executive Committee for the Tree Fruit Reserve established and maintained the well-matured standard for eight (8) years without Secretarial approval.

In the prior hearing, Wileman/Kash questioned the necessity for maturity to be determined at the time of picking, rather than at the time of packing the fruit. The Secretary of Agriculture never published a regulation to that effect; however, maturity determined at the time of picking became a California Tree Fruit Agreement regulation. Respondent argued, and the Judicial Officer adopted, that although the Secretary never required maturity to be determined at the time of picking, California state law required such and the California Tree Fruit Agreement merely incorporated the state law into the California Tree Fruit Agreement Bulletins.

Neither Respondent nor the Judicial Officer referenced any specific statute for the position that maturity determined at the time of picking was California state law.

The Commodity Committee members engaged in favoritism with respect to dealing with handlers and growers, in the arbitrary application of "supervisory discretion" to preclude and/or deny requests for changes or variances from the illegally imposed color standards. A common complaint of handlers, subject to "laws" set forth by the Commodity Committee members, and/or the California Tree Fruit Agreement was that they could not secure relief, by way of a color standard variance, unless LeRoy Giannini (Chairman, at that time, of the Nectarine Administrative Committee) had the same variety, and even then the relief, by way of variance, was never granted unless "LeRoy gets it."

On various occasions, the Commodity Committee members would order the Shipping Point Inspection to allow fruit to pass inspection, for themselves and "friends," that did not

meet color standards. This would be done without calling on the Sub-committee to vote on a variance, and without following their own by-laws.

As statutorily required by law, during the period 1980-1987 the Commodity Committees could operate only with the approval of the Secretary of Agriculture. However, there was no active supervision nor meaningful oversight by the United States Department of Agriculture over their decisions, nor in their application of the precise color standards and maturity standards to be employed, per variety, to the tree fruit. The color standards and maturity standards imposed by the Commodity Committees, through the California Tree Fruit Agreement, for Nectarines, Plums, and Peaches, up through 1987, have never been published in the Federal Register, nor has there been a substantial basis and purposes statement made by the United States Department of Agriculture, nor anyone properly delegated by it, nor were provisions ever made for notice and comment.

The tree fruit Commodity Committees negated the authority delegated by the Secretary of Agriculture to the Federal and the Federal-State Inspection Service as provided in the Orders' provisions. Regulations specifically empowered the Shipping Point Inspection to determine the appropriate maturity standard for each particular variety of Nectarine, Plum and Peach, for each particular season. Instead, the Commodity Committees usurped that authority by setting the standards themselves. The Commodity Committees and their employees, the California Tree Fruit Agreement, relegated the Shipping Point Inspection's authority to that of a neutral bystander which, on occasion might concur in making recommendations to the Committees regarding the appropriate color standards which would be accepted or rejected by the Commodity Committees.

The record evidence herein shows that Wileman/Kash suffered losses as a result of withholding variances and the

arbitrary application of advanced maturity requirements and specific color standards, which advanced standards did not create a better consumer quality Nectarine, Plum or Peach.

In 1988 the Secretary engaged in "rulemaking" for Peaches, Plums, and Nectarines (Ex. Nos. 33, 34, and 35) the results of which remain arbitrary, capricious, and not based upon substantial record evidence, but reinforced an entrenched system.

The mere publication in 1988 of a "well-matured" maturity standard lacks reasoned decisionmaking and is not based upon a substantial record and is contrary to the facts brought forth to the Secretary.

Pursuant to informal rulemaking, 7 C.F.R. § 916.356 and 7 C.F.R. §§ 917.459 and 917.460, the Secretary issued regulations in 1988. (Petitioners Ex. AB 33, 34, 35). The question presented is whether such regulations cured the prior deficiencies of noncompliance with the Administrative Procedure Act. I believe not. It is quite clear that the "well-matured" standard which previously existed was sought to be enacted for the tree fruit industry in 1988, and subsequent years.

The reasons for this statement are obvious. The "well-matured" standard imposed by the United States Department of Agriculture on the tree fruit industry for the 1988 and 1989 harvest seasons used the same color chips that were in existence in the 1987 harvest season. [Note: It is not known if the Secretary had a set of color chips before him when he issued the regulations, and, if so, which set. There were two sets which differed. Neither is a part of the rulemaking record.] Since the application of the color chips used in 1987 and prior years was clearly arbitrary and capricious as not reflecting the intended result of determination of maturity, the color chips and other "maturity tests" used in 1988 and 1989 must also be deemed arbitrary and

capricious. There remains a significant difference, depending on the variety, between a U.S. No. 1 Standard and a "well-matured" standard as perceived by the California Tree Fruit Agreement.

The illusiveness of the terms mature and well mature is recognized in the Secretary's 1988 Interim Final Rules where it was indicated that the Secretary, relying on 1979 data as to criticism relating to maturity stated, *inter alia*:

"We do, however, believe that a more specific definition of 'well-matured' could be helpful. Therefore, comments are invited on developing a definition *with more specificity*." (Emphasis added).

The evidence herein clearly shows that the color chips used were not necessarily reflective of when a fruit had desirable market maturity. The Department recognizes this:

"Chemists Robert J. Horvat, James A. Robertson and Glen W. Chapman Jr., of USDA's Agricultural Research Service have identified and quantified the exact profile of chemical compounds that make a tree-ripened peach smell mouthwatering good.

"We identified five specific compounds from tree-ripened fruit that, mixed together in the right quantities, are essential to create what our smell panelists call 'the peach aroma,' Horvat said.

He and the co-researchers did the studies at the ARS Horticultural Crops Quality Research Laboratory in Athens, Ga.

He said the research team's informal smell panels could detect differences in the aroma of peaches just four hours after they were picked. On the panels were people who are specialists in odor chemistry.

'For our panels to get the best peach smell, we found a peach really had to be less than four hours off the tree,' Horvat said

But commercially, most peaches must be picked a little on the green side. That allows time for them to be shipped to market before they set soft or overly ripe. Eventually, Horvat said, the objective is to make recommendations for when peaches should be picked for the best compromise in shelf life and aroma.

When the researchers analyzed peaches picked on a typical commercial schedule, they found there was a totally different profile for the five essential compounds.

'It wasn't so much that any were missing, but rather they were in a different combination of concentrations.' Horvat said. *'In particular, there was a much lower concentration of the two aldehydes.'*

Now that research has isolated the essential compounds in peaches that come up to snuff as far as aroma, Horvat said studies are needed to pin down the point at which peaches on the tree start approaching that profile." [From selected speeches and news releases, January 4-11, 1989.³ (Emphasis added).

While the administrative agencies and officers have the primary task of administering broad policy mandates for the common good of our society, they should not be required to refine their rules to assure tailor-made equity for each of the

³Neither party requested official notice of this news release and, accordingly, it is mentioned, not for the truth of the statements therein, but, rather to show, together with the vast amount of evidence in this case, the illusiveness of color chips as a determining factor of well matured fruit.

complexities that may arise. However, the rules they issue must be rational and supportable in their general application and must show that they address the important aspects of what they are about to do, and if they are arbitrary, capricious or irrational, they are null and void. *Evergreen State College v. Cleland*, 621 F.2d 1002 (9th Cir. 1980); *Saint James Hospital v. Heckler*, 679 F. Supp. 757 (D.C. Ill. 1984), *aff'd*, 760 F.2d 1460.

The specific color standards adopted for Nectarines and Plums for the 1988-1989 harvest seasons did not objectively determine good consumer quality or marketability. There is nothing in the rulemaking record that suggests that the color standards would result in compliance with whatever goals the Secretary wished to achieve. There is no indication that the Secretary ever considered the impact on the consumer, the impact on the handler, whether the "well-matured" standard would significantly affect East Coast shippers more than West Coast shippers, nor whether the "well-matured" standard was, in reality, intended for volume control rather than quality control.

The Secretary never considered whether the rule could be applied uniformly in order to provide the same amount of shelf life for each variety of fruit, regardless of where it was shipped or whether the fruit was being supplied to a chain store operation or was destined for a terminal market. The Secretary failed to consider whether or not, as a result of the regulations, there would be increased picking costs or decreased parity prices to growers. Based on the rulemaking record before the Secretary, it can only be inferred that he "rubber-stamped" a Committee recommendation, did not give it any independent thought, set no standards and did nothing to define what he actually intended. At the time of formulation of the 1988 regulation, the Secretary had before him the sworn testimony of the *Wileman/Kash I* hearing. The difference in the quality of submission in the aforesaid

rulemaking procedure and in adjudicatory proceeding is substantial: the former consists of comments and recommendations, not subject to cross-examination and not subject to sworn statements.

Nowhere in the proposed rule, the Interim Final Rule, nor the Final Rule is there any indication as to how the Secretary arrived at the particular color chip designations set forth in the Tables, as published in the Federal Register (see Exhibit Nos. 31(A) through 31(G) and 32(Z) through 32(BB)).

Basically, Respondent argues that it does not have to show substantial basis in the rulemaking record, because Petitioners have the burden of showing otherwise. More, specifically, Respondent sets forth on brief.

Since they [the Petitioners] cannot explain away the scientific studies, statements drawn from the experience of experts in the industry, and input from the marketers and consumers, petitioners merely bury their heads in the sand and squawk that there is *no* such information. This ostrich approach, however, does not work, either logically or legally. It is petitioners, not respondent, who bear the burden of showing that there is not substantial evidence and that the rulemaking decision is arbitrary and capricious. Clearly they have not met this burden.

*** Similarly, petitioners in their Brief make no showing that the rulemaking record of the Department was insufficient in any manner. They merely persist in just stating that it obviously was not sufficient, since it didn't result in a rulemaking decision in accord with their views.

Petitioners further state that the rulemaking proposal documents could have been more descriptive of the proposals. Yet, they fail to show that said documents were not sufficiently detailed to advise them and other inter-

ested growers and handlers. Petitioners would have one believe that each test designation merited a lengthy theoretical discussion. Yet, it is clear from the rulemaking documents and record that the particular test designation for each variety *merely reflected the accumulated in-the-field experience* of the inspection service and the committees staff and members in matching well matured fruit with the particular tests and color chips. Furthermore, the correctness of the vast majority of the designations is apparent in that they drew no comment or request for change in the meetings prior to the proposals (Exhibits 31 (K), (M), (O), (R)), in the comments to the proposals (Exhibits 31 (HH), (II), and (QQ)), or in variance requests during the season (Exhibits 307-310). Even petitioners made suggested changes to very few of these specific tests designations (Exhibit 31 (II)). Thus, it is apparent that petitioners' complaints regarding the descriptive language in the 1988 maturity regulation documents are also without merit. (Emphasis added).

Throughout the course of the instant 15(A) proceeding, Wileman/Kash made attempts to determine where, in the rulemaking record, the rational for the imposition of the color chips was located. Respondent continually argued that the basis for the Secretary's imposition of color chips "was located in the rulemaking record," but did not assist Petitioners in locating same nor indicated the bases therefor. A review of the stipulated rulemaking record regarding the 1988 and 1989 maturity regulations (Exhibit Nos. 31 and 32) fails to reveal where, in the rulemaking record, studies and reports supporting the Secretary's decision might be.

The rulemaking record, as supplied by Respondent and stipulated into evidence, for the 1988 maturity regulations incorporates no reports and/or studies which in any way substantiate or shed light on the reasons behind the Secretary's adoption of color chips as "an accurate indicia of

peach, plum or nectarine maturity." A careful review of Respondent's stipulated rulemaking record for the 1988 maturity and size regulations sets forth three (3) studies, however, *none relates to the application and use of color chips*. The only studies and/or reports incorporated into the rulemaking record are located at Exhibit Nos. 32(GG), 32(HH) and 32(II). These studies and/or reports are not related to the implementation or continued application of color chips in accurately evaluating tree fruit maturity. The record evidence herein shows that color chips are not an accurate indicium of maturity.

At the oral hearing in *Wileman/Kash II*, Respondent did not stand exclusively on the promulgation record of the 1988 regulations. In an attempt to justify the rulemaking record for the implementation of color chips, Respondent presented Mr. Gordon Mitchell, a member of the Department of Pomology at the University of California at Davis. Mr. Mitchell, is without question, one of the world's leading experts in the area of fruit science. Since Mr. Mitchell has, over the years, performed a substantial number of studies paid for by the California Tree Fruit Agreement and the tree fruit Commodity Committees, Respondent's calling Mr. Mitchell to testify was, in theory, a "sure thing." Mr. Gordon Mitchell is the only person that the Committees and the California Tree Fruit Agreement have ever hired to conduct studies relating to color chips. (Tr. 4655). However, Mr. Mitchell failed to provide Respondent with the support Respondent sought.

Mr. Mitchell, instead, testified that the use of the California Tree Fruit Agreement's color chips was virtually meaningless. The newer "redder varieties" of Nectarines and Peaches meet and exceed the most stringent application of color chips prior to their ever becoming internally mature. (Tr. 4552). When a fruit becomes too "mature," it is subject to deterioration.

Respondent's own expert substantiated what Wileman/Kash have been contending and which the overwhelming evidence in this case demonstrates — *that the external color of fruit fails to be an adequate indicia in determining whether or not tree fruit is mature*. The red color development of Peaches and Nectarines is, in essence, cosmetic. As Mr. Gordon Mitchell testified, red color development is an over-color that is often influenced by other factors such as temperature and light and is unrelated to the internal maturity of the fruit. (Tr. 4660). Mr. Mitchell testified that the development of red color is part of the maturation process of Plums, however, for Peaches and Nectarines the development of red color is not linked to maturity. It is merely a function of environment — primarily sunlight and temperature. (Tr. 4661).

Two other witnesses confirmed the testimony of Mr. Mitchell. Mr. Edward Brown, a Supervising Inspector with Shipping Point Inspection, the industry "expert" with respect to tree fruit maturity, appeared and testified pursuant to a subpoena issued by Wileman/Kash. Wileman/Kash provided Mr. Brown with fifteen (15) Sun Grand Nectarines and requested that he evaluate this fruit for color chip external maturity and to then cut the fruit to determine and compare the internal maturity to the color chip maturity evaluations he previously made.

In evaluating the external color of these fifteen (15) Sun Grand Nectarines, Mr. Brown testified that virtually all of the Nectarines tested either met or exceeded the "M" color chip (which is the most stringent of the California Tree Fruit Agreement's color requirements). Yet, upon cutting the fruit to test the internal maturity, the Shipping Point Inspection Supervisor determined that internally the fruit was merely "mature" and not "well-matured." (Tr. 1084-1122). In actuality, the color chip designation which the Committees have determined is appropriate for the Sun

Grand Nectarine is a "G" color chip (Exhibit 32(BB)); the "G" color chip requires substantially less external color than the "M" color chip which Mr. Brown indicated the fifteen (15) Nectarines either met or exceeded. (Ex. No. 248).

The persuasive evidence herein shows that the application of color chips to determine the internal maturity of fruit is arbitrary and capricious. Fruit can be "well-matured" and overripe but still not meet the color chip that was designated for that particular variety. (Ex. No. 2, p. 4). Fruit can meet and exceed the color chip requirement designated for that particular variety but may still not be internally "well-matured." The testing procedures conducted by Mr. Brown established, and the subsequent testimony of Respondent's expert witness, Mr. Gordon Mitchell, confirmed that the use of color chips to determine internal maturity is arbitrary and capricious.

The arbitrary and capricious nature of the use of color chips to determine internal maturity of tree fruit is epitomized by the necessity to inquire "which color chips did the Secretary implement?" In 1988, the Secretary, for the first time, published in the Federal Register a list of the color chip designations to be employed for that year's harvest season. (Ex. Nos. 31(B), 31(E), and 31(G)). In 1989, the Secretary repeated this procedure for the 1989 harvest season (Ex. Nos. 32(Z) and 32(AA)). This was done not only without the Secretary having ever viewed, or incorporated into the rulemaking record, the actual color chips, but without reference to which set of color chips the Secretary was adopting. Respondent has stipulated *that no color chips have ever been incorporated into the rulemaking record* (Appendix "A", Respondent's Stipulated Response No. 21a). The color chips being employed for the 1989 harvest season were not in existence and were substantially different from the color chips which were in existence, and not part of the rulemaking record, at the time the Secretary

promulgated the color chip assignments for the 1988 and 1989 harvest seasons. The effect of arbitrariness of relying upon unknown color chips can extend into the future; whereas in the past, there were more than one set of color chips, each different, although one or the other (or both) were binding upon the industry.

To explain, during the 1987 and 1988 harvest seasons, the Shipping Point Inspection used the "1987" set of color chips. (Ex. No. 262). However, having a need to duplicate additional sets of color chips prior to the 1989 harvest season, the Shipping Point Inspection contracted with a San Jose company to provide additional sets of color chips. Although the color chips were developed and delivered to the Shipping Point Inspection, it became immediately apparent that the color chips did not match the color chips used in prior harvest seasons. (Tr. 2200-2224). It was obvious to the naked eye that five (5) of the new color chips were substantially different from those previously employed by the Shipping Point Inspection. After extensive effort and attempts at modification, the new "1989" color chips were issued to the industry. (Ex. No. 247). The Shipping Point Inspection and the California Tree Fruit Agreement felt that they had a "pretty good match" on most of the chips with the exception of one particular chip which the Shipping Point Inspection intended to "monitor closely" during the season. (Tr. 2200-2224).

Neither the Shipping Point Inspection, the California Tree Fruit Agreement or the United States Department of Agriculture ever had the new color chips scientifically tested to determine their compatibility with the chips used prior to 1989. Instead, these new color chips were issued to the industry based on no more than an eyeball comparison of the two (2) differing sets of color chips. (Tr. 2518). The Secretary, upon issuing his regulations for the 1989 harvest season, failed to reference whether the color chip designa-

tions specified for each variety of fruit were to relate to the "1987" color chips or the "1989" color chips. (Exh. Nos. 32(Z) and 32(AA)). Respondent's expert, Mr. Gordon Mitchell, testified that it would be difficult if not impossible to accurately compare two (2) different color chips with the naked eye. He testified that the human eye may not pick up differences in color that would be denoted by the use of electronic color meters used to scientifically compare color differentiation. (Tr. 4588).

In an attempt to determine the extent of any differences existing between the two (2) sets of color chips employed by the industry, Wileman/Kash employed Dr. Julian Whaley, a Ph.D. in plant pathology and microbiology to evaluate whether a substantial color differential did in fact exist between the "1987" (Exhibit No. 262) and "1989" (Exhibit No. 247) color chips and the extent of that differential. Dr. Whaley used the "Minolta Chromometer" to analyze each "1987" color chip and compare and contrast that color chip with the corresponding "1989" color chip. The Minolta Chromometer was used by Dr. Whaley to establish a numerical value for each color chip designation for the "1987" chips and for each "1989" color chip.

The result of his testing procedures clearly indicates that each and every "1987" color chip when compared with its "1989" counterpart failed to establish a match. Specifically, each color chip, "A" through "M" for 1987 was markedly different than the 1989 chip used by the California Tree Fruit Agreement to denote the "well-matured" maturity standard. (Ex. No. 246).

A review of Exhibit No. 246 not only establishes that the "1987" chips are different from those issued by the Shipping Point Inspection in 1989, but further establishes that there is no pattern or uniformity in either the "1987" or "1989" color chips. For example, it would be expected that as one moved from the "A" color chip through to the "M" color

chip a gradual increase in yellow color from the "A" to the "M" color chip would result. However, such is not the case. (Tr. 2055).

In fact, the "I" color chip has less yellow color than the "H" color chip. The same is true for the "K" color chip and the "L" color chip. Meaning, if a grower sought relief by way of a variance from the "L" color chip requirements, by being granted relief from the "L" color chip to the next lower color chip (that being the "K" color chip) he would, in fact, be required to meet a higher maturity determination, as the "K" color chip has a higher degree of yellow than the "L" color chip within the same set of chips. This same result occurs when testing either the "1987" or "1989" color chips. (Tr. 2054; Ex. No. 246).

The testimony of Dr. Whaley was later confirmed by Respondent's own expert, Mr. Gordon Mitchell. Mr. Mitchell testified that if he were requested to compare two (2) color chips with one another, he would necessarily use one of the electronic color meter machines rather than attempt to "eyeball" the chips to evaluate their differences. He stated he would use either the Hunter, the Gardener or the Minolta units for these determinations, as they would provide accurate numerical evidence of the differences between the color chips. (Tr. 4599-4602). Although Mr. Mitchell testified that he would use the "A" scale, the "B" scale and the "L" scale to measure the exact color differential as opposed to Dr. Whaley's only using the "B" scale, he did confirm, however, that if differences exist on the "B" spectrum, the chips would be different colors. (Tr. 4632).

Mr. Mitchell went on to confirm that he certainly would not impose upon the tree fruit industry a new set of color chips, such as those issued in 1989, without having properly compared them with the previously issued "1987" chips. Had he been requested by the California Tree Fruit Agree-

ment to study the "1987" color chips to determine their compatibility with the newly issued "1989" color chips, he would have tested them before issuing new color chips. (Tr. 4636). This was not done by the Shipping Point Inspection, the California Tree Fruit Agreement or the United States Department of Agriculture before issuing regulations which are used to govern the tree fruit industry.

Further, the rulemaking record does not reflect that the Secretary was aware that the new chips were issued in 1989. Instead, the "1989" color chips were issued and made the "law" without any testing and/or studies being conducted and without the Secretary of Agriculture ever having approved the issuance of these new color chips. Clearly, forcing the entire tree fruit industry to comply with this haphazard approach can only be deemed arbitrary and capricious.

One who is subject to such stringent regulations, as is the California tree fruit industry, has a right to know — On what did the Secretary base his determination that the Tom Grand Nectarine must meet an "L" color chip before it can be deemed "well-matured?" On what information did the Secretary determine that the Black Beaut Plum must have "full surface distinct red color with 'spring,' or supervisor discretion" for it to satisfy the definition of "well-matured?" On what criteria is "spring" evaluated? What is the definition of "Supervisor Discretion," and what are the parameters of said discretion? On what information did the Secretary determine that the Elegant Lady Peach must meet an "M" color chip before it could be determined to be "well-matured?"

These questions can be asked regarding each and every variety of Nectarine, Plum and Peach listed in the Secretary's final rule. Did the Secretary ever question what is "spring," what is "slight spring," what is "good spring," when evaluating the spring requirement in his establishment of the "well-matured" designation for each variety of Plum?

Respondent's own expert, Gordon Mitchell, testified that he has submitted reports to the California Tree Fruit Agreement explaining that the use of "spring" is poor indicia in determining the internal maturity of Plums. (Tr. 4575). Mr. Mitchell stated that he has told the Plum Committee that "spring" was not a good measure of maturity. In fact, he has no explanation as to why "spring" is still being employed by the industry. (Tr. 4658-4659).

It has previously been proven and the record herein amply shows that the specific color standards and maturity requirements as determined by the use of color chips discriminates against fruit which has less red color and favors fruit, particularly the newer varieties, because the newer red varieties reach and exceed the specific color standards prior to ever becoming "well-matured."

It is not the purpose of this administrative proceeding to delineate the manner in which the Department engages in rulemaking, but, rather to determine if prior rulemaking fulfills legal requirements. See, *North Buckhead Civic Association v. Skinner*, (11th Cir. June 26, 1990) 3 AdL.3d 98, as to the arbitrary and capricious standard and, the relevancy, of inquiry if the Secretary's decisions were based on a consideration of the relevant factors and whether there has been a clear error of judgment. The Eleventh Circuit in *North Buckhead* noted that the difference between the arbitrary and capricious standard and the reasonableness standard was not of great pragmatic consequence. A pertinent question is, did the Secretary ignore or fail to respond to pertinent factors.

Title 5 U.S.C. § 553 is designed to give affected parties an opportunity to participate in agency decisionmaking early in the process, when the agency is more likely to consider alternative ideas.

"Section 553 is intended to insure that the process of legislative rulemaking in administrative agencies is in-

fused with openness, explanation and participatory democracy which is essential to minimize the dangers of arbitrary and irrational decisionmaking. While the final choice of among technically available alternatives is vested with the administrative agency, it is only when decisions are made in an atmosphere of public understanding, awareness and participation that resulting rules and regulations reflect a spirit which is consistent with our form of government and thus entitled to the respect of the Courts." *State of Carolina v. Block*, 558 F. Supp. 1004 D.S.C. 1983), rev'd on other grounds after rem., cert. denied, 464 U.S. 1080 (1984).

The Department of Agriculture, when setting forth its own "Departmental Regulations," adopted the provisions of the Administrative Procedure Act in stating:

"The Department is committed to providing the public reasonable opportunity to participate in rulemaking. For rules that have a substantial effect, it is recommended that comment periods on proposed regulations be 30-days or more." *U.S.C.A. Regulatory Decisionmaking Requirement*, 1512-1 p. 9, December 15, 1983.

As with assessments, the Secretary failed to comply with the requirements of the Administrative Procedure Act and his own "Departmental Regulations." The proposed rules which, for the first time, attempted to set forth a "well-matured" maturity standard failed to allow for the 30-day notice and comment period.

Department Regulation 1512 was not a discourse on internal agency procedures, but rather affected the rights or interests of those regulated. As explained in *Montilla v. Immigration and Naturalization Service*, 3AdL.3d 856 (2nd Cir. February 12, 1991):

"The seeds of the *Accardi* doctrine are found in the long-settled principle that the rules promulgated by a

federal agency, which regulate the rights and interests of others, are controlling upon the agency. *Columbia Broadcasting System, Inc. v. United States*, 316 US 407, 422 (1942) (agency regulations on which individuals are entitled to rely bind agency). The doctrine was first announced in an immigration case in *United States ex rel. Accardi v. Shaughnessy*, 347 US 260 (1954), where the Court vacated a deportation order of the Board of Immigration Appeals because the procedure leading to the order did not conform to the relevant regulations. The failure of the Board and of the Department of Justice to follow their own established procedures was held to be reversible error.

The doctrine has been applied in other contexts, for example, in *Service v. Dulles*, 354 US 363 (1957) and *Vitarelli v. Seaton*, 359 US 535 (1959), to vacate the discharges of government employees, and in *Yellin v. United States*, 374 US 109 (1963), to overturn a criminal contempt conviction. This Circuit and other circuits have also used it. See, e.g., *Smith v. Resor*, 406 F2d 141, 145 (2d Cir 1969); *United States v. Leahey*, 434 F2d 7, 9-11 (1st Cir 1970); *United States v. Heffner*, 420 F2d 809, 812 (4th Cir 1969); *Geiger v. Brown*, 419 F2d 714, 718 (DC Cir 1969); *Pacific Molasses Co. v. FTC*, 356 F2d 386, 389-90 (5th Cir 1966).

The *Accardi* doctrine is premised on fundamental notions of fair play underlying the concept of due process. See *International House v. NLRB*, 676 F2d 906, 912 (2d Cir 1982); *Massachusetts Fair Share v. Law Enforcement Assistance Administration*, 758 F2d 708, 711 (DC Cir 1985); K. Llewellyn, *The Bramble Bush* 43 (1951); Note, *Violations by Agencies of Their Own Regulations*, 87 Harv. L. Rev. 629, 630 (1974). Its ambit is not limited to rules attaining the status of formal regulations. As the

Supreme Court noted '[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required,' and even though the procedural requirement has not yet been published in the federal register. *Morton v. Ruiz*, 415 US 199, 235 (1974) (declining to address constitutional issues raised by aggrieved Indians because case disposed of on this statutory ground). (Emphasis added).

To be sure, the cases are not uniform in requiring that every time an agency ignores its own regulation its acts must subsequently be set aside. Nonetheless, decisions contrary to the views expressed in *Accardi* may generally be distinguished from the instant case because in most of those cases the agency regulation that was departed from governed internal agency procedures rather than, as here, the rights or interests of the objecting party; see, e.g., *United States v. Caceres*, 440 US 741, 752-55 (1979); *American Farm Lines v. Black Ball Freight Service*, 397 US 532, 538-39 (1970); *United States v. Lockyer*, 448 F2d 417, 420-21 * * *.

The Secretary issued, on April 8, 1988, his proposed rule with respect to the imposition of the "well-matured" maturity standard for Plums. (Ex. No. 31(C)). In that proposed rule he provided for a 15-day comment period. He subsequently extended the comment period an additional seven (7) days. (Ex. No. 31(D)). With respect to Peaches and Nectarines, the Secretary issued his proposed rule regarding the imposition of the "well-matured" maturity standard on April 18, 1988. (Ex. Nos. 31(A) and 31(F)). Again, he allowed only a 15-day notice and comment period.

Justification for violating the provisions of the Administrative Procedure Act cannot be forthcoming from the Department's publication:

"... the Department already has received letters in opposition to the proposed nectarine size changes indicating the industry is aware of the committee's recommendation." (53 F.R. 12690; Exhibit No. 31(A)).

That statement presumes that because comments previously had been received, that the entire tree fruit industry must be aware of the proposed regulatory changes, and that all individuals who desired to comment had done so. *However, nowhere in 5 U.S.C. § 553 does it indicate that a reasonable notice and comment period may be minimized or ignored because some interested parties became aware of the proposed regulation and submitted comments.* It cannot be presumed, merely because one or two individuals received advance notice of the proposed rule and submitted comments, that the entire industry was aware of the proposed rulemaking and were capable of providing their comments within a 15-day period.

Informal meetings are not a substitute for the hearing requirement and make a mockery of due process. *C&K Manufacturing & Sales Co. v. Yeutter*, (D.C. Cir. August 28, 1990) 2 AdL.3d 572.

Furthermore, the Secretary failed to provide any substantial basis and purpose upon which comments could be directed, making the 15-day notice and comment period meaningless. There were no substantial basis and purpose provided for the color chip designations or "spring" requirements set forth in the proposed regulations for Nectarines, Plums or Peaches. There is no explanation as to how the particular color chip designations were determined, why each color designation was appropriate, and who deemed

those particular color chip determinations to be a true measure of maturity.

The color chip requirements are substantive rules no less than volume limitation regulations, and they establish a binding norm that is subject to the notice and comment and 30-day effective date of the Administrative Procedure Act, unless the "good cause" exception is applicable. (5 U.S.C. § 553(b)(B), (d)(3)).

In the subject case there has been no proof that an emergency existed. The procedure entail herein has existed over many years. There has been no attempt made to experiment with another system such as was done with the Navel Orange Administrative Committee during a two-year period (1983-1985). The facts in *Wileman/Kash II* do not show that it was impossible or impracticable for the Secretary to execute his statutory duties in order to achieve the objectives of the Act, had he not invoked the good cause exception.

Civil penalty rules subject to the Administrative Procedure Act notice and comment rulemaking requirements were considered in *Air Transport Association of America v. Dept. of Transportation* (D.C. Cir. April 13, 1990) 3 AdL.3d 160. The Court found therein that there was not "good cause" to dispense with the statutory requirement of the Administrative Procedure Act and it was noted that the good cause exception is to be narrowly construed and only reluctantly countenanced. Statutory time limits do not ordinarily excuse compliance with the Administrative Procedure Act's procedural requirements.

If the Secretary were required to give notice and comment opportunity as to the regulations, including approval of the expense budgets of the various Committees, the Administrative Conference of the United States has suggested 30 days as a minimum comment period, with 60 days as a more

reasonable minimum period as stated in *Petry v. Block* 737 F.2d 1193, 1201 (D.C. Cir. 1984): The Administrative Conference of the United States has opined, for the guidance of administrative agencies, that the shortest period in which parties can meaningfully review a proposed rule and file informed responses is thirty days. [Administrative Conference of the United States, Guide to Federal Agency Rulemaking 124 (1983)]. However, there is scarcely anything talismanic about that particular length of time. Indeed, a thirty-day period is, in the Administrative Conference's view, 'an inadequate time to allow people to respond to proposals that are complex or based on scientific or technical data.' [Footnote omitted]. The Administrative Conference itself thus suggest a sixty-day period as 'a more reasonable *minimum* time for comment.'" [Footnote omitted].

The Secretary's promulgation of rules which impact the economic well-being of the entire tree fruit industry, may not use administrative expediency or the wishes of a few dominant persons in the industry to shut out input from others. Such methods result in failure to explain the *rationale* for the Secretary's rules, or upon what basis those rules are promulgated. See, *United Mine Workers of America v. Department of Labor* (D.C. Cir. April 2, 1991), where the Appellate Court remanded for more fully reasoned decision-making, stating in part:

Instead, the Assistant Secretary must make an additional and distinct finding that, considering all of the effects of the proposed alternative method, both positive and negative, modification would achieve a net gain, or at least equivalence, in overall mine safety. See *Emerald II*, slip op. at 6; *Quarto*, slip op. at 5. At a minimum, this second step requires the Assistant Secretary to respond reasonably to serious Union concerns regarding the proposed modification, and to explain why the benefits of

modification would outweigh or neutralize any potential adverse effects. See *Emerald II*, slip op. at 8.

It may well be the case that modification of section 75.326 at the Martinka No. 1 Mine will lead to an overall safety gain, or at least to the retention of existing safety levels. Under *Emerald II*, however, the Assistant Secretary is required to make that determination explicitly and on the record. Because he has failed to do so here, we remand for reconsideration. On remand, the Assistant Secretary must perform the second step of his own test for modification, providing reasoned analysis on the global safety effects of the SOCCO's proposal and considering the detrimental effects cited by UMW.

After failing to provide a sufficient basis upon which to permit interested persons an opportunity to participate by submission of relevant views, data and argument, he then fails to provide a sufficient notice and comment period to allow for even a superficial response.

Without adequate notice there is a violation of due process. *Mobile Exploration and Prod v. FERC* (5th Cir., 1989) 1 AdL.3d 1397.

Due process requires adequate notice where individual interests may be adversely affected by a proceeding. *Pyro Mining Co. v. Slaton* (6th Cir., 1989) 1 AdL.3d 924. For other cases relating to due process see, *Chernin v. Lyng* (8th Cir., 1989), 1 AdL.3d, 560, wherein it was stated that due process is a separate right from the statutory grant. It is not derived from congressional intent in a statute, but from the Fifth Amendment. In that case, the failure to give the litigant therein a hearing rendered the Department of Agriculture's actions a violation of due process, and the Fifth Amendment.

With respect to the Secretary's imposition of small-sized elimination of Nectarines and Peaches, he failed to satisfy the legal requirements as imposed by the Administrative Procedure Act and failed to follow his own policy.

The Nectarine, Peach and Plum Committees held their annual meetings in December, 1987. At those meetings, the Committees recommended, and forwarded to the Secretary, small-size elimination regulations. In April 1988, *four months* after the Committees submitted their recommendations, the Secretary issued proposed rules indicating his intention to eliminate small-sized Nectarines (53 Fed. Reg. 12687; Exhibit No. 31(A)), Peaches (53 Fed. Reg. 12691; Exhibit 31(F)) and Plums (53 Fed. Reg. 11669; Exhibit No. 31(C)). In each of those proposed rules, the Secretary allowed only a 15-day notice and Comment period. With respect to each of these tree fruit commodities, the Secretary stated "a comment period of less than 30-days is deemed appropriate for this proposal." The Secretary goes on to state that the harvest season is about to commence as to each of these commodities, which seems to imply that it is appropriate to give less than a thirty-day notice.

To compound the Secretary's disregard of the law with regard to allowance of a thirty-day notice and comment period, the Secretary issued his Interim Final Rule, wherein he implemented smaller-sized elimination regulations as to Nectarines and Peaches with no notice whatsoever. On May 27, 1988, the Interim Final Rules were published in the Federal Register. The Secretary, in identical statements for Nectarines and Peaches, stated:

"Pursuant to 5 U.S.C. 553, it is also found and determined that it is impractical, unnecessary and contrary to the public interest to give notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until thirty days after publication in the Federal Register..." (53 Fed. Reg.

12931 (Nectarines), Exhibit No. 31(B)); 53 Fed. Reg. 19238 (Peaches), Exhibit No. 31(G)).

If the elimination of smaller-sized Nectarines and Peaches would in some manner effect the nation's safety, "emergency" implementation of these regulations would undoubtedly be appropriate. However, it is difficult, if not impossible, to comprehend the need for the Secretary to avoid the requirements of the Administrative Procedure Act and his own "departmental policy." But to state that it is "impracticable, unnecessary, and contrary to the public interest to give notice" is without basis. The "public interest" exception contemplates real harm to the public, not mere inconvenience to the agency. *U.S. Steel Corp. v. E.P.A.*, 649 F.2d 572 (8th Cir. 1981).

Respondent argues that the Secretary properly invoked the good cause exception to providing for notice and comment in that the Administrative Procedure Act provides that notice and comment rulemaking is not required: "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B) (1988). Respondent contends that notice was both impracticable and unnecessary.

Respondent would disregard the 30-day comment period in favor of the rule: "The only comment period required is one which will provide interested persons with a reasonable opportunity to respond. *Phillip Petroleum Co. v. U.S.E.P.A.*, 803 F.2d 545 (10th Cir. 1958)." The Respondent does not want the Department burdened with rulemaking requirements beyond the strictures of the Administrative Procedure Act. It is sufficient, from Respondent's viewpoint, if the recommendations of the Committees were discussed and announced at public meetings.

The "good cause" exceptions to the Administrative Procedure Act are intended to be used only when an emergency or a real necessity exists.

"The exception of situations of emergency or necessity is not an escape clause in the sense that an agency has the discretion to disregard its terms or facts. A true and supported or supportable finding of necessity or emergency must be made and published." *Senate Report No. 248*, 79th Cong., 2d Sess. 200 (1946).

The Secretary fails to acknowledge that emergency situations are indeed rare and that Courts will examine closely proffered *rationale* justifying the elimination of public procedures. *American Federation of Government Employees v. Block*, 655 F.2d 1153 (D.C. Cir. 1981). The Secretary bears the burden of proof when he determines that notice is unnecessary. *Northern Apahoe Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987).

The Secretary had the Committees' recommendations for over four months before issuing his Proposed Rule (for which he allowed a 15-day notice and comment period). Five weeks later, he issues an Interim Final Rule, in which he determined that notice is not required as, after months have passed, an "emergency" is then found to exist. The Secretary's determination that notice and comment is not required, based on his own interpretation of the requirements of the Administrative Procedure Act, does not discharge his burden of proof. Further, the Secretary's failure to consider the Committee's recommendations for a period of four months, does not then allow him the option to avoid the Administrative Procedure Act by claiming an "emergency." The Secretary cannot create, or be the cause of an emergency based on his own dilatory conduct, as a basis for avoiding the Administrative Procedure Act.

Year after year, the Secretary dispenses with notice and comment requirements by merely claiming that he has "good cause." In *Buschmann v. Schweiker*, 676 F.2d 352 (9th Cir. 1982) the Ninth Circuit Court observed:

"The notice and comment procedures in Section 553 should be waived only when 'delay would do real harm.' The good cause exception is essentially an emergency procedure. This Court would not permit the Environmental Protection Agency to rely solely on statutory deadlines to satisfy the good cause exception in enacting clean air standards. *Western Oil & Gas v. E.P.A.*, 633 F.2d 803, 810-813 (Ninth Cir., 1980). *U.S. Steel v. E.P.A.*, *supra*."

The good cause exception to notice and comment is an emergency procedure, which must be interpreted narrowly, and used only when the delay attendant to notice and comment rulemaking would do real harm. *Buschmann*, *supra*; *United States Steel Corp. v. E.P.A.*, *supra*. "As the legislative history of the APA makes clear, moreover, the exceptions at issue here are *not* 'escape clauses' that may be arbitrarily utilized at the agency's whim." *American Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). Examples of where the good cause exception has been found to have been properly applied were explained in *South Carolina v. Block*, 558 F. Sup. 1004, 1018 n. 18 (D.S.C. 1983):

Courts have found good cause several times in cases involving government price controls, because the announcement of future controls could cause severe undesirable market distortions. *See De Rieux v. Five Smiths, Inc.*, 499 F.2d 1321 (Em. App.), *cert. denied*, 419 U.S. 896 (1974); *Nader v. Sawhill*, 514 F.2d 1064 (Em. App. 1975). The exception has been approved concerning regulations on gas stations where shortages and discriminatory prices had led to privations of supply and violence. *Reeves v. Simon*, 507 F.2d 455 (Em. App. 1974), *cert. denied*,

420 U.S. 991 (1975). It has also been permitted when the exigencies of a foreign relations crisis made an imperative response essential. *Marenji v. Civiletti*, 481 F. Sup. 1132 (D.D.C. 1979; cf. *Yassini v. Crosland*, 618 F.2d 1356 (9th Cir. 1980).

The examples illustrate that the good cause exception requires a true emergency with exigent circumstances. Courts have warned that such emergency situations are rare and that Courts will closely scrutinize the reasons used for dispensing with notice and comment. *American Fed'n of Gov't Employees*, 655 F.2d at 1157 n. 6; *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980).

There was no emergency in this case. Courts have rejected an agency's reliance on the good cause exception where the so-called emergency was solely the result of the agency's own creation of deadlines, or merely a reflection of a desire for administrative efficiency. *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983); *Sharon Steel Corp. v. E.P.A.*, 597 F.2d 377, 380 (2d Cir. 1979); *South Carolina, supra*, 558 F. Sup. at 1018.

The Secretary's statement in the final rule that there was not sufficient time to allow notice and comment does not suffice. Since deadlines alone cannot equal good cause, the Secretary failed to provide a good cause for dispensing with notice and comment. Mere recitation that there was good cause does not create good cause, nor does a desire to provide immediate guidance. *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d at 803.

The Secretary's 1988 attempt at rulemaking encompassed significant decisions affecting the tree fruit industry. Prior comment at the Committee meetings cannot substitute for the requirement of notice and comment contained in the Administrative Procedure Act. Not all who wanted to com-

ment might have been present at the Committee meetings. In addition, notice and comment allows anyone, not merely handlers in the industry, to comment. This would give someone a chance to comment who might not have known about the Committee meetings. Moreover, there are those who attend the Committee meetings who, for one reason or another, do not speak up either because it will be meaningless or they do not want to incur the ill will of the larger handlers. If this kind of prior comment could substitute for the notice and comment required, Congress would have so specified.

As set forth by Judge Edward Dean Price in a review of Judicial Officer Campbell's ruling in *Riverbend Farms, Inc., et al. v. Yuetter*, (CV F-88-98 EDP) (1989), wherein, with respect to the Secretary's use of the "good cause" exception to justify the weekly imposition of prorated quotas, he states:

"... the practice is constant, and no attempt has been made to limit the practice to those cases where intervening forces of nature make it imperative that the regulations be issued without the necessity or possibility of public comment, at p. 9."

The Secretary has failed to establish "good cause" for ignoring the provisions of the Administrative Procedure Act.

The Secretary's failure to allow for any meaningful comment with regard to size elimination and the imposition of the "well-matured" maturity standard as determined by the application of color chips cannot be ratified. It is clear that the Secretary's proposed rules failed to establish a substantial basis and purpose as to the particular color chip designations, per variety, and violated the notice and comment provisions of the Administrative Procedure Act. Therefore, as to those regulations not complying with the Administrative Procedure Act with respect to the imposition of the well-matured maturity standard, and the use of color chips,

as they relate to Nectarines, Plums and Peaches and to the small-sized elimination of Nectarines and Peaches, they must be declared not binding upon Petitioners.

Petitioners also challenge the Constitutionality of the Agricultural Marketing Agreement Act of 1937, contending that the Act contains insufficient standards. Although it is appropriate for Petitioners to raise Constitutional issues in this administrative proceeding (*United States v. Ruzicka*, 329 U.S. 287, 294 (1946)), an administrative agency has no authority to question the constitutionality of a statute under its jurisdiction. *Public Utilities Commission of California v. United States*, 355 U.S. 534, 539 (1958); *In re: George Steinberg and Son, Inc.*, 32 Agric. Dec. 236, 248 (1973), *aff'd*, 491 F.2d 988 (2nd Cir.), *cert. denied*, 419 U.S. 830 (1974).

The appropriation clause of the Constitution of the United States requires that all monies drawn from the treasury be in consequence of appropriations made by law. The payment of monies without an Appropriation Act authorizing it, is illegal.

The Petitioners have raised, among their Constitutional contentions, the difference which exists between appropriated monies and monies derived from statutorily imposed fees which the Courts have had occasion to consider both from the aspect of the retroactivity and their disproportionate application. Although avoiding the Constitutional tax issue in this proceeding, it is nevertheless one which frequents the Courts. Fees which are more like a tax because they provide money for projects that benefit the general public are constitutionally defective. See, *Bacchus Imports Limited v. Dias*, 468 U.S. 263 (1984); *American Trucking Associations v. Scheiner*, 483 U.S. 266 (1987).

Although fully mindful of other Constitutional issues raised herein, for the most part, only a brief reference is

made thereto, because of adherence to the principle that when cases can be decided on non-Constitutional issues, they should be. Among such contentions of Petitioners is that of seeking reliance upon the pronouncement over the years of the Supreme Court, the Court of Claims and the Courts of Appeal for the Federal Circuits, which have consistently upheld the principle that excessive regulation may constitute a taking. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 1986, 104 S.Ct. 2862, 2874-75 (1984); *Kirby Forrest Industries v. United States*, 104 S.Ct. 2187, 2196 (1984); *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138 (1980).

The Supreme Court has enunciated the following tests as to whether a regulatory taking occurred: "A statute regulating the uses that can be made of property affects a taking if it 'denies an owner economically viable use of his land . . .'" *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 295-96, 101 S.Ct. 2352, 2370-71 (1981).

Thus, the Petitioners argue that the Secretary's imposition of size restrictions as to Nectarines and Peaches for the 1988 and 1989 harvest seasons is unconstitutional as being a violation of the Fifth Amendment's Just Compensation Clause.

Respondent argues that since there was not a substantial taking, *Wileman/Kash* had the benefit of the majority of their expectations so that a taking did not occur which is compensable. However, the 1988 regulations are procedurally defective and, although there was a "taking" of *Wileman/Kash's* property, the matter can be determined under the Administrative Procedure Act.

Volume control is *prohibited* by the Agricultural Marketing Agreement Act, with the exception of products listed in

7 U.S.C. 608c(2). Nectarines, Plums and Peaches are *not* subject to volume control.

The Secretary's imposition of regulations eliminating the smaller-sized Nectarines and Peaches is arbitrary, capricious and was illegally imposed for volume control.

The regulations published in 1988, do not meet the requirements of the Administrative Procedure Act and were arbitrary, capricious and not based upon sufficient and substantial evidence in the rule making record.

Although there was an attempt, after the *Wileman/Kash* hearing to correct the implementation of the Order provisions, the 1988 regulations fall short of achieving the requirements of the Administrative Procedure Act:

(1) There was an insufficient notice and comment period with respect to the Interim Final Rules, and no good cause was shown for not providing additional comment period;

(2) There was no "emergency" existing which would permit the Secretary to only provide a fifteen day notice period instead of at least thirty days;

(3) There was no emergency existing except a self-made emergency by the Secretary, in issuing an Interim Final Rule, as opposed to another proposed rule;

(4) Since the Interim Final Rule, with respect to maturity procedures, was drastically different than the proposed rule issued five weeks earlier, no Interim Final Rule should have been issued before another proposed rule was issued, and the Secretary's reliance on the emergency exceptions to justify the Interim Final Rule is without merit and without validity;

(5) There is no basis and purpose statement with respect to the new size elimination and maturity rules and regulations;

(6) The Interim Final Rules wholly failed to address objecting comments, refused to consider other alternatives, and relied on incorrect and misleading information that the Secretary knew or could have known to be false and/or misleading.

The Petitioners also contend that the delegation of authority by the Secretary to Committees, made up of Petitioners' competitors, and the delegation of authority to the Maturity Subcommittees, and to the Appeals Committees, are contrary to the intent and policy of Congress in enacting the Agricultural Marketing Agreement Act of 1937, and contrary to the spirit and intent of the Agricultural Marketing Agreement Act.

The record as a whole supports Petitioners' contentions that the Secretary failed to comply with the Administrative Procedure Act's notice and comment period, and that there was no good cause shown for not doing so, other than habitual practice. (2) The Secretary's regulatory rules promulgated for the 1988 harvest season, and years subsequent, are arbitrary, capricious, and not based upon substantial evidence. No explanation is given for issuing an Interim Final Rule, which substantially differed from the proposed rule issued by the Secretary approximately five weeks earlier, with respect to maturity determinations and maturity variances. The Secretary's proposed rule with respect to maturity for Peaches, Plums and Nectarines, proposed that the Shipping Point Inspection Service actually set color standards or other maturity tests to determine the "well-matured" standard, and granted only to the Shipping Point Inspection the right and ability to vary or change those color chip standards or other maturity tests, which proposed to eliminate the Maturity Subcommittee of each of the respective Committees, which had existed from 1980 through the 1987 seasons. In said proposed rules, the Secretary published, for the first time, the "color standards" or other

"maturity tests" which the Secretary claimed the Inspection Service established previously, which the evidence in this proceeding refutes in that in the past eight years, it was the Maturity Subcommittees, made up of Petitioners' competitors, utilizing the California Tree Fruit Agreement which actually set the "color standards" or other maturity tests, and changed the "color standards" or other maturity tests, and which granted or denied supervisory discretion as to variances.

With respect to the Interim Final Rules issued regarding Peaches, Plums and Nectarines, there were unwarranted statements made in the Interim Final Rules which the Secretary could have known or should have known, were inconsistent with the facts (some of which were brought out in sworn testimony in *Wileman/Kash I*) or were conclusions drawn by the Secretary which were arbitrary, capricious, or not based upon persuasive evidence — some of which are stated as follows:

(a) Comments to the proposed rule not only discussed, but showed, that the maturity regulations and the size recommendations were done by the Committees for volume control; the Secretary never addressed this comment;

(b) The Secretary, with respect to Nectarines, found that consumers wanted larger-sized Nectarines, but at the same time, found that the evidence was inconclusive with respect to consumers not desiring smaller-sized Plums — despite the fact that the same studies cited by the Secretary with respect to Plums were the same authorities cited with respect to Nectarines, and the studies do not distinguish between the two; and in fact, only four retailers out of twenty-five retailers interviewed wanted to see the smaller sizes eliminated, and twenty-one out of twenty-five of the retailers interviewed wanted both the smaller sizes and the larger sizes;

(c) The report (by Ervin D. Thuerk) cited by the Secretary was directed to twenty-five "key supermarket chain executives" which represented only 38.7 percent share of the total industry, and the Secretary failed to point out that the terminal markets were totally unrepresented in the study conducted, which is where many handlers, including the Petitioners, ship their fruit;

(d) The Secretary cites Mr. Thuerk's research that early-season fruit which is small in size does not provide satisfaction to the consumer and does not encourage repeat purchases, but fails to consider and discuss that only four out of the twenty-five large supermarket chains interviewed wanted to eliminate small sizes, while the vast majority wanted to keep them; thus the Secretary relied on certain statements made by Mr. Thuerk, and failed to address others that would contradict the conclusions wished to be drawn by the Secretary;

(e) The Secretary addressed the comments that it was too late for growers to modify their cultural practices in order to meet the more restrictive size requirements for Nectarines and Peaches, but the Secretary rejected this by stating that when the Committee made its recommendations the growers had already begun to undertake cultural practices to obtain "desirable fruit size"; but with respect to Plums, the Secretary contradicted this statement by stating: "Finally, it is too late this season for growers to make any cultural changes on the basis of the proposed size increases if they have not already done so"; and the Secretary fails to explain the difference in the two statements — one with respect to Nectarines and Peaches, and the other with respect to Plums;

(f) In response to the comments that the size proposal would reduce the volume of fruit and was thus volume control, the Secretary stated that that was disputed because "small size Nectarines have been a detriment to the trade

and as such the industry has directed its efforts toward production and marketing of better quality and larger size fruit", and thus, there was a failure to address the issue of whether there would be a reduction of the amount of fruit to reach the market and was indeed volume control;

(g) Furthermore, the size regulations affect certain varieties of fruit, but were not directed at other varieties of fruit which is discriminatory, arbitrary and capricious, since if consumers reject small-size fruit, they would reject them with respect to all varieties, and not just some varieties; the Secretary made an unfounded statement when he stated that since May 16, 1980, Nectarines, Plums and Peaches "have been required to be 'well-matured' rather than 'mature' ". Equally misleading was the statement that "this requirement has been implemented by the Federal-State Inspection Service since that time"; since in truth and in fact, which was known by the Secretary, the regulations which went into effect on May 16, 1980, did not state that fruit was required to be "well-matured" but it was merely what the Committees decided thereafter to implement on their own without any rulemaking whatsoever; the Secretary knew, or should have known, that the Federal-State Inspection Service did not set those standards in the past, but were set by the Committee of competitors made up of the Plum, Nectarine and Peach Committees and their respective Maturity Subcommittees, along with the California Tree Fruit Agreement; the Secretary also invalidly states that since 1980 "the Federal-State Inspection Service, based on its expertise, has been primarily responsible for determining which specific test or tests should be used for each variety of Nectarines and which test level (e.g., particular color chip) is appropriate for each variety", and the Secretary knew, or should have known, that this statement was incorrect since the Federal-State Inspection Service has merely occupied a neutral, by-stander role with the respect to the Committees and their respective Maturity Subcommittees; under the

cloak of authority, the California Tree Fruit Agreement, actually set the standards, changed the standards at their whim and actually made "law" regardless of the concerns and opinions of the Federal-State Inspection Service;

(h) The Secretary also states that when the proposed rule was issued in April, 1988, the responsibility for issuing the maturity tests, and granting variances during the seasons with respect to those maturity tests, was proposed to be given to the Federal-State Inspection Service to "lessen the burdens on Committee members", and Petitioners contend that the Secretary knew, or should have known, that this statement that the proposal to provide sole responsibility to the Federal-State Inspection Service, was a direct result of the Petitioners' previously filed and heard administrative petition;

(i) The Secretary also invalidly stated that it was proposed to continue the "requirement that not less than ninety-percent of the fruit surface shall meet the color guide established for that variety, and not less than ninety-percent of any lot shall meet the color guide established for that variety", in that the Secretary knew or should have known, that that was never a "requirement", but was a determination made by the respective Committees and the respective Maturity Subcommittees, and the Secretary had never made that "requirement" before; it was also stated in the proposed rule with respect to maturity for Nectarines, Plums and Peaches, issued in April, 1988, that the Inspection Service had intended to use certain "color chips" and other maturity tests for Nectarines, Plums and Peaches in the 1988 season, implying that the Inspection Service had actually set those "maturity tests" or other "color standards", when the Secretary knew, or should have known, that the Inspection Service has never set those standards, but they have been set by the California Tree Fruit Committee, the respective Committees and their respective Ma-

turity Subcommittees — all made up of Petitioners' competitors;

(j) The Secretary, in adopting the "well-matured" standards, or re-adopting the "well-matured" standard, relies in part upon Mr. Thuerk's report which is attributed by the Secretary to state that the consumers do not want early-season fruit which is picked immature, but the Secretary fails to point out that such study states that consumers do not want "immature" fruit, which is not synonymous with "well-matured", and is different than fruit being just "mature";

(k) The Secretary also vacuously states, in response to a comment that the "well-matured" requirement has become more restrictive than it was when implemented in 1980, that only the number of color chips have increased but the "well-matured" standards had not become more restrictive, and the Secretary knew, or should have known, that his contention was contrary to evidence adduced at the *Wileman/Kash I* hearing;

(l) In responding to a claim that the "well-matured" fruit has caused a large increase in harvesting costs, the Secretary merely responds that the commentor "did not document this claim", but the Secretary knew, or should have known, that said claim was documented through the transcripts of the hearing that occurred with respect to the administrative petition filed by the same Petitioners and heard in February and March of 1988, which information was before the Secretary at the time the Interim Final Rule was issued;

(m) The Secretary also buttresses his claim that the "well-matured standard" has been well received by growers since at the last referendum, a majority of those voting favored continuance of the program, which ignores the fact that the referendum was conducted with respect to a contin-

uation or termination of the entire Marketing Agreement Order. There was no opportunity for line-item veto of any provision. In responding to a commentor's objection to the "well-matured" standard that it is done for the purpose of volume control as indicated by the decrease in packages shipped per acre from 1980 through 1987, even though a higher number of trees were planted per acre, the Secretary stated that this evaluation was inconclusive because the commentor did not consider other factors in addition to the "well-matured" requirement such as age of the trees, weather, cultural practices, and failure to meet other types of handling requirements such as minimum size requirements, and the Secretary knew, or should have known, that this contention was unfounded, or, at the very least, disputed and there was a complete failure by the Secretary to document his contention that there were less cartons per acre shipped since the "well-matured" standard came into existence based upon age of the trees, weather, cultural practices, and other handling requirements; and

(n) The Secretary failed to consider the comments with respect to the fact that the color standards or other maturity tests were not uniform, varied from variety to variety, causing some fruit to have a shorter shelf life than other fruit, causing some fruit to be left on the trees a much longer time after the fruit otherwise met a U.S. No. 1, than other varieties of fruit, and caused fruit that was shipped to the East Coast to arrive in an overripe condition. The lack of consideration to the drastically increased picking costs for having a "well-matured standard," in that said standard has required orchards to be picked five to seven times as opposed to two to three times, fails to address the comments that the said specific color chips or other maturity tests lacked any substantial basis and purpose, lacked any uniformity, lacked any studies and tests to determine the amount of fruit lost, or fruit wherein a decreased sales price was paid as a result of the overripe condition of the fruit.

The Secretary wholly failed to consider the testimony given under oath and the documents and exhibits presented at the *Wileman/Kash I* administrative hearing with respect to the precise issues stated in the Secretary's Interim Final Rules.

The 1988 maturity requirement procedure and variance procedures are substantially different than what has occurred in the past, and substantially different than what was proposed in the proposed rule, and it is the Secretary's doing that the matter was not first published until April, 1988.

The importance of an opportunity for meaningful submission to the Secretary of data and views and comments with respect to matters which materially and importantly affect members of the industry cannot be overlooked. With those submissions the Secretary is still bound to act in a reasonable manner and to relate to the submissions and viewpoints with respect to arriving at his decision. Where decisions are made and adequate explanation has not been given therefor, mere self-serving statements on behalf of the agency are not adequate. *Natural Resources Defense Council Inc. v. EPA*, 824 F.2d 1258 (1st Cir. 1987).

The importance of meaningful notice and comment and the opportunity for submission of views was long ago emphasized in *Walter Holm & Co. v. Secretary of Agriculture*, 449 F.2d 1009 (D.C. Cir. 1971) where the Court of Appeals for the District of Columbia considered the allegations of the Plaintiffs therein that the Department officials gave no independent judgment to important matters and indeed had no pertinent evidence at hand of the relative significance of the controverted size restrictions, but instead abdicated the decisionmaking function to the industry Committee and relied on the so-called expertise of its members.

The Court in that case found that the procedural rights of the Plaintiffs therein had been violated and in seeking a reasonable and balanced approach to the issues presented

the Court stated among other things that: "This is not an area that may rightly be approached in terms of absolute rigidity of requirements. It is not the law that all orders must be preceded by oral hearings when hearing is sought only on matters not involving material issues of fact * * * and it is not the case that all administrative actions legitimately denominated regulations are *ipso facto* freed from any need for oral hearings * * *." Instead, the Court indicated that:

"The kind of procedure required must take into account the kind of questions involved. In this case we have a tie of restriction on domestic producers to restrictions on imports, issues of foreign policy involved in any decision importantly affecting imports * * *.

"* * * the essential point is that a procedure not requiring an opportunity for oral presentation with the Department on crucial matters, and not requiring evidence in the record, is a feed bed for the weed of industry domination. *When the Secretary comes himself to make a determination of crucial facts and conclusions, he must think in terms of support in evidence and general standards, and cannot be guided solely by deference to industry desires* * * *.

"We think the kind of underlying issue, involving as it does * * * requires oral presentation to the Department officials, that this right is available to them. *American Airlines* indicates that the oral hearing may be legislative in type although fairness may require an opportunity for cross-examination on the crucial issues. This requirement of hearing is not shackled by rigidities of procedure that may stultify the regulatory program. What counts is the reality of an opportunity to submit an effective presentation, to assure that the Secretary and his assistants will take a hard look at the problems in light of those submissions. (Emphasis added).

Obviously, the Court of Appeals in that case was concerned with the procedural aspects of the Administrative Procedure Act in light of the facts and circumstances of that case.

Anti-Trust Liability

The Respondent has sought a Finding of Fact that the Marketing Order Committees' members are immune from anti-trust liability. Alternatively, Respondent contends that determinations of anti-trust liabilities and possible remedies are beyond the scope of this proceeding. Finally in regard thereto, Respondent argues "***even if appropriate herein [any such arguments], are necessarily limited to the 1988 and 1989 seasons since the legality of the maturity regulation for prior years was expressly dealt with or waived in the *Wileman I* proceeding."

The Agricultural Marketing Agreement Act expressly provides in section 608b:

In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement shall be deemed to be lawful.

In support of its position the Respondent has relied upon *Berning v. Gooding* 820 F.2d 1550 (9th Cir. 1987) and *United States v. Borden*, 308 U.S. 188, 200 (1939). However, see earlier cases of *Maryland and Virginia Milk*

Producers Assn., Inc. v. United States, 362 U.S. 458 (1960); *Cow Palace Ltd. v. Associated Milk Producers, Inc.* 390 F. Supp. 696 (D.C. Colo. 1975).

Wileman/Kash do not contend that the Nectarine, Plum and Peach Marketing Orders, *per se*, are subject to Federal anti-trust laws. What Wileman/Kash contend is that the Committees, the Maturity Subcommittees and the California Tree Fruit Agreement, do not fall within the exemption created by 7 U.S.C. § 608b for anti-trust violations.

The Supreme Court has construed anti-trust exemptions quite narrowly. See *California v. F.P.C.*, 369 U.S. 482, 485 (1962); *United States v. Philadelphia National Bank*, 374 U.S. 321; *United States v. Borden Company*, 308 U.S. 188, (1939); *Canter v. The Detroit Edison Co.*, 428, U.S. 579, 597, fn. 37 (1976).

Under the Agricultural Marketing Agreement Act, the Secretary of Agriculture is authorized to enter into Marketing Agreements with producers and processors, and such Agreements will not be invalidated because of their anti-competitive affects (*Bramsen v. Hardin*, 346 F. Supp. 934 (S.D. Fla., 1972); *Chiglaides Farms, Inc. v. Butz*, 485 F.2d 1125 (5th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974)). The Supreme Court has long recognized that the marketing of agricultural products is not *per se* immune from the Sherman Act. *Maryland and Virginia Milk Producers Assn., Inc. v. United States*, 362 U.S. 458 (1960); *United States v. Borden*, *supra*. Under the Act, *handlers* are therefore protected from antitrust prosecution when they sign or act pursuant to a valid marketing agreement, and compliance with an order is similarly protected from anti-trust prosecution. *Bramsen v. Hardin*, 346 F. Supp. 934, 941 (1972), *aff'd sub nom.*, *Chiglaides Farm Ltd. v. Butz*, 485 F.2d 1125 (5th Cir. 1973). *Bramsen* also held that the Secretary of Agriculture had no duty to determine the potential anti-competitive effects, of his orders before issuing them.

However, only the precise activities authorized or required by an order are protected from prosecution, and practices not literally legitimized by the order and "designed to achieve a monopoly position" in an industry are subject to anti-trust restraint. *Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019 (1972), Anti-competitive activity carried out "under the cover" of Federal Marketing Orders may therefore be regarded in some circumstances for what they are, namely; namely to diminish competition and/or to drive out competition.

Successful anti-trust actions have been raised previously with respect to commodities governed by the Agricultural Marketing Agreement Act. *Marketing Assistant Plan, Inc. v. Associated Milk Producers, Inc.*, 380 F. Supp. 880 (W.D. Miss. 1974); *Marketing Assistant Plan, Inc. v. Associated Milk Producers, Inc.*, 338 F. Supp. 1019 (S.D. Tex. 1972); See also *Maryland and Virginia Milk Producers Assn. v. United States*, *supra*, and *United States v. Borden*, *supra*.

What has been involved herein is something more than the imposition of regulation whereby there has been a reduction of competition in the public interest. There has resulted, under the color of law, preferences for certain members of the industry to the detriment of others and a restraining of trade to some, not applicable to all similarly situated.

The sovereign may not exempt private action from anti-trust violation nor may it give immunities to those whose actions are violative thereof by authorizing them to violate anti-trust laws, or by declaring that their actions are lawful. *Parker v. Brown*, 317 U.S. 341 (1943); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

It is clear that the Marketing Orders do not lawfully permit the Committees, the Maturity Subcommittees or the California Tree Fruit Agreement, to establish an "alter-ego"

private corporation for purposes of thwarting the laws of the United States of America. It is uncontradicted that the Tree Fruit Reserve, an allegedly "non-profit corporation," was established for the purpose of avoiding proscriptions and limitations placed upon the Committees and their agents by the Agricultural Marketing Agreement Act. (Tr. 2475-2476).

Wileman/Kash's assessment monies, ostensibly are used to pay "... such expenses as the Secretary may find are reasonable and are likely to be incurred by [the Commodity Committees], during any period specified by him ... for the maintenance and function of such authority and agency ..." (7 U.S.C. § 610(b)(2)(ii)). The collection of assessments is also authorized for "... any form of marketing promotion including paid advertising ..." (7 U.S.C. § 608c(6)(I)). The Secretary, when he approves the budgets of the various Committees, is signing what he enunciates to the world to be expenses that are "reasonably and likely to be incurred" by the Committees. However, in reality, Nectarine, Peach and Plum Committees members and their agents are in a position to use assessment monies in an effort to protect their own special interests and advance their own economic gain emanating from decisions made by them. An example, is use of "supervisory" discretion. This is a significant power. Instead of changing the color standard, it is granted or withheld on a case by case basis.

Failure to abide by the Administrative Procedure Act and to make known, through the administrative process, elements which go into decisionmaking and the scope and breath thereof result in *individual* determinations as to the areas to which variances may apply. As counsel for Agricultural Marketing Service explained:

"Mr. Cooper: I said variance could be given for the whole area or could be given for a smaller portion.

Mr. Kemper: At the discretion of whom?

Mr. Cooper: It would be based on the determination that was made. Depend upon who made the determination * * *." (Tr. 3446).

Supervisory discretion is not an admitted relaxation of the color chip standard, but permits the supervisor to allow fruit to pass which does not meet it. It can be applied to any area. (Tr. 3451, 3452).

It appears that when the Tree Fruit Reserve Corporation was originally formulated, it was for the purpose of benefiting the tree fruit industry. However, over the years, those individuals in control of the Tree Fruit Reserve and the tree fruit industry (the Commodity Committeemen) have been in a position to distort the original purpose for the establishment of the Tree Fruit Reserve, with resultant personal economic benefits. For example, when it was first determined to purchase or build a building to house the office of the California Tree Fruit Agreement, it was because the industry was expending Four Thousand Dollars (\$4,000.00) a year for rent which could more appropriately be applied to the purchase of their own facility. (Ex. No. 35). A review of the Minutes of the Tree Fruit Reserve, during the early sixties indicates that in November 1967, the Tree Fruit Reserve "now owes \$1,164 on the building and the building will be free and clear in slightly over two months." (Ex. No. 87).

However, instead of complying with the original intent to discontinue the rent once the building was owned free and clear, the rent payments consistently increased each year. (Ex. Nos. 170-214). A review of the Minutes of the Tree Fruit Reserve references the fact that the rent paid to Tree Fruit Reserve from handler assessments increased to Fifty-Two Thousand Eight Hundred Dollars (\$52,800.00) in 1988 (Ex. No. 165) and escalated to Seventy-Nine Thousand

Five Hundred Dollars (\$79,500.00) for 1989. (Ex. No. 167). Upon termination or liquidation of the Tree Fruit Reserve, its assets do not revert to the tree fruit industry, a result contrary to the Marketing Orders' provision.

It was established through the testimony of Mr. LeRoy Giannini and Mr. Virgil Rasmussen (Tree Fruit Reserve Directors and "industry leaders") that these increases in rent in recent years were the result of Tree Fruit Reserve's employment of attorneys to represent the interests of a chosen few. (Tr. 2475-2476). Although it was understood that the building belonged to the commodities (the Plum, Peach and Pear growers) (Tr. 1946), the Directors of the Tree Fruit Reserve found it appropriate to escalate the rents in order to maintain funds and reserves to be spent on endeavors which were illegal for these individuals to expend as members of the Commodity Committees. (Tr. 2475).

The Tree Fruit Reserve attempts to justify charging rent to the California Tree Fruit Agreement in the amount of Seventy-Nine Thousand Five Hundred Dollars (\$79,500.900) on the theory that this is the commercial rate. Mr. Jonathan Field, the Manager of the California Tree Fruit Agreement and the Secretary/Treasurer of the Tree Fruit Reserve, testified that the rent was established by "calling around" and seeing what other people are paying for rent and then the Executive Committee of the Tree Fruit Reserve established the rent: (Tr. 4712). This is a building that was paid off in 1967 with handler assessment monies. Mr. Field as Secretary/Treasurer of the Tree Fruit Reserve, establishes the rent to be paid each year by the California Tree Fruit Agreement. As the Manager of the California Tree Fruit Agreement, Mr. Field is the individual who must "negotiate" and use best efforts to secure the lowest price available on behalf of the tree fruit industry. The rental of office equipment and automobiles were also subject to

Mr. Field's decisions. What benefits incurred to the industry, as a whole, appear illusory.

With respect to the computer system, after several discussions on who should purchase the computer, the California Tree Fruit Agreement or Tree Fruit Reserve, the Committee Chairmen determined that the \$78,000.00 computer should be purchased by the California Tree Fruit Agreement as an instrumentality of the United States Department of Agriculture at General Services Administration prices. If the California Tree Fruit Agreement were to purchase the computer, the California Tree Fruit Agreement would not be required to pay state sales tax, which amounted to approximately \$4,000.00. The Committee Chairmen, voted to proceed with the purchase of the computer system by the California Tree Fruit Agreement. (Ex. No. 157).

A review of the California Tree Fruit Agreement's financial audit shows that the California Tree Fruit Agreement, in 1986, purchased a new press, a computer and software, and other office equipment, totalling \$82,339.00. These items were purchased at the direction of Management Services Committee members, acting as agents for the Secretary of Agriculture, and also as members of the Executive Committee of the Tree Fruit Reserve. The \$82,000.00+ cost was paid out of handler assessments. The item was not capitalized and depreciated over the estimated useful life, instead, the \$82,000.00+ was listed as a yearly expense and the Secretary "rubber-stamped" this expense as reasonable and necessary. (Ex. No. 212). In connection therewith, the Secretary was advised by the accounting firm:

"Note 6 — FIXED ASSETS:

In accordance with the direction of the United States Department of Agriculture, it is the policy of California Tree Fruit Agreement to expense all fixed assets in the year purchased. Generally accepted accounting principles

require that fixed assets be capitalized and depreciated over their estimated useful lives.

In the current year, the following fixed assets were purchased and expensed:

New Press	\$17,106
Computer Equipment and Software	57,762
Other Office	7,521
	<u>\$82,389</u>

The Department of Agriculture was also advised: The effects on the financial statements of these practices are not reasonably determinable." (Ex. No. 212).

Although the purchase would appear appropriate, with no fanfare whatsoever, ten months after the California Tree Fruit Agreement used handler assessments monies to purchase \$82,000.00+ worth of computer and equipment, the Chairmen of the various Committees, wearing the hat of the Management Services Committee, unanimously voted to transfer the computer and press from the California Tree Fruit Agreement to the Tree Fruit Reserve. (Ex. No. 162). Mr. Pinkham, Chairman of the Plum Committee and, therefore, both a member of the Management Services Committee and the executive Committee of the Tree Fruit Reserve, testified that it is the policy of the Committees to transfer assets to the Tree Fruit Reserve once they have either been depreciated or expensed. (Tr. 3505). Thus, \$82,000.00+ worth of equipment, bought and paid for by handler assessments, was transferred at "salvage value" to the Tree Fruit Reserve within one year of its purchase.

By transferring the computer and the press to the Tree Fruit Reserve, it is no longer an asset of the California Tree Fruit Agreement. Now, the California Tree Fruit Agreement has need for the use of a computer. Thus, they rent this computer, along with all other office equipment, from the Tree Fruit Reserve.

Then, when the California Tree Fruit Agreement requests authorization for its expenses from the Secretary of Agriculture each year, one of the expenses listed is office equipment rental. Since office equipment rental has been submitted for Secretarial approval each season, such a budget item draws no special attention. The Secretary will approve expenditures for office equipment rental. The reality of this situation is that the tree fruit handlers, through their assessments, bought and paid for a computer and press in 1986. Now, for every subsequent year, the tree fruit handlers must continue to be assessed so that they might "rent" the same computer they purchased four years ago.

The ripening bowl, developed several years ago by the California Tree Fruit Agreement, was an extremely profitable endeavor. The ripening bowl is a plastic bowl which was marketed through the California Tree Fruit Agreement. The consumer places his/her fruit in this enclosed plastic bowl, the ethylene gas emitted from the fruit is trapped within the bowl, thus, accelerating the ripening process. The profits generated by the California Tree Fruit Agreement's sale of "ripening bowls," which the industry always believed was used for the benefit of the tree fruit handlers, presently goes directly to the Tree Fruit Reserve. (Ex. No. 167).

Respondent contends that the transfer of the ripening bowl income to the Tree Fruit Reserve was lawful conduct. Respondent argues that the ripening bowl was no longer viable and the California Tree Fruit Agreement employees were expending too much time and effort to make the project cost effective. However, this was not documented. The California Tree Fruit Agreement began marketing the ripening bowl in approximately 1978 and it became an immediate success. The ripening bowl was marketed through the California Tree Fruit Agreement office, and the administration of those sales was handled by the California Tree Fruit Agreement personnel (Tr. 4707).

The Minutes of the Management Services Committee meetings from November, 1978 through November, 1985 (Ex. Nos. 129 through 156), chart the progress and profitability of the ripening bowl. At the November 12, 1985, Management Services meeting, Mr. Sanderson, then Manager of the California Tree Fruit Agreement, points out that the industry was becoming bored with the ripening bowl; sales were down; it was therefore decided to discontinue production of the bowls. (It should be noted that the bowls had generated a balance of over \$300,000.00 in net profits for the industry since its introduction in 1977). (Ex. No. 156).

Mr. Field, present Manager of the California Tree Fruit Agreement, testified that the ripening bowl was discontinued because of lack of sales and the marketing of the bowls was extremely time consuming for the California Tree Fruit Agreement personnel. Thus, the Committees decided to get out of the ripening bowl business. (Tr. 4707-4708).

A review of the joint Minutes of the Management Services Committee and the Executive Committee of the Tree Fruit Reserve, dated December 7, 1987 (Ex. No. 163), shows that, without discussion, the California Tree Fruit Agreement casually referenced that it was considering reintroducing the ripening bowl. Then, at the very next meeting, on May 3, 1988, the ripening bowl was voted back into existence. However, this time not by the California Tree Fruit Agreement, instead, the Tree Fruit Reserve would now market the bowl. (Ex. No. 164).

In a separate set of minutes, also dated May 3, 1988, which references a meeting of the Executive Committee of the Tree Fruit Reserve, Jonathan Field discusses the ripening bowl. Jonathan Field stated that the California Tree Fruit Agreement did not desire to reenter the ripening bowl business and suggested that the Tree Fruit Reserve handle

the sale of the bowl, as there was renewed consumer interest in the ripening bowl. (Ex. No. 164(A)).

In his testimony Mr. Field, in attempting to justify the transfer of the ripening bowl from the California Tree Fruit Agreement to the Tree Fruit Reserve, stated that although there was a profit made on the ripening bowls, the books did not reflect the amount of staff time that was used in selling the ripening bowl. In essence, he stated that there was a minimal profit, if any, made on the ripening bowls. (Tr. 4708-4709). Mr. Field testified that all remaining inventory and/or supplies relating to the ripening bowl were purchased by the Tree Fruit Reserve from the California Tree Fruit Agreement. He stated that there wasn't very much because the California Tree Fruit Agreement had been out of the ripening bowl business "for so many years" (one year). (Tr. 4709-4710). A review of the Tree Fruit Reserve Summary of Income and Expenses attached to the Minutes of the Executive Committee of the Tree Fruit Reserve, dated May 2, 1989 (Ex. No. 167), points out that ripening bowl income for the first year after its re-introduction exceed One Hundred Twenty-Five Thousand Dollars (\$125,000.00) prior to expenses.

Respondent's contention that the Tree Fruit Reserve purchased *the rights to the ripening bowl* from the California Tree Fruit Agreement cannot be substantiated. Neither the financial statements of the California Tree Fruit Agreement nor those of the Tree Fruit Reserve show a bill of sale or transfer of funds from Tree Fruit Reserve to the California Tree Fruit Agreement for materials, product or the right to market the product.

The evidence introduced at the hearing established that income of the Tree Fruit Reserve is Generated from the syphoning off, through the California Tree Fruit Agreement, of handler assessment monies which is then used to promote the special interests of the various Commodity Committee-

men. This includes paying for the services of a private law firm to intervene on behalf of the "industry" to oppose Administrative Law Judge's rulings which fail to promote the various Committees' control of the industry. Handler assessment monies are also funneled through the California Tree Fruit Agreement to the Tree Fruit Reserve to hire private attorneys to assist the United States Attorney's office in filing briefs on behalf of various Committeemen charged with anti-trust violations. (Tr. 2482; Ex. No. 165). The Tree Fruit Reserve uses individual handler assessment monies to hire private law firms to conduct lobbying efforts on behalf of modifications to 7 U.S.C. § 608e(1), dealing with commodities imported into the United States and to lend support to the Grape and Tree Fruit League and the Alliance For Food and Fiber.

Wileman/Kash do not contend that it is illegal for a "private" corporation to expend its funds in the manner described above. However, it is argued that it is unlawful for the members of the Nectarine, Peach and Plum Committees to spend handler assessment monies in such a manner:

"Attorneys of the office of the General Counsel (OGC) are available for advise and consultation on legal matters. Committees should request such assistance through the Marketing Field Offices. When available, OGC Attorneys will also help administrative committees in the preparation and presentation of testimony at hearings on program amendments. Thus, *Administrative Committees are prohibited from employing legal counsel. . . .*" United States Department of Agriculture, Agricultural Marketing Service, Internal Operations Manual, p. 47.

The members of the Nectarine, Peach and Plum Committees have devised a mechanism to circumvent the Secretary's regulations and Congress' intent in establishing the Agricultural Marketing Agreement Act. By creating their own private "alter-ego" corporation, they attempt to avoid

the restrictions that would otherwise make their conduct unlawful.

To compound what is clearly misuse of handler assessment monies for unlawful purposes, the actions and various tacit arrangements of the Tree Fruit Reserve are known to, and aided by, various employees of the Federal Government. At the instant hearing, it was established that various members of the Office of the General Counsel, employees of the Agricultural Marketing Service, and attorneys with the United States Attorney's office are, and have been, aware of the existence of the Tree Fruit Reserve.

Kurt Kimmel, the local Field Representative with the Fruit and Vegetable Division of the Agricultural Marketing Service, United States Department of Agriculture, was subpoenaed to testify, and did testify at the instant hearing. Mr. Kimmel testified that he was at virtually all of the joint Management Services Tree Fruit Reserve Executive Committee meetings as the liaison between the Committees and the Department of Agriculture. (Tr. 2693).

Mr. Kimmel admitted knowledge of the existence of the Tree Fruit Reserve, and further stated that he had told a number of people in Washington about its existence. (Tr. 2712). Mr. Kimmel further admitted that he was aware that the Tree Fruit Reserve was spending money on items that the Commodity Committees were not authorized by the Secretary of Agriculture to spend money on; he had known this for over two years when he became Agricultural Marketing Service's Representative. (Tr. 2711). Mr. Kimmel then acknowledged that the United States Department of Agriculture guidelines specify what the Committees can and cannot do. Mr. Kimmel explained that the Committees, or more specifically their Chairmen, are not allowed to lobby, nor, are they allowed to employ private attorneys without the permission of the Secretary. This approval was never sought. (Tr. 2703).

Mr. Kimmel admitted that the Commodity Committee Chairmen at their Management Services meetings discussed lobbying on behalf of amendments to Section 8(e) with respect to imported fruit. Mr. Kimmel stated that he had advised the Commodity Committee members that they were not allowed, pursuant to the United States Department of Agriculture regulatory guidelines, to lobby or provide funds to any association for the purpose of supporting such lobbying efforts. (Tr. 2707; Ex. No. 166). It is Mr. Kimmel's position that although the Commodity Committee Chairmen met in a joint session with the Executive Committee of the Tree Fruit Reserve, since all actions with respect to expending handler assessment monies for unlawful activities was through the Tree Fruit Reserve and not through the Management Services Committee, he was not concerned. (Tr. 2711).

The subservience of the Agricultural Marketing Service's representative to the will of the dominant forces of the industry is illustrated: For example, on February 21, 1986, the Management Services Committee, made up of the Chairmen of all of the Commodity Committees and also serving as the Executive Committee of the Tree Fruit Reserve, held one of their meetings. Mr. Sanderson, then Manager of the California Tree Fruit Agreement and Mr. Muck, then Field Representative for the Fruit and Vegetable Division of the Agricultural Marketing Service, were also present. There was a discussion with respect to providing money to the Grape and Tree Fruit League in support of the Alliance for Food and Fiber. Mr. Muck advised the Commodity Committee Chairmen that the Marketing Order programs were not allowed to fund the Alliance. This did not deter the Management Services Committee, as reflected in the Minutes of that meeting:

"Mr. Sanderson reported that he recently attended a meeting concerning the Alliance For Food and Fiber at

the Sacramento Airport. Ms. Pam Jones is the Director of this effort and at the meeting the Table Grape and Lettuce Commissions offered funding in the amount of \$20,000.00 and \$13,000.00, respectively, to try to counter adverse public opinion on the use of chemicals. Mr. Sanderson has been advised by Mr. Durando that the Grape and Tree Fruit League would soon request a contribution from the California Tree Fruit Agreement to support the Alliance. *Mr. Sanderson characterized the request as a 'sticky wicket' and said he is troubled by the implication of a Marketing Order program contributing to this organization.* Mr. Peterson [Al Peterson — Chairman, Peach Committee and President, Tree Fruit Reserve] said he had been contacted by Mr. Vern Crookshanks asking for support and contributions to the Alliance. Mr. Giannini [Leroy Giannini — then Chairman, Nectarine Administrative Committee and Director, Tree Fruit Reserve] had also been approached and he stated that the program involves developing and disseminating information designated to offset the poor image of agriculture from the use of chemicals. Mr. Sanderson asked whether the Alliance would be powerful enough to overcome a round sell of public opinion. The meeting in Sacramento was attended by perhaps fifteen organizations, including the Western Growers Association, Table Grape Commission and the League, also with three federal Marketing Order spokesmen. Two of the federal Marketing Order programs present expressed reluctance. Mr. Rasmussen (Virgil Rasmussen — then Chairman, Plum Commodity Committee, Director, Tree Fruit Reserve and Executive Committee, Tree Fruit Reserve) stated that the Table Grape Commission is *not* providing money *directly* to the Alliance but has arranged to contribute through the Grape and Tree Fruit League. Mr. Muck stated that *Marketing Order programs cannot fund the Alliance.*

Mr. Rasmussen suggested that *each commodity fund the project at \$5,000.00* but not be committed beyond one year. It was moved by Mr. Pinkham [Patrick Pinkham — Chairman, Plum Commodity Committee, Director, Tree Fruit Reserve and Executive Committee, Tree Fruit Reserve,] seconded by Mr. Peterson and unanimously passed that *Tree Fruit Reserve* contract with the Grape and Tree Fruit League to provide \$20,000.00 to fund the Alliance for one year based on adequate reporting of the activities and that CTFA *not* be named *directly* as a sponsor of the program." (Ex. No. 157). (Emphasis added).

It has been the position of Respondent that the Tree Fruit Reserve is not subject to the control of the United States Department of Agriculture. (Ex. No. 100). From such prospective, as long as the \$20,000.00 did not come directly from the California Tree Fruit Agreement, all was well. Although the \$20,000.00 was collected from handler assessments from each of the four commodities: Peaches, Plums, Nectarines and pears, no laws are broken because the Tree Fruit Reserve wrote the check because its funds are not subject to Government control. (Ex. No. 76). A United States Department of Agriculture representative was present and acquiesced to such conduct.

Respondent, rather than acknowledging the misdeeds of the Commodity Committeemen, in their capacity as Directors and Officers of the Tree Fruit Reserve, attempted throughout the instant hearing and in their Post-Hearing Brief to minimize the relevance of all Tree Fruit Reserve issues. Even with respect to the proof presented at the hearing that the Tree Fruit Reserve controls the activities of the California Tree Fruit Agreement, Respondent continues its denials.

Respondent contends that the California Tree Fruit Agreement employees, although working for the Tree Fruit

Reserve, were employed pursuant to contract and received remuneration for any time expended and work performed for the Tree Fruit Reserve. However, it must be remembered that the Manager of the California Tree Fruit Agreement, since the inception of the Tree Fruit Reserve in 1957, has been the Secretary-Treasurer of this so-called private non-profit corporation. No remuneration was forthcoming to the California Tree Fruit Agreement for services rendered until 1989 pursuant to the agreement between the California Tree Fruit Agreement and the Tree Fruit Reserve. (Ex. No. 30(C)). Respondent ignores the fact that the only reason for the creation of this contract was an attempt to rectify what had previously taken place.

Only after Government officials expressed their concern about the "relationship between the Tree Fruit Reserve, the Committees and the Chairmen," and suggested the drafting of an agreement for remuneration by Tree Fruit Reserve to the California Tree Fruit Agreement, did such a contract come into existence. In fact, until the Respondent expressed its concern as to the overlap of these various entities, nothing to separate these entities was even considered. (Ex. No. 165).

The Petitioners have set forth in their Post-Hearing Reply Brief, pp. 193-201 (which are incorporated herein by reference) the details of the power wielded by a few as to whom is to head up the California Tree Fruit Agreement office, inter-office relationships, what happened to a former Manager of the California Tree Fruit Agreement and why; special dispensations to Committee members, such as shipping "red-tag" fruit in violation of regulations; and unequal treatments of these Petitioners.

It is clear that there exists more than one set of rules. There are rules and regulations which are applied and enforced against the industry at large, and then there are the exceptions to those rules and regulations which are granted

to certain individuals, for whatever reason, who are in a position to exert power and control. Not all Committee Members may be categorized as "industry leaders." However, those involved in the Management Services Committee and the Tree Fruit Reserve have assumed the power to grant and/or secure variances from the color chip designations for themselves and to avoid the other rules and regulations, thus, allowing them to pick, pack and ship their fruit where others in the industry may not.

Another California Tree Fruit Agreement program which fails to withstand even slight scrutiny are the "market tours" paid for by the California Tree Fruit Agreement — once again with handler assessments monies. One particular "market tour" which was referenced in the instant hearing dealt with the tour of various packing facilities by the buyer representatives for "Lucky Markets," a chain grocery store operation. The stated purpose of these tours, similar to the "Lucky tour," is to bring buyers to see Peaches, Plums and Nectarines in the picking and packing stage and to familiarize them with these industry operations. (Tr. 3394-3398).

The "Lucky tour" took two days, June 21 and 22, 1989. The California Tree Fruit Agreement rented a bus, picked up the buyers for Lucky Stores at the Modesto Airport and transported them to the various packinghouses. This tour was an all expense paid trip for the Lucky Store buyers, paid for by handler assessments. It included breakfast, lunch (two days), cocktail hour, dinner and lodging at the Holiday Inn in Visalia.

Wileman/Kash question how they might benefit from their assessments being expended on this form of promotional tour? Wileman/Kash's packinghouses were not requested to be involved in the tour, nor were they even advised that such a tour was conducted. A review of the itinerary for this particular tour makes it readily apparent

why these tours are conducted. The packinghouses visited included:

Wawona — Operated by Al Peterson, Chairman Peach Commodity Committee; Chairman, Management Services Committee; President, Tree Fruit Reserve Corporation; Chairman, Executive Committee Tree Fruit Reserve Corporation. (Tr. 2403-2404).

George Bros. — Owned and operated by Mickey George, Chairman, Nectarine Administrative Committee; Director, Tree Fruit Reserve Corporation; member, Executive Committee Tree Reserve Corporation. (Tr. 2399).

Sadoian Packing Co. — Owned and operated by Cliff Sadoian, member, Peach Commodity Committee. (Tr. 2399).

Mineral King — Packing Coop. owned in part by Patrick Pinkham, Chairman, Plum Commodity Committee; member, Management Services Committee; Director, Tree Fruit Reserve Corporation; member, Executive Committee Tree Fruit Reserve Corporation. (Tr. 2399).

Ito Packing — Owned and operated by Jimmy Ito, member, Nectarine Administrative Committee, and owner of the patent on the Red Jim nectarine. (Tr. 2399).

Ballentine Produce — Owned and operated by Virgil Rasmussen, past Chairman, Plum Commodity Committee; past Chairman, Management Services Committee; Chairman, Control Committee of CTFA; past President, Tree Fruit Reserve Corporation; past Chairman, Executive Committee Tree Fruit Reserve Corporation. (Tr. 2400).

The dinner for the "Lucky tour" buyers was attended by the Commodity Committee Chairmen, while lunch the following day was with Mr. Virgil Rasmussen, one of the admitted "industry giants." (Ex. No. 239).

Wileman/Kash can certainly understand the benefit that is derived from conducting tours such as the one for the Lucky Store buyers and the expectation of a beneficial future relationship. However, those benefits are limited to the packinghouses which were invited to be part of the tour. The Lucky buyers made contact with only those packinghouse operations that the California Tree Fruit Agreement designated. Obviously, it was just a coincidence that the packinghouses visited on this tour were affiliated with the Commodity Committees and the Tree Fruit Reserve members. What possible benefit is provided to the tree fruit industry by the "Lucky tour?" Assuming that the Lucky Store representatives were impressed by the tour, when it comes times to purchase tree fruit for the Lucky Store organization, the buyers will call Messrs. Peterson, George, Pinkham, Ito, or Rasmussen. They will not call neither Messrs. Elliott, Chang or Kashiki. The handler assessment monies expended for these actions of self-interest will benefit that portion of the industry that the Committee Members intended that money to benefit, themselves.

Every grower and handler wants to promote his own product. If he gains some advantage, by reason of the proper promulgation, administration, and interpretation of the Order provisions, he cannot be faulted for such advantage. This is clearly distinguishable from a situation composed of lack of *bona fide* transactions, conflicts of interest, and the interpretation and administering of an order to the economic benefit of those who control. To the extent such situations exist, they are beyond the area of responsibility or permission flowing from the Secretary — nor does he have authority to circumvent Congressional intent and purpose.

Of the 22 witnesses testifying in *Wileman/Kash II*, all but 7 thereof were Committee members, employees of Committee members, an employee of Respondent, or employees of the State of California as Federal-State inspectors.

Very careful evaluation has taken place as to the weight and credibility to be given the testimony of the testifying witnesses, a number of whom served in dual capacities in the California Tree Fruit Agreement and the Tree Fruit Reserve. Not only was there a reluctance of some to testify, but there were instances where knowledgeable successful businessmen or Government employees had severe cases of forgetfulness or feigned a lack of knowledge as to the meaning of commonly used expressions and everyday business matters with which they were associated. A number of the witnesses were not eager to reveal the information being sought on examination.

I do not believe it necessary, for Petitioners to prevail, that a determination be made herein as to anti-trust liability of the Committee members. It is enough that the record as a whole shows that regardless of what the maturity laws are with respect to Nectarines, Plums and Peaches for the 1988 and 1989 harvest seasons, and the years preceding, the Commodity Committee members, without any authority and contrary to any law which may be applicable, cannot intentionally violate that law, ignore the law and conceal from the rest of the industry, including Wileman/Kash, their true intent and motivation. When Wileman/Kash are restrained as competitors, competition in the market place is diminished, and, at the same time, there is increased production and marketing of Nectarines, Plums and Peaches by their competitors. Under the circumstances herein, the private non-profit corporation provides no cloak for such actions.

The Commodity Committees, through the use of the Tree Fruit Reserve and with the assistance of the California Tree Fruit Agreement, established and maintain the "well-matured" maturity standards, not the Secretary.

The Supreme Court has foreclosed the question with respect to whether or not a Committee of competitors can

make laws preventing and restraining their competitors. The Supreme Court in *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855 (1936), absolutely holds that a Committee of competitors cannot make law. In the present case, the power conferred or assumed by the majority, is, in effect, the power to regulate the affairs of an unwilling minority.

In addition to the cases cited earlier herein, the Supreme Court, in 1980, decided the case of *Industrial Union v. American Petroleum*, 448 U.S. 607 (100 S.Ct. 2844) 1980. There, the Court considered a situation much less egregious to that presently before this tribunal. In *Industrial Union, supra*, the Court considered the authority granted to the Secretary of Labor by the Occupational Safety and Health Act of 1970 (OSHA) to promulgate standards for safe and healthful working conditions. The Court indicated at 448 U.S. 608:

"By empowering the Secretary to promulgate standards that are reasonably necessary or appropriate to provide safe or healthful employment in places of employment; as required by § 3(8), the Act implies that, before promulgating any standard, the Secretary must make a finding that the work places in question are not safe."

In upholding the lower Court's decision that OSHA had exceeded its authority in promulgating a new standard, the Court stated at 448 U.S. 614-615:

"We agree with the Fifth Circuit's holding that § 3(8) requires a Secretary to find, as a threshold matter, that the toxic substance in question poses a significant health risk in the work place and that a new, lower standard is therefore reasonably necessary or appropriate to provide safe or healthful employment in places of employment."

The most important part of the Supreme Court holding in *Industrial Union, supra*, is stated at page 646:

"If the government was correct in arguing that neither § 3(8) nor § 6(b)(5) requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in *A.L.A. Schechter Poultry Co. v. United States*, [Citations omitted], and *Panama Refining Co. v. Ryan*, (Citations omitted). A construction of the statute that avoids this kind of open-ended grant should certainly be favored."

The United States Department of Agriculture, in prior arguments, has placed much emphasis on the fact that the Committees of competitors were impliedly delegated authority by the Secretary of Agriculture to create maturity standards, change maturity standards, or deny a variance from maturity standards. This delegation occurred by the Secretary "rubber-stamping" the Committees' "well-matured" color chip designations for 1988 and 1989. However, even if the Secretary did validly approve of said conduct, it cannot be condoned under the holdings of the above-cited cases. For if the Secretary's actions are deemed sufficient, said delegation would be unconstitutional.

Sections 916.70 and 917.68 (Title 7 C.F.R.) appear to grant limited immunity from liability to members and employees of the Committees "except for acts of dishonesty, willful misconduct or gross negligence." However, the Secretary cannot issue a regulation (like §§ 916.70 and 917.68) which would exempt members of the Committees, or their employees, from violating anti-trust laws, which are not among the statutes he enforces, so that it is not necessary to determine whether or not a violation of anti-trust laws involves acts of dishonesty, willful misconduct, or gross

negligence. It certainly may fall within the former two categories but with the Supreme Court cases clearly on point, any attempt by the Secretary to exempt Committee members from anti-trust laws would be invalid.

The Supreme Court, in reviewing the Agricultural Marketing Agreement Act, has made it quite clear that "the Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescribed manner." *United States v. Borden Company, supra*, 308 U.S. at p. 199. The Supreme Court in *Borden* went on to state:

The Agricultural Act declares it to be the policy of Congress 'through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in the interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period described to carry out that policy a particular plan is set forth. *'Farmers and others are not permitted to resort to their own devices and to make any agreements or arrangements that they desire, regardless of the restraints which may be inflicted upon commerce.'*" (Emphasis added). *Id.*, p. 199

As the Court further held:

"To give validity to marketing agreements the Secretary must be an actual participant in the agreements. § 8(b) [Fn. omitted]. The orders are also to be made by the Secretary for the purpose of regulating and handling the agricultural commodity to which the particular order relates. § 8(3)(4) (Fn. omitted). That the field covered by the Agricultural Act is not coterminous with that

covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding *under the authority specifically confirmed by Congress*. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched." (Emphasis added). *Id.*, at pp. 199-200.

The Supreme Court went on to state that the Secretary shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers and others engaged in handling of any agricultural commodity. The Court further stated that said "agreement" shall not be held to be in violation of the anti-trust laws of the United States, however:

"These explicit provisions requiring official participation and authorization shows beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable. [Fn. omitted]. *If Congress had desired to grant any further immunity, Congress undoubtedly would have said so.*" (Emphasis added). *Id.*, at p. 201.

The United States Department of Agriculture can hardly claim official immunity for actions taken by the Commodity Committee members which were expressly delegated to the Federal-State Inspection Service. The Commodity Committee members have exercised executive discretion and policy making where they have not been so empowered. As stated recently by the United States Supreme Court in

Berkovitz v. United States, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988):

"Thus, the discretionary function exception will not apply when a federal statute, regulations or a policy specifically prescribed a course of action for an employee to follow. In the event, the employee has no rightful option but to adhere to the directive . . ." *Id.*, at p. 1958.

"In restating and clarifying the scope of the discretionary function exception, we intend specifically to reject the government's argument, pressed both in this Court and the Court of Appeals, that the exception precludes liability for any and all acts arising out of regulatory programs of federal agencies. That argument is rebutted first by the language of the exception, which protects 'discretionary' functions rather than 'regulatory' function." *Id.*, at pp. 1959-1960.

It cannot be said that the Commodity Committee members had an "official duty" to hold clandestine private non-profit corporate meetings, not open to the public, with no notice to the public, wherein they set the maturity standards, and ran the business of the Commodity Committees and the California Tree Fruit Agreement. Further, the regulations issued by the Secretary in 1988 still required the Federal and Federal-State Inspection Service to impose the maturity requirements. It cannot be inferred that the Committees have the authority to actually make "law," particularly hidden from view within the confines of the Tree Fruit Reserve, for to do so would violate the exact proscriptions laid out in *Carter v. Carter Co.*, *supra*.

In a recent Supreme Court decision, *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 108 S.Ct. 1931, 100

L.Ed.2d 497 (1988), in determining whether or not private competitors had anti-trust immunity, the Court stated:

"Whatever *defacto* authority the association enjoys, no official authority has been conferred on it by any government, and the decisionmaking body of the association is composed, at least in part, of persons with economic incentives to restrain trade. [Citations]. 'We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.' [Citation]. The dividing line between a restraint resulting from governmental action and those resulting from private action may not always be obvious. But whereas here the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action." *Allied Tube, supra*, 108 S.Ct., at pp. 1937-1938.

The Supreme Court in *Allied* went on to state:

"... we hold that at least where, as here, an economically interested party exercises decision making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any anti-trust liability from the effect the standard has on its own force in the marketplace." *Id.*, at p. 1942.

There is nothing in the declared policy of Congress nor in the Peach, Plum and Nectarine Orders which bestows upon private industry the powers of making law, changing law, refusing to change the law set by themselves, and causing discriminatory enforcement of the law with the foreseeable result of restraining or diminishing competition. *Wileman/Kash I* set forth the importance of "timing" and shipping

during windows of opportunity (mostly at the beginning of the harvest seasons). Even if the Secretary had "approved" same, by inaction, non-disapproval, or inattentiveness, this is not the sort of approval referred to in *Berning v. Gooding, supra*.

This principle set forth in *Allied* has recently been considered by the United States Supreme Court in *City of Columbia, et al. v. Omni Outdoor Advertising, Inc.* (No. 89-1671, April 1, 1991). There the Court clearly reorganized the difference between situations in which persons use the governmental process — as opposed to the outcome of that process — as an anticompetitive weapon. One is not entitled to achieve governmental results through improper means.

Approval Process

The last contention of Petitioners to be addressed at length relates to the validity of the approval process for expenditures and to the imposition of assessments — were they arrived at and made in accordance with law. The examination thereof, in this case, results in a departure from *Wileman/Kash I* because of the nature of the pleadings herein, the voluminous evidence, and a factual set of circumstances which differs in some respects.

In my decision with respect to the *Wileman/Kash I* case I indicated that I was of the opinion that the approval process of the assessments was in accordance with law based upon the evidence presented in that case. Although this opinion was adhered to by the Judicial Officer in his decision on the *Wileman/Kash I* case, I am now of the opinion, based upon additional legal precedents which have come to my attention, as well as the additional evidence, setting forth the facts in greater detail, that my opinion in the original *Wileman/Kash I* case should not be adhered to. Among my reasons for this are the facts which flow from extensive testimonial evidence and certain stipulated evidence in this

case, such as Exhibits 31, 32, 33 and 297 and all subparts thereof. Exhibit 33 was stipulated to as being the total rulemaking record relative to advertising assessments for Peaches, Plums and Nectarines. Exhibit 297 was stipulated to as being the "Budget Approval Record" and as being the entire budget, and all supporting documents thereto, which the Nectarine, Plum and Peach Committees submitted to the Secretary of Agriculture for his approval each harvest season from 1980 through 1989.

Also, in *Wileman/Kash I* the issue of retroactivity of the assessments was not addressed. The Judicial Officer's final decision in *Saulsbury Orchards and Almond Processing Inc., et al.* AMA Docket No. F&V 981-4 (January 23, 1991) indicates that he *did not consider*, in *Wileman/Kash I*, that retroactivity was directly raised. It is not disputed herein that the assessment amounts are determined retroactively and it is not disputed that the Tree Fruit Reserve expended sums, derived mostly from rents from assessments paid to the California Tree Fruit Agreement, on attorney's fees and lobbying expenditures illegal for the Secretary to make or approve, thus being a factor in the approval process.

The Respondent's position is clear: Because, sometime in the distant past at rulemaking hearings, the Secretary was given the authority, if he chose, to implement procedures to have paid advertising. From that initial authorization, the Respondent argues that everything the Secretary did after that fell within the parameters of that authorization. Authorization to advertise is not the equivalent of an advertising program which has increased steadily through the years to the extent that it now comprises approximately fifty percent of the assessments imposed upon the handlers. Nor did such initial authorization intend to include procedures whereby, through payment of excessive rents, amounts would be expended for lobbying and attorney's fees, contrary to the Agricultural Marketing Agreement Act, or to devise a

vehicle to be a conduit to avoid the provisions of the Agricultural Marketing Agreement Act in the event of termination of the Orders.

The Secretary of Agriculture, for each harvest season, has applied the advertising and expense assessments retroactively. Each harvest season, the Secretary sets the effective date for the imposition of assessment rates to commence on the first day of the harvest season which is the first of March. (7 C.F.R. §§ 916.227, 917.250 and 917.251).

For the 1988 and 1989 harvest seasons, the Secretary issued his final order with respect to advertising and expense assessments on July 19, 1988 (Exhibit No. 33(M)), and on July 20, 1989. (Exh. No. 33(A)). A review of the advertising and expense assessments for each season from 1979 through 1987 (Exhibit No. 7, A.B. 21-32) establishes that this has been the Secretary's usual procedure since 1979.

The harvest season commences on March 1st each year. The handling of Nectarines, Peaches and Plums commences approximately May 15th-20th of each year. Yet, the final rule with respect to advertising and expense assessments was not published until July 19, in 1988 and July 20, in 1989. Inasmuch as the Secretary's advertising and expense assessments are retroactively applied to all tree fruit received by handlers after the harvest season begins on March 1st, it is retroactive and not in accordance with law.

The Nectarine, Plum and Peach Committees submit their proposed budgets and recommended assessment rate per carton after their spring meetings, which occur, each season, approximately the first week in May. There is no explanation why the Committees do not submit their recommendations to the Secretary prior to May, each season.

Each harvest season, farmers, including the Committee members, in seeking crop loans must submit their estimates and budgets to the loan institutions as early as November.

Thus, the lending institutions and the growers have estimated the following season's crop well before the commencement of the next harvest season. Yet, recommendations are not submitted to the Secretary of Agriculture with respect to advertising and expense costs until the May meetings. (Tr. 1269).

Were the Committees to submit estimated recommendations to the Secretary, there is no reason why the Secretary would not have time to review those recommendations and complete his rulemaking, at least interim rulemaking, well before handlers commence their handling of the tree fruit in May. Yet, instead, the Secretary issues his final rule some nine (9) weeks after the commencement of the harvest season, making it retroactive to March 1st. Each harvest season the Secretary then announces that:

"... good cause exists for not postponing the effective date of this action until thirty (30) days after publication in the Federal Register." (Exhibit Nos. 33 (M) and 33 (A)).

Inasmuch as the final rules apply to all tree fruit received by handlers from March 1st, it is unquestionably retroactive. As such, it is the kind of rulemaking action which the Courts have held invalid without express statutory grant. Although the Secretary has the authorization to adjust the assessments, during the harvest year, if events so warrant it, this is not sufficient basis for not making the initial assessments well in advance.

Courts have determined that there are limitations on permissible retroactive rulemaking, and the relevant factors include the degree of retroactivity, the need for administrative flexibility and the hardship on affected parties. *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission*, 606 F.2d 1094 (D.C. Cir. 1979) cert. denied, 100 S.Ct. 1284 (1979). Courts frown on retroactive applica-

tion when the rule has not been preceded by formal rulemaking requirements requesting input from interested or affected parties. As previously noted, there is no satisfactory avenue for the affected handlers to make known to the Secretary their views as to correctness of the proposed expenses. Committees meetings do not suffice. *Montana Power Co. v. Environmental Protection Agency*, 429 F. Supp. 683 (D.C. Mont. 1977). Furthermore, Courts have held that retroactive agency policy-making and/or rulemaking is disfavored when the ill effects of such application outweigh the need of immediate application, or when the hardship on affected parties will outweigh the public ends to be accomplished. *Iowa Power and Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796 (1981) cert. denied, 102 S. Ct. 1253 (1981).

The Supreme Court of the United States recently had occasion to consider an agency's power to promulgate regulations. The Supreme Court in *Bowen v. Georgetown University Hospital, et al.*, 109 S.Ct. 468 (1988), found that the 1984 reinstatement of a 1981 rule was invalid. In so ruling, the Court indicated that an administrative agency's power to promulgate regulations is limited to the authority delegated by Congress. More specifically, the Court unanimously stated that the threshold question was whether the legislation in question authorized retroactive rulemaking:

"Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires that result... by the same principal, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encumbrance the power to promulgate retroactive rules unless that power is conveyed by Congress in expressed terms..." *Id.*

The Court was cognizant that in the interim forty years since the passage of the Administrative Procedure Act, the

Court "... has never directly confronted whether the statute authorizes retroactive rules. This in itself casts doubt on the Government's position ..." *Bowen v. Georgetown University*, *supra*.

Justice Scalia joined in the opinion of the unanimous Court by concurring and writing a separate opinion wherein he reiterated that the most authoritative interpretation of the Administrative Procedure Act was the 1947 Attorney General's Manual on the Administrative Procedure Act to which the Supreme Court repeatedly has given great weight. The profound thought given to this previously unconsidered area by the Supreme Court is reflected in Justice Scalia's opinion:

"That document was prepared by the same office of the Assistant Solicitor General that advised Congress in the later stages of enacting the APA, and was originally issued 'as a guide to the agencies in adjusting their procedures to the requirements of the act.' AG's Manual 6. Its analysis is plainly out of accord with the government's position here:

Of particular importance is the fact that 'rule' includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of future effect, implementing or prescribing future law.

[T]he entire act is based upon a dichotomy between rule making and adjudication ... rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations ... conversely, adjudication is concerned with the determination of past and present rights and liabilities. *Id.*, at 13-14.

"These statements cannot conceivably be reconciled with the government's position here that a rule has future effect merely because it is made effective in the future. Moreover, the clarity of these statements cannot be disregarded on the basis of the single sentence, elsewhere in the manual, that '[n]othing, in the act precludes the issuance of retroactive rules when otherwise legal and accompanied by the findings, required by Section 4(c).' *Id.*, at 37. What that statement means (apart from the inexplicable reference to Section 4(c), 5 U.S.C. § 553(d), which would appear to have no application, no matter which interpretation is adopted, is clarified by the immediately following citation to the portion of the legislative history supporting it, namely, H. Rep. No. 1980, 79th Cong., 2d Sess., 49, n. 1 (1946). That Report states that '[t]he phrase 'future' effects does not preclude agencies from considering and, so far as legally authorized, dealing with past transactions and prescribing rules for the future.' *Ibid.* The Treasury Department might prescribe, for example, that for purposes of assessing future income tax liability, income from certain trusts that has previously been considered non-taxable will be taxable — whether those trusts were established before the effective date of the regulation. That is not retroactivity in the sense at issue here, i.e., in the sense of altering, the past legal consequences of past action. Rather, it is what has been characterized as 'secondary' retroactivity, see *McNulty, Corporations and the Intertemporal Conflict of Laws*, 55 Cal. L. Rev. 58-60 (1967). A rule with exclusively future effect (taxation of future trust income) can unquestionably affect past transactions (rendering the previously established trusts less desirable in the future), but it does not for that reason cease to be a rule under the APA. Thus, with respect to the present matter, there is no question that the Secretary could have applied her new wage-index formulas to respondents in the future, even

though respondents may have been operating under long-term labor and supply contracts negotiated in reliance upon the pre-existing rule. *But when the Secretary prescribed such a formula for costs reimbursable while the prior rule was in effect, she changed the law retroactively, a function not performable by rule under the APA.*" [Emphasis added].

Bowen, supra, especially the concurrence by Justice Scalia, demonstrates that the Supreme Court does not look kindly upon an agency's attempt to promulgate rules which have a retroactive effect. Justice Scalia indicated that the Administrative Procedure Act meant what it said and there was no reason to think that Congress varied therefrom.⁶

The 1989 market development "generic" advertising budget was in excess of Five Million Dollars (\$5,000,000.00). Of that \$5,000,000.00+, 56 percent, or well in excess of \$2,500,000.00 was expended on television and radio production. (Ex. No. 348). With respect to the \$2,500,000.00+ which was expended on radio and television production, in excess of \$2,000,000.00 was expended prior to the Secretary authorizing any expenditure whatsoever. Although there was some evidence that some of the recipients may have been aware that receipt of their funds was dependent on the Secretary's approval, nevertheless, such funds were committed *prior* to the Secretary's approval. The same advertising firm could rely upon its expected, or actual, income prior to the harvest season.

⁶It is not known the application the Judicial Officer may, or may not give this case and that of *Air Transport Ass'n of America v. Depart. of Transportation* 900 F.2d 369 (D.C. Cir. 1990) *cert. granted*, as *Dept. of Transportation v. Air Transport Ass'n of America*, 111 S.Ct. 669 (January 7, 1991). Judgment vacated and remanded to consider question of mootness. See Ruling on Certified Questions May 1, 1991, *supra*.

Exhibit No. 350 as prepared by Jonathan Field, shows that 86.3% of the entire advertising budget is expended in the first eight weeks of the harvest season. The harvest season commences on or about May 15th-May 22nd. In 1989, the Secretary authorized the Committees' budgets on July 20, 1989. (Exh. No. 33(A)). Therefore, at the time the Secretary authorized the expenditure of \$2,500,000.00+ for advertising, the Committees, through the California Tree Fruit Agreement, had already spent, or committed for expenditure, most of the money allocated. Yet, the assessments were levied for all fruit which was picked and packed prior to the effective date of each year's assessment regulations.

A review of the Secretary's assessment regulations from 1979 through 1989 establishes that, through the last decade, virtually the entire advertising budget was expended well before the Secretary authorized any expenses to be incurred or assessments collected. (Ex. Nos. 7, A.B. 21-32; 33(A); 33(M)).

Although the Judicial Officer is of the opinion that retroactivity is permissible, his opinion in *Saulsbury, supra*, reveals he is more concerned with *administrative* malfunction and inconvenience. He has stated, in part: That the Petitioners therein were simply attempting to find some legal technicality to relieve them of assessment obligations. Moreover, the Judicial Officer stated:

"Finally, even if the rule is found to be retroactive, and if the holding in *G. U. Hosp.* is found to apply, the rule is nevertheless permissible as any retroactivity is specifically authorized by the authorizing statute, the AMAA. The AMAA provides that each order 'shall provide that each handler subject thereto shall pay to [the Board] such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by [the Board], during

any period specified by him...["](emphasis added) 7 U.S.C. 610(b)(2)(ii). Pursuant to this authority the Secretary, in Order 981, has established the crop year as the specified period. As petitioners themselves note (Tr. 321), the Board and the Secretary must have a reasonable estimate of the crop to permit the procedure to operate. That can not happen until mid-July at the earliest which is after the start of the crop year established by the Secretary pursuant to the authority provided to him by the AMAA to specify the applicable period. Thus the Secretary has ruled that assessments shall be on all almonds received by a handler during a crop year (7 C.F.R. 98.18) and the rate must be based on an estimate which can not occur horticulturally until after the crop year has begun and will, by prospective rule 7 C.F.R. 981.81, apply to all almonds handled during the crop year.

"* * * it is no longer my view that the assessment rate must be included in a regulation. * * * However, there is nothing in the Agricultural Marketing Agreement Act of 1937 that requires that a handler's assessment obligations be set forth in a regulation. (See 7 U.S.C. § 608c(6)(I), 610(b)(2)(ii)-(iii)). Since the Order, published in the Federal Register after a formal rulemaking hearing, expressly requires handlers to pay their pro rata share of expenses approved by the Secretary, and expressly authorizes retroactive assessment determinations (7 C.F.R. § 981.81), it is my present view that the Secretary could notify handlers by personal notice or otherwise of their assessment obligations, without issuing a regulation.

"If the rules imposing the assessment rates from 1980-81 through 1988-89 were *invalid because of retroactivity* (which is not the case), this could not be cured by any new rulemaking procedure, but consideration would still have to be even as to whether reimbursement is just and

reasonable considering all of the circumstances, whether laches would preclude recovery for some of the years, and whether all handlers should voluntarily be reimbursed by the Secretary. * * *

If the imposition of assessments had been subject to rulemaking where handlers and others, including the general public, would have opportunity for input, and, the assessments were made prospective, ~~these~~ Petitioners would have little merit to this aspect of their arguments. But, the facts herein show otherwise. Certainly, the amount of assessments levied as to each handler can have a direct impact on his business judgments. Presently, there is no forum where meaningful input and consideration can be achieved as to the pros and cons of paying the Tree Fruit Reserve high rents for lease of a building and office furniture and cars, and the resultant expenditure of such amounts through the Tree Fruit Reserve for lobbying and attorney's fees. The present process precludes the submission of alternatives and such preclusion manifests itself in the retroactive assessments, most of which have been spent before such determination is made.

Moreover, such actions are contrary to original intent as reflected at the oral hearing considering whether there was a need for a Federal Marketing Order relative to the handling of Nectarines grown in California. (Docket No. OA-303, March 20, 1958). The testimony of one of the proponents, Mr. James Laird, indicates among other things, with respect to the authorization of the proposed Nectarine Committee: "The Committee should have the duty of establishing an office, and, if it appears to be in the interest of the industry, a working out space and management arrangements with some other industry fruit office. *The Committee should consider the cost of operation as a matter of primary concern and operate as economically as possible consistent*

with the effective performance of its duties." (Tr. 334, 335 of that hearing). (Emphasis added.)

In addition, Mr. Laird indicated in his testimony that as to the duty of the Committee to prepare a budget of expenses and recommend a rate of assessments to the Secretary that: "*This, of course, should be done at the start of each fiscal year* *** growers and handlers likewise should be informed as to the budget, as they have a right to know what is being done with the money they will pay to the committee to cover its operating expenses." (Tr. 335 of that hearing).

There are no express provisions for retroactive rulemaking in the Agricultural Marketing Agreement Act. Moreover, when the Marketing Order was promulgated, there was recognized the need to issue rules before the handling of fruit begins in mid-May and designated March 1st as the start of each crop year to allow adequate lead time for rulemaking.

The Secretary did not have "good cause" for dispensing with rulemaking requirements. Moreover, by the time the Secretary signed the final rule and began enforcing his regulations, the retroactive assessments owed amounted to a significant amount of money which did, in fact, impose an economic hardship on all handlers. The Secretary has no authority to retroactively force handlers to pay said assessments.

In reality, as the process now works, the Secretary has unfettered discretion to set the assessment rates at any level he deems "reasonable." When this determination as to "reasonableness" is not subject to meaningful public and handler scrutiny, one is left without guidelines or restrictions. If there is opportunity for interested persons to have meaningful input then a reviewing Court has basis for determining if the Secretary acted arbitrarily and capri-

ciously or in an unreasonable manner when he includes certain items in the expense category. Surely, there must be boundaries beyond which the Secretary may not go. Even "reasonableness" has its bounds. For instance, what if the various Committees decided, for one reason or another, to increase expenditures for advertising to Fifty Million Dollars (\$50,000,000.00) a year, and, the Secretary for reasons known only to himself, approved same under the guise of being good for the fruit industry and furthering the objectives of the Agricultural Marketing Agreement Act. Such approval process would put a lot of people out of business but would it be reasonable? Although the members of the various Commodity Committees are familiar with the industry, they have inherent self economic interests to promote, and the reasons underlying their recommendations must be weighed in light of the entire industry and the Agricultural Marketing Agreement Act. The recommendations of the Committees and the approval process do not, *per se*, acceptably establish reasonableness and non-arbitrary and non-capricious acts.

The Respondent maintains that the Secretary's approvals of the Committees' budgets are not subject to rulemaking at all, but are matters left to the discretion of the Secretary.

Where an agency must make a determination, such agency must form a judgment predicated upon factual circumstances. Such determination, even if discretionary, is not automatic, nor is it a matter of absolute agency discretion. Administrative legal process encompasses the due process clause of the United States Constitution (Fifth Amendment). Due process may not be dispensed with in administrative procedure. *Chernin v. Lyng*, 1 AdL.3d 560 (8th Cir. 1989).

Where there had been no delegation or a concise setting of parameters within which a Government employee functions, it is not inappropriate to examine and make findings of

fact concerning the policy of such functions, the degree of discretion allowed, and whether such discretion as existed was grounded in social, economic, or political policy. *See, Irving v. United States* (Ct. App. 1, No. 89-1365 (July 25, 1990)) where the Court indicated that the discretionary function exception to Government's waiver of sovereign immunity in the Federal Tort Claims Act does not automatically preclude suit against the Occupational Safety and Health Administration for negligent inspection, but depends on the amount of discretion actually held and exercised by the inspector, which required specific findings of fact.

It is further argued by the Respondent that according to the rulemaking records the Committees are required to include their proposed advertising and other expenditures to the Secretary with their proposed budget of their anticipated expenses for each fiscal year period. *See*, 31 Fed. Reg. 5625 (7 C.F.R. §§ 916.31(c) and 917.35(f)). At that time, the Secretary may approve or disapprove of the "proposed" expenditures. The Secretary may adopt the proposed expenditures, he may reject portions of the recommended expenditures or he may reject all advertising and other expenditures for that year, just as he may do with any expenditure in the Committees' proposed budgets. Thus, it is Respondent's argument, that the Secretary through the approval process of proposed expenditures, as an ancillary matter, is simply approving the amounts for advertising and other expenditures, and that no separate determination need be made thereof.

The most obvious basis for the Secretary's "approvals," through the various harvest seasons, has been the Committees' recommendations, which, with a few minor exceptions, have been *pro forma* approved.

The Respondent maintains that the Secretary's approval process for the expenditures is made only after "examination of voluminous reports, proposals and budgets." However, an

examination of the data contained in Exhibit 297 reveals that for the most part the aforesaid referenced "voluminous" data consist of California summer fruit field staff bulletins; Minutes of promotional Subcommittee meetings, export Subcommittee meetings, economic Subcommittee meetings, research reports; and the proposed budgets submitted by the Committees. These documents are submitted to the Secretary with a view to approval of the Committees' requested budgets.

The Committees' recommended budgets contain not only amounts to be expended for "generic" advertising, but also amounts which are being remitted, through the California Tree Fruit Agreement, to the Tree Fruit Reserve for rents. The Exhibits, particularly Exhibit No. 297, do not contain a comprehensive statement or study indicating the effect that advertising activities have had on the sale of California summer fruits. Moreover, the fact that such data as Exhibit No. 297, is in existence does not *ipso facto* reflect that careful study and scrutiny were accorded thereto by those who had to make decisions as to the upcoming budget.

One searches in vain for factors against which the Secretary's discretion can be measured, such as data revealing the impact of advertising on profit. To what extent does "generic" advertising hurt or help brand names? Does the format utilized by the California Tree Fruit Agreement whereby only certain varieties are advertised result in a detriment to those who are not included in such advertising? By admission, advertising on the color chart does not benefit the smaller sellers because to get on the chart, one has to be among the 15 top sellers. What determinations were made as to whether or not the California Tree Fruit Agreement advertised proprietary varieties? One who holds a patent thereon or who "controls" a variety possesses a proprietary interest. To what extent is it desirable that the California Tree Fruit Agreement (through the approval process of

Mr. Parker) use assessments in determining what fruit are "promoted?" To what extent is it desirable, for example, through its advertising program, that the California Tree Fruit Agreement make decisions as to what varieties of fruit to "push," or advertise, together with the basic message that all California fruit are the same? This is not so. Mr. Gerawan, Mr. Kash and Mr. Elliott all believe their fruits are superior and should not be pulled down to mediocrity. By doing so, such persons/entities are deprived of additional profits which would be forthcoming from the sales of their superior products.

Without searching analysis and evaluation, how is the Secretary (or even growers and handlers) to know the extent to which "generic" advertising may reduce the profits of brand labels and the extent to which "generic" advertising may or may not benefit the industry. What degree of profitability is forthcoming from forced advertising? The evidence is devoid of any comprehensive research program which would answer these questions. Has there been a tracking of the fruit over a period of years and through good and bad economic cycles? What is the extent to which the level of advertising influences the "perceived value" of a product and how does this perception affect both the relative market share and the relative market price of the product? To what extent can one quantify the direct impact of different advertising strategies on profitability and growth? What is the average return on advertising investments? Is there a level at which additional advertising becomes nonprofitable.

Wileman/Kash's assessment monies ostensibly are used to pay " * * * such expenses as the Secretary may find are reasonable and are likely to be incurred by [the Commodity Committee] during any period specified by him * * *, for the maintenance and function of such authority and agency * * *." (7 U.S.C. § 610(b)(2)(ii)). The collection of as-

sessments is also authorized for " * * * any form of marketing promotion including paid advertising * * *." (7 U.S.C. § 608c(6)(i)). The Secretary, when he approves the budgets of the various Committees, is signing what he determines to be expenses that are "reasonably and likely to be incurred" by the Committees. If they are not reasonable and are unnecessary for the functions of the Committees, they lack the validity which attaches to a proper approval process.

It is not the purpose of this decision to delineate the details which the Secretary may consider in his legislative capacity, but rather, to seek to ascertain what factors he did take into consideration and what details he omitted. It is beyond the scope of this hearing, and indeed would be inappropriate, to attempt to mandate the Secretary of Agriculture to hold a rulemaking proceeding with a view to amending the Orders with respect to any deficiencies which may exist. However, it is not beyond the scope of this adjudicatory proceeding to determine whether or not, when the Secretary approves the assessment amounts, he does so in a manner consonant with the Administrative Procedure Act and takes into consideration all of the various factors which should properly make up the assessment obligations.

The Petitioners seek not to have their views and contentions usurp those of the Secretary — it is his prerogative to make reasoned decision making. It is the Petitioners' view that he has not done that, but rather has contained a bureaucratic syndrome of approval of almost anything the Committees request. The evidence herein supports the Petitioners.

Basically, these are the concerns of the Petitioners — concerns which, fundamentally, the Respondent maintains are within the prerogative of the Committees and the California Tree Fruit Agreement to determine, and then send their determinations in to the Secretary, who, in the past, has rendered rather routine approval.

Would not "reasoned decision making" require a review of whether the forced "generic" advertising program has been of any benefit to the industry, i.e., has the advertising program increased the sales and profits of the growers and handlers? Also, the evidence is devoid of any attempt by the Secretary to consider alternatives to the Committee's recommendations, or to give reasoned explanations for rejecting alternatives.

Thus, it must be concluded that the Secretary has consistently failed, every season, to consider any alternative to the forced "generic" advertising program as imposed on the tree fruit industry by the California Tree Fruit Agreement and the Committees. The Secretary thus has abdicated his statutory duty, through *pro forma* bureaucratic action, of rubber stamping, for the most part, the California Tree Fruit Agreement's "generic" advertising and other expense recommendations, via the Committees. The Secretary not only failed to subject the Committees' and the California Tree Fruit Agreement's recommendations to the "deliberate thought" process as independent analysis required, but there was a failure of action to consider responsible alternatives and to give a reasoned explanation for rejection of such alternatives. There is an absence of evidence to support the determinations made by the Secretary other than self-servicing statements to the effect that everything in Exhibit No. 297 was reviewed.

The Respondent's argument falls by its own weight in this regard. On page 24 of its brief the Respondent states: "But the Petitioners have not shown what alternatives may have been before the Secretary at the formal hearing period as discussed above. The Secretary must base his decision exclusively on the record before him. However, Petitioners *never* cite to alternatives placed before the Secretary at *any* rulemaking proceeding." Therefore, Respondent would disregard Petitioners' challenges in this regard. However, for-

mal rulemaking records did not make forced advertising mandatory nor did they determine the amount thereof.

The rulemaking records gave the Secretary the discretion to have an advertising program, or not to have an advertising program. Obviously, when one has discretionary authority, there is visualized a plethora or at least one or more alternatives available to him. Otherwise he wouldn't have any discretion. Surely, it was never intended by anyone, that the Secretary would have such discretion that he would simply rubber stamp any recommendations which came to him from the California Tree Fruit Agreement via the Committees, with respect to forced advertising. If anything, the hearing records giving the Secretary authority and discretion to have an advertising program, support the Petitioners. Even an elemental definition of discretion indicates that it is the power of free decision or latitude of choice within certain legal bounds. The Secretary's legal bounds are those of assuring that the provisions of the Act and the objectives of the Marketing Orders are carried out. This is not to say that the Secretary might not have arrived, over a ten-year period, at the very same decisions which he made. However, based on the stipulated responses, and other evidence, there is a lack of showing of independent scrutiny and analysis of the Committee's recommendations, and there is no way of knowing upon what factual basis the Secretary did, in fact, base his approvals. One can try in vain to give the Secretary benefit of doubt, namely, that he was aware of important matters affecting the industry and that his approval was a significant act.

Accordingly, the Respondent's argument that the requirement of reasoned consideration of forced advertising and whether to have it or not, was simply an alternative devise or thought conceivable by the mind of man and does not partake of significant and viable alternatives, is without merit. Certainly one cannot argue that the amount of these

assessments which are attributable to advertising and the amounts paid by the California Tree Fruit Agreement to the Tree Fruit Reserve are small amounts. Accordingly, the recitation by Respondent of *Farmers Union Central Exchange Inc. v. Federal Energy Regulatory Commission*, 734 F.2d 1486, 1511, n. 4 (D.C. Cir. 1984) is inapplicable as cited by the Respondent but it, indeed, is applicable to the extent that the court recognized that there is a duty to consider alternatives which are "significant and viable." Likewise, the argument of the Respondent that the Petitioners have not shown what alternatives may have been before the Secretary is likewise inappropriate. Obviously, and from a very elemental standpoint, the Secretary had alternatives such as mentioned above as to whether or not to have "generic" forced advertising, the extent of such "generic" forced advertising, the manner of any advertising program, and the amount of funds to be attributable thereto. Similar choices were available to him as to other expense amounts disbursed by the California Tree Fruit Agreement.

By ignoring practical realities and utilization of the bureaucratic system whereby interested persons do not have the opportunity to meaningfully voice their opinions to the United States Department of Agriculture decision-makers, not only have such persons been denied the right to participate in the decision-making process, but also, the Secretary has permitted the bureaucratic maze to attribute to him knowledge concerning such matters as: by admission of Mr. Kimbell, if certain matters were done differently by the California Tree Fruit Agreement, the assessments could be less; that the Tree Fruit Reserve was acting on a continuing basis as the alter ego of the California Tree Fruit Agreement, resulting in not only higher assessments, but also resulting in the achievement of acts which would be illegal were the Secretary to do them (such as lobbying and paying lawyers to defeat the Department's judicial process system). Without having to set forth the factors which went into his

determinations, one is left to guess as to what consideration was given to the aforesaid factors, if any.

The Respondent's argument that because the assessment rate is the result of a mathematical calculation, no lengthy comment period is necessary, begs the question. The question propounded by the Petitioners is what is included in those figures which make up this mathematically computation and why. Without the Secretary's statement as to why the assessment rates are higher than would be necessary, or why the advertising budget partakes of such a large amount of the assessments, as well as other relevant data surrounding the amounts making up the expenses of the Committees, one is without the facts by which to measure the legality of the Secretary's action as determined by standards, guidelines, and due process. Notwithstanding the assertions of the Respondent, there was no witness at either the *Wileman/Kash I* nor *Wileman/Kash II* hearing who testified that the determination of the Secretary of the advertising budget was based on review of thousands of documents provided from the field, such as is set forth in Exhibit 297. It well may be true that such documents were available but no witness indicated that he reviewed all of these documents and made certain judgmental determinations with respect thereto.

By attributing to the Secretary the knowledge and actions of his subordinates, including the Committeemen, the California Tree Fruit Agreement and, by inference, the Tree Fruit Reserve, the approval of the 1988-1989 expense budgets of the Committees was arbitrary and capricious. Absence such attribution, his approval of the 1988-1989 expense budgets was not reflective of reasoned decisionmaking and was unreasonable. In any event, the approval process was flawed and defective.

A review of the Secretary's assessment regulations from 1979 through 1989 establishes their retroactivity and, also, that, through the last decade, virtually the entire advertising

budget was expended well before the Secretary authorized any expenses to be incurred or assessments collected. (Ex. 7; A.B. 21-32; 33A; 33M). It is undisputed, and the evidence clearly shows, that a very substantial percentage of the tree fruit harvest each season was completed prior to the issuance of the assessment relation. In other words the fruit was picked and packed prior to the effective date of each year's assessment regulations.

First Amendment

Both parties recognize Petitioners' First Amendment claims to be a substantial issue in this case. In fact, the Respondent devoted approximately 23 pages of its brief thereto. The Respondent argues that the "forced speech" doctrine is inapplicable to commercial speech; that the promotional programs conducted under Marketing Orders 916 and 917 do not require the Petitioners to speak or engage in expressive conduct of any kind; that Petitioners' reliance on "union-shop" arrangements to support its forced association claim is meritless; that Petitioners' arguments are mere disagreement as to policy; and that Petitioners' First Amendment claims have been rejected in the case of *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989) *cert. denied*, 58 U.S.L.W. 3513, Feb. 20, 1990.

For the Department of Agriculture, a declaration of unconstitutionality as to these assessments, would constitute an administrative dilemma and inconvenience where the Department would be forced to seek ways of redress. See the Judicial Officer's decision in *Saulsbury Orchards and Almond Processing, Inc., et al.*, AMA Docket No. F&V 981-4, January 23, 1991. However, the concern herein relates to the validity of Petitioners' contentions is if this were to be regarded as an issue calling for resolution herein. Although it is not necessary to reach this Constitutional assertion of Petitioners, a summary of their conten-

tions is appropriate in the event they do not prevail on the other issues.

The First Amendment to the Constitution of the United States provides:

"Congress shall make no law . . . abridging freedom of speech . . . or the right of the people peaceably to assemble, and to petition the government for a redress for grievances."

Freedom of association is protected by the free speech clause of the First Amendment to the United States Constitution. While freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit, within the parameters of the principles, inclusion of freedom of speech, assembly and petition. *Healy v. James*, 408 U.S. 169, 181 (1972). This protection necessarily incorporates the right to be free from such association. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-634, 63 S.Ct. 1178, 1182-1183 (1943). A system which secures the right to proselytize religion, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." *West Virginia State Board of Education, supra*; *Century Communications Corp. v. F.C.C.*, 835 F.2d 292 (D.C. Cir. 1987); *Pacific Gas and Electric v. P.U.C.*, 106 S.Ct. 903 (1986).

As stated above, the right of freedom of thought and association protected by the First Amendment includes both the right to speak freely and the right to refrain from speaking at all. *West Virginia State Board of Education v. Barnette, supra*, at p. 633-634; *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831 (1974); *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428 (1977).

The Supreme Court has addressed the issue of forced speech coupled with forced association on a number of occasions. In *Railway Employees Department v. Hanson*, 351 U.S. 225, 76 S.Ct. 714 (1955), the employees argued that a union-shop agreement violated their right to freedom of association and freedom of thought protected by the First Amendment. The Court disagreed, and found no First Amendment violation or injury as the record contained no evidence that the compelled union dues were used for any purpose other than collective bargaining. However, the Court cautioned that "*if assessments are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented.*" (Emphasis added). *Hanson*, at p. 235.

Just such an issue was presented to the Supreme Court in *International Assn. of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784 (1961), where the Court considered another challenge to a union-shop agreement under the Railway Labor Act. In that case, there was evidence that the compelled union dues were being used for purposes of financing the campaigns of candidates for federal and state office and to promote political and economic doctrines, concepts and ideologies which the plaintiffs in that action opposed.

The Court avoided the Constitutional issues in that case by construing the Railway Labor Act as prohibiting the use of compulsory dues for political purposes. Although Justice Black and Justice Douglas, in concurring opinions, indicated that First Amendment violations existed.

The right of non-association under the freedom of speech provision of the First Amendment was squarely considered and recognized in *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976). This case challenged the Sheriffs Office policy requiring all sheriffs employees be affiliated with the Democratic party. The Supreme Court determined that such a requirement would withstand judicial scrutiny as applied to

those employees in policy-making job classifications. However, it was violative of the individual employee's First Amendment non-association rights as to those employees who were not in policy-making positions. The court determined that the government's interest for effectiveness, efficiency and preservation of the party system could all be accomplished by "less restrictive means."

The Supreme Court ultimately was confronted with the issue which had not been previously decided previously: Whether compelled fees as a condition of employment could be used for political and ideological purposes unrelated to collective bargaining.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782 (1977), the Board entered into a contract with the Teachers' Union pursuant to which all teachers who failed to join the union were required to pay the union a service fee equal to the regular dues of members (an "agency-shop agreement"). A portion of those dues was used by the union to engage in a variety of activities and programs, encompassing economic, political, professional, scientific and religious points of view.

Plaintiffs, in *Abood*, *supra*, as members of the affected class opposed the use of said funds for anything "not germane to collective bargaining." *Hanson*, *supra*, at p. 235.

The Supreme Court agreed with the employees, and found no distinction between:

"The fact that the appellants are compelled to make, rather than prohibited from making contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscious rather than coerced by the state." *Id.*, at pp. 234-235.

In upholding the position that the Supreme Court took in *Hanson, supra*, the Court explained that:

"We do not hold that a union can not constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective bargaining representatives. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by that threat of loss of government employment." *Ibid*, at pp. 235-236. (Footnote omitted).

The *Abood* case (*Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)), which has been discussed herein before, was followed in the recent case of *Keller v. State Bar of California* (S. Ct. 1990) [58 L.W. 4661.] It was also followed in the case of *Gibson v. Florida Bar* (Ct. App. 11th Cir, No. 89-3388, July 23, 1990). The last case (*Gibson*) emphasized that the dissenter or the one providing the funds has the affirmative burden and obligation of raising an objection. But then, the Court went on to state: "The objector need not provide any further information concerning the motivation for his objection or his own position regarding the legislative policy and issue."

The central issue in the instant matter is whether the Constitutional limitations enunciated by the Supreme Court in *Abood, supra*, apply within the framework of the Agricultural Marketing Agreement Act and its Marketing Orders. Stated another way, the issue presently before this tribunal is: Whether Wileman/Kash, as a condition of their being handlers of tree fruit, may be forced to expend their money, deemed by the Respondent to foster the legitimate purposes of the Agricultural Marketing Agreement Act, but which expenditures do not improve their business position, but

rather are used to finance an advertising program which is contrary to their personal, professional, ideologic, philosophical and commercial beliefs. The Respondent's position that the assessments are used to foster the legitimate purposes of the Agricultural Marketing Agreement Act is contested. Respondent dismisses the use of assessment money by the Tree Fruit Reserve as irrelevant, but the Tree Fruit Reserve was the California Tree Fruit Agreement's *alter ego* and so its expenditures must be considered in evaluating the merits of Petitioners' arguments.

The Respondent admits that there are thirty-three States in this Nation which handle Peaches, twenty-six States which handle Plums and twenty-eight States which handle Nectarines. *However, California is the only State of forced assessments to pay for "generic" advertising for these three tree fruit commodities.* As noted above, the Petitioners have raised the issue of whether such assessments are in the nature of taxes.

There are those who benefit from the forced "generic" advertising assessments, but they are not the Petitioners nor many other tree fruit handlers who are forced to subsidize such "generic" advertising. There has been no showing that the expenditure of forced assessment funds are of benefit to many of those who pay them. There are many others who participate and profit from the tree fruit industry, in addition to the competitors of Petitioners. Those individuals and entities, both nationwide and internationally, who grow Peaches, Plums and Nectarines, market them, transport them, retail them, and those who otherwise profit from Petitioners' packing operations, benefit therefrom but they do not contribute financially to the promotion and advertising programs. This is equally applicable to the retailers who traditionally are the entities who receive the lion's share of the profits from the tree fruit industry. (Tr. 2953-2954).

It has not been shown through evidentiary data that the United States Department of Agriculture's interest in promoting Peaches, Plum and Nectarines industries, is accomplished by assessing California handlers, *as a selective portion of the industry*. The evidence does establish that there is not an equal involvement of the entire industry. Growers and handlers in other States which grow Peaches, Plums and Nectarines are allowed to receive a "free ride" and benefit from the "generic" advertising conducted by California Tree Fruit Agreement. This is equally true of fruit derived from foreign markets. Several foreign nations provide Peaches, Plums and Nectarines to the American consumer. The influx of such similar tree fruit commodities from these foreign markets directly competes with the California Tree Fruit industry. Although competing in the same market for the same customers, no restrictions nor mandatory contribution to a "generic" advertising program are imposed on the import market.

It is not believed necessary to address the contention of the Petitioners that they should be allowed a credit towards their "generic" advertising assessment obligations for direct expenditures when they directly advertise their specific brand name. This would be a matter for rulemaking. As indicated by Respondent: "Congress delegated authority to the Secretary of Agriculture to further determine on the basis of formal rulemaking hearings whether the promotional programs would effectuate the declared policy of the Act as it pertains to peaches, plums and nectarines." It will be noted herein that with respect to the implementation of the "advertising" programs under the Orders here in question, there is scant evidence in the formal rulemaking records, other than general statements and opinions with respect to the need therefor, as to what limitations should be imposed thereon, what specific objectives are to be obtained, how the advertising program are to be evaluated, etc. Certainly, the rulemaking records contain generalized state-

ments. In order for the record to be complete it will be noted that the Petitioners' arguments in this regard, briefly summarized, relate, among other things, to the contention that there is nothing in the Agricultural Marketing Agreement Act nor the legislative history of the Agricultural Marketing Agreement Act expressing why handlers of certain commodities are allowed a set off from their assessment obligations when they advertise their own brand label. (Pub. L. No. 92-210, 85 Stat. 340).

The Petitioners, however, do point out that 7 C.F.R. section 981.41 is the "research and development" regulation applicable to the almond industry. Such regulation allows for "crediting the *pro rata* expense assessment obligation of each handler with such portion of his direct expenditure for such marketing promotion including paid advertising * * *." At the time Congress was considering an amendment to the Agricultural Marketing Agreement Act to require forced "generic" advertising for all handlers within the almond industry, the Secretary was, at the same time, requesting that Congress authorize credits to be applied to offset the assessment obligation imposed:

The proposed amendment would encourage handlers to maintain or develop their own promotions by crediting a handler's assessment obligation with such of his direct expenditures as are authorized in the marketing order. S. Rep. No. 91-1204, 91st Cong., 2d Sess. (September 17, 1970).

The history of this amendment does not state the reason why it was decided that handlers of almonds should be allowed a credit towards the imposition of "generic" advertising assessments when they advertise their own specific brand. This is also true with respect to raisins which were added to 7 U.S.C. section 608(6)(I), with no legislative explanation whatsoever. (Pub. L. No. 95-279, 92 Stat. 242 (May 15, 1978)).

Filberts (Hazel nuts) were added to 7 U.S.C. 608(6)(I) in 1983. Filberts are grown for the most part only in Oregon and Washington. With respect to authorizing credits against the handlers forced "generic" advertising assessment obligations, it is indicated that such credits "would stimulate filbert handlers to promote their own brands and to develop their own promotional programs in concert with the overall marketing strategy." (Pub. L. 98-171, 97 Stat. 117 (1983)).

It is believed that California is the nation's leading producing state of olives and walnuts. The legislative history also states that walnuts and olives are a rapidly growing industry and advertising is necessary in order to educate the consumer as to the various uses of the product and *pro rata* assessment credits are to be encouraged so that handlers will advertise their own product.

The Petitioners contend that the situations described above, with respect to commodities which are allowed credits towards "generic" advertising assessment obligations, when a handler advertises his own specific brand, are not distinguishable from California grown Peaches, Plums and Nectarines. In fact, they are virtually identical. These commodities are grown primarily on the West Coast. California, with respect to Peaches, Plums, Nectarines, walnuts, olives, raisins and almonds; Oregon and Washington for filberts. Thus, Petitioners maintain that there is no "rational basis" nor compelling governmental interest as to why some commodities are allowed credits while others similarly situated are not. These contentions of Petitioners relate more clearly to their Constitutional arguments

Petitioners do not want to be forced into associating with, nor to be forcibly required to promote their competitors' fruit. (Tr. 1767). Respondent does not address, but it did not dispute, that during the course of the instant hearing, it was established that "generic" advertising assessments are being imposed which promote the proprietary variety of one

of the Committeemen. In a previous 7 U.S.C. § 608c(15)(A) Petition hearing brought by another handler, Jonathan Field, Manager of the California Tree Fruit Agreement, testified that the "generic" advertising assessments levied were expended solely on "generic" advertising. He stated that no specific proprietary variety of any grower/handler was promoted through the California Tree Fruit Agreement "generic" advertising program. (Ex. No. 258). Yet, one week after Jonathan Field testified in that matter, the 1989 California Tree Fruit Agreement Promotional Chart was distributed throughout the nation. That chart included the promotion of the "Red Jim" Nectarine, an exclusive proprietary variety of one of the commodity Committeemen. (Ex. No. 256).

As one of Petitioners' witnesses, Mr. Ray Gerawan, testified, the Red Jim Nectarine directly competes with his varieties. Mr. Gerawan explained that the Red Jim Nectarine is perhaps one of the most popular varieties sold. For Mr. Gerawan to compete directly with the Red Jim Nectarine, he must expend additional money and effort to promote his own "Prima Red" variety. Yet, while he expends his own money to compete with the Red Jim, the California Tree Fruit Agreement is, at the same time, expending his "generic" advertising assessments to promote his competitor's variety. (Tr. 1767).

Mr. Gerawan complimented Mr. Jimmy Ito on his successful promotion of the Red Jim Nectarine. Mr. Gerawan pointed out that there have been times when the Red Jim Nectarine might bring as much as \$12.00 a box, while at the same time, Mr. Gerawan's "Prima Red" varieties might only bring \$5.00 a box. He attributes this to brand label recognition and effective individual promotion. (Tr. 1902). As a result, Mr. Gerawan was forced to expend large sums of money, in thinning and pruning, to bring on more color, to compete with Mr. Ito's Red Jim.

This, Mr. Gerawan explains, is as it should be. "That's free enterprise. That's how people become successful. You have to get out of the area of mediocrity." (Tr. 1876). However, Mr. Gerawan does not want his \$660,000.00 in the California Tree Fruit Agreement assessments to be used by the California Tree Fruit Agreement to directly promote his competitor's fruit.

It is Wileman/Kash's contention that they do not surrender their First Amendment rights of free speech and association by becoming members of the tree fruit industry. They did not *voluntarily* become subject to the Nectarine, Plum and Peach Marketing Orders. Those Orders regulate every handler of tree fruit in California. Thus, all handlers are compelled to be regulated by the Federal government. Money is being taken from Wileman/Kash to be used for an advertising program which they ideologically, philosophically, economically and commercially find unacceptable.

The thrust of Wileman/Kash's position is that it is wrong to be required to finance, and be forced to associate with, an advertising program which is not structured for their benefit. (Tr. 3901). It is incongruous for Respondent to maintain that "generic" advertising helps Petitioners! Petitioners are businessmen and know the best use of their funds. It helps, among others, their competition. Testimony was elicited, and adopted by each Petitioner, which, in essence, summarizes their contentions that the California Tree Fruit Agreement "generic" advertising program:

"... is not helping me and I don't want my dollars being spent for me by a committee or any body else. I will spend my own dollars on what I created and what I produce... It is proven that free enterprise and private industry is the essence of this whole thing.

... I am interested in advertising... my label. I'm not interested in putting any money in anybody else's adver-

tising program. I have the right as a grower to grow what I wish to grow.

I don't care what CTFA does with their money. I just don't want any of my money in it. I just don't want any of my money used. Whether it is effective for them or not is of no concern... if growers want to form their own co-ops and they want to be competitive... then God bless them, go for it... It is not a question whether CTFA is effective or not effective or anybody else. They are not effective for me, they are a hindrance to me. I'm not here to judge what they do for somebody else." (Tr. 1835-1836).

The terms of 7 C.F.R. §§ 916.45 and 917.39 make it clear that Wileman/Kash are required to contribute financially to the support of the tree fruit industry. But Wileman/Kash's forced association goes further than mere monetary support. The Agricultural Marketing Agreement Act, the Secretary's Marketing Orders and accompanying regulations purport to require Wileman/Kash, as tree fruit handlers, to maintain various types of books and records, and to prepare and make regular detailed reports to the California Tree Fruit Agreement. (7 C.F.R. §§ 916.60 and 917.50). In short, the scope of Wileman/Kash's forced association goes beyond mere compulsory financial contributions. They are also required to take an active part in administrative procedures which ultimately further the Committees' existence and programs. The added aspects of association may be significant in the analysis of this issue. Some older cases appear to suggest that, if the only compulsory aspect of association is the payment of money, no true forced association results but that forced association arises when there is further compelled action.

Wileman/Kash acknowledge the realization that their Constitutional rights of free speech and association are not absolute. *Roberts v. United States Jay-Cees*, 468 U.S. 609, 104 S.Ct. 3244 (1984); *United States Civil Service Commis-*

sion v. National Assn. of Letter Carriers, 413 U.S. 458, 93 S.Ct. 2880 (1973). Even protected First Amendment rights may be impinged upon "if the state demonstrates a sufficiently important interest." *Buckley v. Vallee*, 424 U.S. 1, 96 S.Ct. 612 (1976). But to justify such a constitutional intrusion the government must demonstrate a "compelling" interest. *Cousins v. Wigoda*, 419 U.S. 477, 95 S.Ct. 54 (1975); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).

Wileman/Kash do not deny that the government may have a compelling interest in regulating the quality of fruit that is disseminated to the American public. Although the mere existence of the Agricultural Marketing Agreement Act constitutes a significant impingement upon the First Amendment rights of handlers, that impingement can be argued to be amply justified by a compelling governmental interest in the regulation of the tree fruit industry to establish and maintain orderly marketing conditions and to insure that minimum standards of quality and maturity are complied with. (Tr. 3879).

Wileman/Kash accept the fact that First Amendment intrusions on their rights are inevitable as a result of the compelled association with the California Tree Fruit Agreement through the enforcement of the Marketing Orders. (See: *Ellis v. Railway Clerks*, 466 U.S. 435, 456, 104 S.Ct. 1883 (1984)). Wileman/Kash question, however, what possible "compelling governmental interest" can be asserted that could justify the impingement of their First Amendment protections by forced subsidization of a tree fruit "generic" advertising program?

Infringement on their right to associate or their right not to associate:

"May be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less

restrictive of associational freedoms. (Citation omitted) [Thus even when pursuing a legitimate governmental interest, the means chosen] ... must be 'least restrictive of freedom and belief and association' (Citation omitted)." *Chicago Teachers Union v. Hudson*, 106 S.Ct. 1066 (1986).

When the activity of any of the various Committees is "clearly germane" to either its regulatory or administrative functions and that activity does not involve ideological, philosophical, commercial or economic causes, no Constitutional barrier prohibits it. "At a minimum, the Union may constitutionally expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining" *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

Thus, for example, when the Committees expend funds for the purpose of inspection services or to organize public meetings, no First Amendment restrictions preclude those expenditures. However, the Committees may not constitutionally use compelled assessments for the support of a "generic" advertising program which is not germane to its statutory purpose.

To the argument the United States Department of Agriculture asserts, that no First Amendment issues have been raised, because there can be no coercion when someone advertises a product he is in the business of selling, is to say that the government can actively be involved in determining what Wileman/Kash's views should or should not be:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by work or act their faith therein." [citations]. *Abood, supra*, at p. 235.

It is certainly not for the Secretary of Agriculture to determine what Wileman/Kash believe to be a good way to spend their money in speaking to the public about their products (amounting to approximately Two Hundred Dollars (\$200.00) an acre), nor is it appropriate for the Secretary to contend that Wileman/Kash should not object to their money being expended to generically advertise a commodity that they are in the business of selling:

"It is our conclusion that the right to remain silent in the face of an illegitimate demand for speech is as much a part of First Amendment protection as the right to speak out in the face of illegitimate demands for silence.

"To compel a person to speak what is not in his mind offends the very principals of tolerance and understanding which has so long been the foundation of our great land." *Russo v. Central School District*, 469 F.2d 623 (2nd Cir. 1972).

The Supreme Court has made it quite clear that a person, be it an individual or corporation, must not be forced to speak or forced to adhere to views which that person finds objectionable, even when the forced speech arguably advances the public good or First Amendment values.

The last case in a line of First Amendment cases emanating from the United States Supreme Court was recently issued. *Keller v. State Bar of California*, 110 S.Ct. 2228 (1990), supports Petitioners' position that they may not be forced to associate with, or financially support, the California Tree Fruit Agreement "generic" advertising program.

In *Keller, supra*, members of the State Bar of California argued that their annual State Bar membership dues were inappropriately channeled to finance ideological and political activities to which they were opposed. A portion of the State Bar membership dues were being diverted to endorse or advance gun control legislation, nuclear weapons freeze

initiatives, etc. The Supreme Court, in supporting the position taken by the dissident State Bar members, stated:

"It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the Courts should be called upon to pay their fair share of the costs of the professional involvement in this effort . . . precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum, Petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with the disciplining members of the Bar or proposing ethical codes for the profession."

Respondent continues to argue that Wileman/Kash have not been prevented from speaking. They may advertise their fruit as they so desire. However, the Supreme Court in *Keller, supra*, found this contention to lack merit.

Wileman/Kash's advertising budget is severely restricted when in excess of One Hundred Thousand Dollars (\$100,000.00) is extracted by the California Tree Fruit Agreement through its forced "generic" advertising program. (The same is true as to Mr. Gerawan's \$600,000). The regulations unquestionably place an "economically chilling effect" on Wileman/Kash's ability to speak as they prefer.

Respondent argues that being forced to associate and contribute to the advancement of ideological and philosophical speech to which Wileman/Kash disagree has "no basis in law or fact." Respondent then attempts to distinguish the cases cited by Petitioners which support Wileman/Kash's right to freedom from forced associational speech and financial support of issues and associations which they find abhorrent.

Mr. Rodney Chang, President of Kash, Inc., testified regarding his moral objections to one particular television advertisement run by the California Tree Fruit Agreement during the 1986 through 1988 harvest seasons. Exhibit No. 301(B) was found, by Mr. Chang to be morally reprehensible. Exhibit No. 301(B) depicts several still photographs which were scenes from the television commercial run during the harvest season. Mr. Chang found objectionable the scenes depicting a young girl in a wet bathing suit running through a sprinkler, while at the same time the announcer is stating "remember the taste...so cool, juicy...taste them and see." (Ex. No. 301(B)).

Mr. Chang feels uncomfortable that Kash, Inc.'s assessment monies are being used to promote a sexually subliminal message (Tr. 2966) involving a young child. He finds it impossible to understand what possible interest the Federal government has in promoting Peach, Plum and Nectarine consumption, particularly by using children in such advertising. (Tr. 2966).

Respondent ignores the damages that have been sustained as a result of this forced association. Respondent argues that the mandatory assessments collected are not used for any purpose other than the promotion of California fruit. This is not the issue, but even if it were, assessment monies are used for such advertising, which benefits growers of fruit in other States who pay no such assessments. The injury sought to be avoided is undue governmental control in

dictating an individual's natural right to choose his own way of life without any compelling interest having been demonstrated therefor. Clearly, coerced participation injures Wileman/Kash, both by forcibly taking from them their time, money and reputation, and then using their money to support views which they oppose. The cases cited, *supra*, by Wileman/Kash recognize that, absent a compelling governmental interest, individuals may not be coerced into rendering direct financial support to private associations. *Aboud v. Detroit Board of Education, supra; Keller, supra*.

An analysis of the cases cited by Respondent fails to recognize the differing circumstances and facts giving rise to Wileman/Kash's forced association Constitutional arguments. For example, Respondent cites *Railway Employees Department American Federation of Labor v. Hansen, supra*, for the proposition that mandatory assessment programs do not violate the protections afforded by the First Amendment. However, *Hansen, supra*, dealt only with fees collected for purposes relative to collective bargaining issues.

Respondent fails to note that the *Hansen* Court recognized that the compelled payment of money for purposes other than collective bargaining would raise First Amendment questions, and cautioned that "if assessment are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented," *Hansen, supra*, at p. 235. It should be further noted that both Justice Douglas and Justice Black found First Amendment violations through the compelled payment of assessments by those opposed to the manner in which the union promoted its economic goals. (See: *Railway Employees v. Hansen, supra*).

Respondent also relies heavily on *Ellis v. Brotherhood of Railway Clerks, supra*, which it argues is supportive of Respondent's position that mandatory assessments for pur-

poses of "generic" advertising are not violative of Wileman/Kash's First Amendment rights of non-association. A review of *Ellis, supra*, does not support Respondent's position. The Supreme Court, in *Ellis, supra*, did not consider the First Amendment Constitutional issues, but rather developed what it deemed to be a proper remedy for the rebate of monies previously extracted by the union to support ideological speech which the union members opposed. There was no question that the union had violated the members' First Amendment rights, that issue was clear. The issue raised in *Ellis, supra*, was whether or not the union had the right to collect mandatory assessments for all members of the union, and then repay, at a later date, those individuals who objected to the use of their assessments expended for improper purposes. The Court ruled that the exaction of assessments, even temporarily, from those opposed to the ideological message to which those assessments were to be used to foster, was improper. Clearly, *Ellis, supra*, is not supportive of Respondent's position in the instant matter.

In a relatively recent case, the Third Circuit Court of Appeals analyzed the leading First Amendment forced association cases, cited by both Wileman/Kash and Respondent, in deciding yet another First Amendment forced association claim. *Galda v. Rutgers*, 772 F.2d 1660 (3d Cir. 1985), dealt with challenges by state university students who were required by school policy to fund an organization that promoted ideological philosophies which the students opposed and declined to support. The Court, in analyzing the leading precedents with respect to this issue, reasoned:

"In short what *Abood* holds objectionable is the 'compulsory subsidization of ideological activities' by those who object to it, 431 U.S. at 237, 97 S. Ct. at 1800. Commentators have debated the basis supporting this right. It may be a broad concept of 'individual freedom of mind,' *Wooley v. Maynard*, 430 U.S. at 714, 97 S. Ct. at 1435, or

a ban on coerced affirmation of distasteful views, or a right not to be subjected to a limitation on freedom of conscience, or perhaps a right to maintain silence in the face of a government pronouncement. We resist the temptation to expound on these absorbing theories because whatever the source or underlying rationale, the Supreme Court's precedents established to our satisfaction that plaintiffs have presented a valid constitutional interest for consideration." *Id.* at p. 1064.

The Court went on to conclude:

"A state may not choose means that unnecessarily restrict constitutionally protected liberty, if there is open a less drastic way of satisfying its legitimate interest. Nor may the state choose a legislative scheme that broadly stifles the exercise of fundamental liberties. [Citations]. The compelling state interest in eliminating 'free-riders' in the interest of preserving labor peace in the union dues context [citation], does not exist in the circumstances here. The university has presented no evidence, nor do we believe it could, that the educational experience which it cites as justification could not be gained by other means which do not trench on the Plaintiffs' constitutional rights." *Id.* at pp. 1066-1067.

Many of these same arguments are present in the instant matter. Wileman/Kash are forced to provide money which is used to project a message, not to foster legitimate purposes of the Agricultural Marketing Agreement Act, nor to improve their business position, but rather to finance an advertising program which is contrary to their personal, professional, ideological, philosophical and commercial beliefs. Wileman/Kash do not deny that the imposition of mandatory assessments that are "clearly germane" to the industry's regulatory or administrative functions are properly collectible. These involve such functions as inspection fees, salaries, and administration of the Orders. However, in-

fringement on their right to associate, or more importantly, their right not to associate, can only be justified:

"... by regulations adopted to serve *compelling state interests*, unrelated to the suppression of ideas, that can be achieved through means significantly less restrictive of associational freedoms. [Citation]. [Thus, even when pursuing a legitimate governmental interest, the means]... must be 'least restrictive of freedom and belief and association.' [Citation omitted]." *Chicago Teachers Union v. Hudson*, *supra*, at p. 1074, fn. 11.

Respondent fails to convincingly persuade that there is any "compelling governmental interest" that justifies the impingement of Wileman/Kash's First Amendment protections through forced subsidization of a tree fruit "generic" advertising program. It is not enough to make a statement that there is a compelling governmental interest, the intrusion on Petitioners' rights must be justified by proof, particularly one that is not "narrowly tailored" to satisfy a compelling governmental interest which seeks a "fit" which is the least burdensome on Wileman/Kash's constitutionally protected First Amendment rights. (*Board of Trustees Of The State University Of New York v. Fox*, 109 S.Ct. 3028 (1989)).

Respondent bears the burden of justifying a "compelling state interest" sufficient to impact Wileman/Kash's constitutionally protected rights. The facts in this case do not reveal that such a burden has been met. That failure of burden was not met when the State of North Carolina wished to protect charitable organizations from the possibility of fraud [*Riley v. National Federation Of The Blind Of North Carolina*, *supra*]; when the Public Utilities Commission Of California wished to provide the public with alternative viewpoints [*Pacific Gas & Electric Co. v. P.U.C. of California*]; 106 S.Ct. 903 (1986) when the Federal Communications Commission wished to protect local television programming

[*Century Communications Corp. v. Federal Communication Commission*, *supra*]; 835 F.2d 292 (D.C. Cir. 1987) or when an anti-American protester publicly burns the American flag [*Texas v. Johnson*, 89 D.A.R. 8029 (1989)].

Even if Respondent were able to satisfy its burden to justify a "compelling governmental interest," which Respondent has not done, the tremendous infringement upon Wileman/Kash's First Amendment rights cannot be circumvented. As must be noted, *Respondent did not attempt to argue that the forced "generic" advertising program imposed on Wileman/Kash had been drafted in such a way that the infringement on their Constitutional rights is no more than necessary to achieve the stated goal.*

Respondent cannot succeed by arguing that forcing California handlers to subsidize a "generic" advertising program has been "narrowly tailored" so that it might "fit" between the legislative ends to be achieved and the means chosen to accomplish those ends. *Board of Trustees Of The State University Of New York v. Fox*, *supra*. Such statements are not reflective of a "compelling governmental interest."

It is Wileman/Kash's position that the assessments for all programs of the California Tree Fruit Agreement not directly related to compliance and inspection costs are unlawful. Specifically, Wileman/Kash contend that assessments collected to support programs which are used for forced "generic" advertising, to fund the administrative costs of a non-existent entity (the California Tree Fruit Agreement), promotion and research projects for the purpose of regulating out smaller sizes or designed for the purpose of buttressing the Committees' intentions to raise maturity standards, are not collectible as they are violative of Wileman/Kash's First Amendment rights. Except for the First Amendment issue, these contentions of Petitioners have been considered herein only to the extent they relate to the statutory grounds for relief.

Purely commercial speech is protected by the First Amendment of the United States Constitution. *Virginia Pharmacy Board v. Virginia Citizen's Consumer Counsel*, 425 U.S. 748, 96 S.Ct. 1817 (1976); *Zauderer v. Office of Disciplinary Council*, 105 S.Ct. 2265 (1985); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912 (1978). The fact that Wileman/Kash are corporations does not detract from Constitutional protection. *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 100 S.Ct. 2326 (1980). The fact that Wileman/Kash are in a heavily governmental regulated monopoly does not preclude their assertion of First Amendment rights. *Consolidated Edison*, *supra*, at p. 530 fn. 1.

Since there is certainty of appeal of the present case to the Federal Courts, it is noted that were the Court unable to find that forced "generic" advertising, as authorized by the Marketing Orders, amounts to a violation of freedom of speech and association, the Court must still determine whether "generic" advertising assessments violate Wileman/Kash's Constitutionally protected commercial speech. Commercial speech is defined as "expression related solely to the economic interest of the speaker and his audience." *Virginia Pharmacy Board v. Virginia Citizen's Consumer Counsel*, 425 U.S. 748 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-364, 97 S.Ct. 2691, 2698-2699 (1977); *Friedman v. Rogers*, 440 U.S. 1, 11, 99 S.Ct. 887 (1979).

In 1980, the Supreme Court issued an opinion which has become the standard by which virtually all commercial speech cases are evaluated. *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2848 (1980), involved a challenge to the Constitutionality of a regulation which banned promotional advertising by an electrical utility corporation. The Supreme Court in ruling that the regulation was unconstitutionally violative of the

First Amendment, set forth a four part test to be used in determining whether governmental regulation of commercial speech constitutes a violation of First Amendment protections:

"For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, or whether it is not more extensive than is necessary to serve that interest." *Id.*, at p. 566.

In applying the four (4) part analysis of *Central Hudson*, *supra*, to the issues involved in the instant matter, the Secretary cannot support his position justifying the forced imposition of "generic" advertising assessments. The Secretary does not contend that the expression at issue is either unlawful or related to unlawful activity. Therefore, the first element of the *Central Hudson*, *supra*, test is not at issue.

Secondly, a determination must be made as to whether the United States Department of Agriculture's interest is substantial. The United States Department of Agriculture contends that the government's interest in forced "generic" advertising lies in promoting the growth of the Plum, Nectarine and Peach industries. Wileman/Kash fail to discern what comprises the basis for a governmental interest in the promotion of an industry in the private sector. Supposedly, it is to promote consumer awareness and interest in the California tree fruit industry. This program, in turn, competes with other Marketing Order's promotional programs. Wileman/Kash derive no benefit from the "generic" advertising program. Further, Wileman/Kash are required to expend in excess of One Hundred Thousand Dollars (\$100,000.00) a year to generically promote the sale of Nectarines, Plums and Peaches. They have no interest in

expending vast sums of money in the promotion of fruit for the benefit of their competitors. Particularly, when this same One Hundred Thousand Dollars (\$100,000.00) could easily support an advertising program directed at promoting their own brand name. (Tr. 3895, 4191).

Throughout the years, Wileman/Kash have developed cultural practices which have enabled them to develop and harvest an extremely high quality fruit. Fruit that they consider substantially superior to that grown by the majority of their competitors. They have invested substantial time and vast sums of money in developing these cultural practices. By being forced to promote a "generic" advertising program their ability to promote their own labels is substantially curtailed. (Tr. 4141). Further, their ability to continue research to improve their products is substantially impaired by being required to fund the California Tree Fruit Agreement's "generic" program.

Promotion, through the California Tree Fruit Agreement's "generic" advertising program, advances the notion that all California fruit is the same and promotes the slogan that "red is better," which is not necessarily correct as revealed by the evidence herein. That is what is projected by the commercials advertising California fruit. Virtually every witness testified that different varieties of the same commodity have different tastes. Further, the same variety grown on different parcels of land will have differences in taste, color, size, different amounts of soluble solids, etc. (Tr. 4596-4597; 2961-2963). Thus, to lump all California tree fruit into a single category is misleading and Wileman/Kash have stressed their philosophical objections of their advertising assessments being directed to such a message. (Tr. 2960). The Respondent has not adduced any evidence to show why the United States Department of Agriculture would have a legitimate purpose in having the

consumer believe that all California fruit are the same, when they are not.

If, as a result of the "generic" advertising assessments being imposed, Wileman/Kash are unable to promote their fruit through their own specific brand name advertising, their competitive advantage is lost. In fact, there would be no incentive for them to continue advancing their cultural practices when their fruit would, from a consumer's standpoint, be no different from that in the mainstream. (Tr. 2960).

Although the Respondent has maintained that "generic" advertising is beneficial to all handlers, there is no record evidence to show that it is more than a general statement. To the contrary, Petitioners, as well as some of their witnesses, have shown that such generic" advertising is not beneficial to them.

If, as stated above, the "substantial interest" necessary for the government to involve itself in a tree fruit "generic" advertising program is to help promote the industry, why does it not encompass all handlers? For example, Peaches are grown in the majority of the states. However, only three states have Marketing Orders which regulate production: Georgia; Colorado; and, California. Only one Marketing Order requires the forced payment of assessments to promote a "generic" advertising program — California. What valid "substantial governmental interest" is promoted by requiring the California Peach to be generically advertised while no such promotional program has been established for the Georgia Peach?

Assuming arguendo, that the Secretary can establish a "substantial governmental interest" sufficient to justify the forced imposition of "generic" advertising assessments on the tree fruit industry, the Court must then proceed to the third prong of the *Central Hudson* test. Has the requirement

of forced "generic" advertising assessments directly advanced the government's substantial interest?

Respondent argues that the government's substantial interest has been set forth in the rulemaking record, located at Exhibit Nos. 31, 32 and 33. Respondent has failed to reference any particular entry in the rulemaking record which substantiates this position and apparently, it does not exist.

There have never been any research projects conducted which establish that forced "generic" advertising has benefitted the tree fruit industry particularly to the extent of the assessments collected therefrom. There is lacking evidence incorporated in the Secretary's rulemaking record which indicates that California tree fruit sales (or profits to the growers and handlers) have increased as a result of the forced "generic" advertising program. As Wileman/Kash testified, such a program has certainly not benefitted their sales' efforts. In fact, the "generic" advertising program does not even reach the people which Wileman/Kash would hope that advertising might influence. As Petitioner Elliott testified, his operation deals solely with the terminal markets where brand label recognition is extremely important. Mr. Elliott stated that promoting his label is vital. As an example, he points out that nobody is aware of "Dan Drackett." However, everyone is aware of the product that he created — "Draino". (Tr. 3895). The logo "Eat California Fruit" which Wileman/Kash are forced to promote provides no benefit whatsoever in the selling of their fruit on the terminal market. "Mr. Sunshine" and "Kash, Inc." brand names are what sell their fruit. (Tr. 3897-3898).

Wileman/Kash can find no nexus between the interest asserted to promote the asserted governmental ends, and the means employed. They point out that it is difficult to envision, based on the type of advertising program conducted by the California Tree Fruit Agreement, any sub-

stantial benefit derived by the growers and handlers. The California Tree Fruit Agreement prints up some colorful posters displaying fruit. (Ex. Nos. 256 and 298). Its effectiveness as an advertisement program has not been shown. The California Tree Fruit Agreement also runs radio spots at odd hours of the day to advertise fruit. For example, radio spots at 5:00 a.m., with little jingles that say "Eat California Summer Fruit." (Ex. Nos. 301 and 302). Although a catchy tune, it hardly entices a consumer to jump out of bed (assuming the average consumer is awake at 5:00 a.m.) and run down to the store to buy California fruit. For this, Wileman/Kash pay to the California Tree Fruit Agreement in excess of One Hundred Thousand Dollars (\$100,000.00) in forced "generic" advertising assessments.

Whatever "substantial Governmental interest" the Secretary has in maintaining a "generic" tree fruit advertising program for the State of California certainly is not directly advanced by the forced imposition of "generic" advertising assessments. As was made clear by the Supreme Court in *Central Hudson, supra*, the Courts refuse to uphold regulations that negatively impact an individual's and/or corporation's Constitutional rights of free speech and association when such regulations, at best, only indirectly advance the "governmental interest" involved.

The fourth and final element which must necessarily be evaluated prior to the upholding of a regulation which would restrict personal liberties, requires a determination be made as to whether said regulation is more extensive than necessary to serve the purported "governmental interest." The issue involved, as it relates to Wileman/Kash, is whether the forced imposition of advertising assessments for the purposes of "generic" advertising is more extensive than necessary to further the United States Department of Agriculture's interest in promoting the tree fruit industry and/or the orderly marketing of tree fruit.

To use a regulation "not more extensive than is necessary to serve that interest," *Central Hudson, supra*, does not require the government to employ the "most restrictive means," however, it *must* "further a legitimate governmental goal." That government goal must be substantial and the cost carefully calculated. *Board of Trustees of the State University of New York v. Fox, supra*. Should it be deemed not to be germane to the purpose of regulating the industry or improving the quality of the service, then those from whom the assessments are derived, need notice in advance of what the Secretary is doing with their money and then allow them to withhold those amounts that are utilized for other purposes, not constituting a compelling governmental interest.

In exercising its purported "substantial governmental interest," the United States Department of Agriculture is forcing Wileman/Kash to speak in a manner which they find objectionable (i.e., paying money to advertise their competitors' products). The Supreme Court has consistently taken the position that the choice to speak, for corporations, as well as for individuals, includes within it the choice of what not to say. "Speech does not lose its protection because of the corporate identity of the speaker." *Pacific Gas & Electric Co. v. P.U.C. of California*, 106 S.Ct. 903 (1986) *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407 (1978)):

"Were the government freely able to compel corporate speakers to propound . . . messages with which they disagree, this protection would be empty, as the government could require speakers to affirm in one breath that which they deny in the next . . . the danger that appellant would be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude, because the message itself is protected under our decisions in *Bellotti* and *Consolidated*

Edison . . . it is a danger that the government may not impose absent a compelling interest." *Pacific Gas & Electric, supra*, at p. 912.

The United States Department of Agriculture has previously taken the position that Wileman/Kash are not being prevented from speaking because Wileman/Kash can advertise their fruit if they so desire. However, this contention is clearly erroneous. Wileman/Kash's advertising budget is severely restricted when assessments amounting to approximately One Hundred Ninety Thousand Dollars (\$190,000.00) are extracted by the California Tree Fruit Agreement by way of forced "generic" advertising assessments. (Tr. 4147).

The regulation unquestionably places an "economically chilling affect" on Wileman/Kash's ability to speak as they would prefer. As they pack what they consider to be a superior grade of fruit than that of their competition (Tr. 2956), it is their desire to educate the consumer as to their existence and to let their high quality fruit work to promote their own labels. Therefore, with what is left of their advertising budget (after paying the California Tree Fruit Agreement forced "generic" advertising assessments) Wileman/Kash advertise their own labels. (Tr. 4141). They would have more funds to do so if they did not have to contribute to the California Tree Fruit Agreement's advertising programs.

Petitioner Elliott testified he spends approximately \$40,000.00 a year for travel and entertainment — directed primarily to his buyers, going to conventions, market tours and in printing of advertising materials to promote his label, "Mr. Sunshine." (Tr. 3893). Whereas, Kash, Inc. feels it benefits most by "in-store" promotional advertising, by providing samples to consumers in the grocery store. Kash, Inc. finds that "in-store" promotion is substantially better than "generic" advertising. By tasting a sample of the fruit

in the store, the consumer knows what he/she is purchasing and is more likely to purchase Kash Inc.'s fruit. Kash, Inc. has found this to be the best promotional program available. (Tr. 2958-2959).

Kash, Inc. also attempts to secure brand name recognition through the use of stickers which the retailer places on the individual pieces of fruit. Stickers which promote "Kash, Inc." (Ex. No. 318); "Alshir Red Plums" a Kash, Inc. variety (Ex. No. 316); and, "Sweetheart Plums" a Kash, Inc. advertising logo (Ex. No. 317). Kash, Inc. also has printed posters which advertise their "Sweetheart Plums" logo. (Ex. No. 321).

Assuming, arguendo, that the California Tree Fruit Agreement's "generic" advertising program does benefit tree fruit sales, who receives that benefit? The grower and/or handler who minimizes his expenses by ignoring cultural practices, and cuts corners wherever he can, receives the same "benefit" (if any) from the California Tree Fruit Agreement advertising program. Growers who take pride in their product and expend large sums of money in the continual improvement of that product, as do Wileman/Kash, are unable to improve their market position because they are unable to educate the consumer as to their superior product. The handler and/or grower with a mediocre product is thus subsidized by the industry, and the long term interests of the industry are being jeopardized by the United States Department of Agriculture's encouragement of mediocrity.

Furthermore, the Department has not quantified the extent to which the level of advertising implements the "perceived value" of the fruit and how, if any, this perception affects both the relative market share (vis-a-vis, other fruits) and the relationship of sales and the relative market price. The evidence does not contain data reflecting the direct impact of different advertising strategies on profitabil-

ity and increase sales, if any, attributable thereto, as opposed to population growth and other factors. Without such data, it is difficult to ascertain any compelling governmental interest in the means employed. In other words, the means employed lack justification in this record.

Wileman/Kash argue they should not be required to "carry" their competitors, that is those who might not otherwise be able to make it in the marketplace by promoting their own inferior fruit, although this situation is inherent in many Marketing Order programs. Wileman/Kash's inability to advertise their own labels, while forcing them to associate with the views expressed by the California Tree Fruit Agreement, impacts their First Amendment rights of free speech and association. *P.G.&E. v. P.U.C.*, *supra*, *Abood, supra*; *Chicago Teachers Union v. Hudson, supra*, which Respondent likens to "slight infringement." A recognition of the economic results of the complained of regulation negates that the infringement was "slight."

Wileman/Kash's right to speak freely, as individuals and in a commercial setting, to promote their own product must not be stifled by governmental regulation without justification. The message that Wileman/Kash wish to project to the consumer is vital in our "free market economy." *Project 80's, Inc. v. City of Pocatello, et al.*, 587 F.2d 592 (1988). The regulations and the obligations imposed therefrom are not a "narrowly tailored means of furthering a compelling state interest." As the Supreme Court in *Central Hudson, supra*, explained:

"Commercial expression not only serves the economic interest of the state, but also assists consumers and furthers the societal interest, in the fullest possible dissemination of information. In applying the First Amendment to this area we have rejected the highly paternalistic view that government has complete power to suppress or regulate commercial speech. [P]eople will perceive their

own best interests only if they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them [citation omitted." *Id.*, at p. 561-562.

Assuming, arguendo, a "substantial governmental interest" is herein involved, the United States Department of Agriculture's interest clearly could be served by less restrictive means. For example, although still a violation of Wileman/Kash's First Amendment rights, credits could be applied against the forced "generic" advertising assessments to handlers who engage in a direct brand name specific advertising program, similar to that which exists in the almond, filbert, walnut, olive and raisin Marketing Order regulations.

Although this impinges on Wileman/Kash's rights to be free from associating with or speaking to any subject, as protected by the First Amendment, it more reasonably fits a compromise position between the legislative ends, and the means chosen to accomplish those ends. *Board of Trustees of the State University of New York, supra*, at p. 831. There has been no showing that a more limited regulation would be ineffective. Respondent views the above contention as a disagreement as to how the money should be spent. However, there is no indication in the rulemaking records that the California Tree Fruit Agreement and/or the Committees were to become the final arbiters of fund expenditures. The nonaction (tacit approval of the Secretary) indicates he does not actively engage in such determinations.

Respondent, in its Post-Hearing Brief, argues that Wileman/Kash have no First Amendment rights to refrain from engaging in commercial speech. Respondent's argument implies that the First Amendment, with respect to commercial speech, is applicable only when the government restricts an individual's ability to speak. Respondent's evaluation, although artfully drafted, misapplies the Supreme

Court's analysis of the First Amendment within the context of commercial speech.

As set forth in detail above, the right of freedom of thought and association protected by the First Amendment includes both the right to speak freely and the right to refrain from speaking at all. As Judge Sloviter recognized in her dissenting opinion in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 58 U.S.L.W. 3513 (1990):

"Contribution of money to further the projection of a message is a form of speech, see *Buckley v. Valeo*, 442 U.S. 1, 16-17 (1976), and it follows, as the majority recognizes, that mandated contribution of money for purposes of funding advertisements implicates *Frame's* rights against forced speech." *Id.*, at p. 1172.

Respondent argues that Wileman/Kash are not forced to speak; however, such is clearly not the case. Forcing Wileman/Kash to contribute their money to a "generic" advertising program impacts Wileman/Kash's First Amendment guarantees as much, if not more so, than requiring an individual to carry the slogan "live free or die" on their automobile; or, requiring a newspaper to permit other speakers, with whom the newspaper disagrees, to use the newspaper's facilities to spread the speaker's own message or, to force a corporation to disseminate information in direct conflict with the corporation's views (*Pacific Gas & Electric Co. v. Public Utilities Commission of California, supra*); or, to force an employee to finance a dissemination of ideas to which the employee disagrees (*Abod v. Detroit Board of Education, supra*).

Certainly, many of Wileman/Kash's views are commercially motivated, however:

"Since all speech inherently involves choices of what to say and what to leave unsaid . . . the central thrust of the

First Amendment to prohibit improper restraint on the voluntary public expression of ideas . . . there is necessary . . . a concomitant freedom *not* to speak publicly, one which services the alternate end as freedom of speech in its affirmative aspect." [Citing to *Harper & Rowe Publishers, Inc. v. National Enterprises*, 471 U.S. , 105 S.Ct 2218]. *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, *supra*, at p. 909.

Wileman/Kash, in their testimony, and in the volunteered testimony of other witnesses in support of Wileman/Kash's position, succinctly explained their opposition to the California Tree Fruit Agreement's "generic" advertising program. It was made clear that they are not opposed to advertising. They would spend at least the amount of money they are forced to give the California Tree Fruit Agreement on their own brand label advertising. (Tr. 4148). However, they are unable to advertise to the degree, or in the manner, they feel would benefit their corporations because the California Tree Fruit Agreement extracts their advertising budget for its forced "generic" advertising program. Thus, they are prohibited from speaking in support of their own views or in the promotion of their own product. (Tr. 1714-1716).

Wileman/Kash contend, and have always contended, that the forced "generic" advertising program of the California Tree Fruit Agreement promulgates an untruth. The California Tree Fruit Agreement's "generic" advertising program promotes the idea that all Nectarines, Peaches and Plums, taste the same, which is contrary to the evidence herein and Wileman/Kash are being forced to perpetuate this. (Tr. 2960). Compelling the financing of forced speech, through a program such as the California Tree Fruit Agreement's, "both penalize the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *P.G.&E. v. P.U.C.*, *supra*.

Respondent argues that Wileman/Kash have no ideological disagreement with the content of the California Tree Fruit Agreement advertising program paid for by compelled assessments, and thus they have not raised a First Amendment claim. Yet, Respondent goes on to state that Wileman/Kash are convinced that "generic" advertising does not benefit the industry, clearly setting forth ideological disagreements with the Secretary of Agriculture's "generic" advertising program. Wileman/Kash specifically wish to promote their "Kash, Inc." and "Mr. Sunshine" labels, fruit which they consider to be superior to that marketed by the majority of the tree fruit industry. Wileman/Kash believe that given the opportunity to promote their products through advertising their own brand names, the consuming public will grow to associate their label with the quality consumers generally associate with the brand name "Sunkist" when referencing oranges, lemons, etc. (Tr. 4141).

All Petitioners testified quite convincingly that the California Tree Fruit Agreement's forced "generic" advertising program does nothing to benefit Wileman/Kash. (Tr. 3901, 1815, 2953). In fact, there has been no showing that such a program benefits anyone other than the advertising company employed by the California Tree Fruit Agreement. There is no evidence that handler or grower profits increased significantly and in proportion to the "generic" advertising program in place. "There have been no attitudinal surveys, polls of research studies" conducted to indicate that the California Tree Fruit Agreement's "generic" advertising program benefits tree fruit sales. *Century Communications Corp. v. F.C.C.*, 835 F.2d 292 (D.C. Cir. 1987).

Respondent, in its Post-Hearing Brief, fails to acknowledge that: "... speech may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the

restrictions are no more extensive than necessary to serve that interest." *Central Hudson, supra*, at p. 566.

What is the government's substantial interest? Respondent contends that it is in the interest of the public and the interest of the tree fruit industry to encourage the consumption of agricultural products. But, where is the substantial governmental interest? In *United States v. Frame, supra*, the Court found a substantial governmental interest in salvaging the beef industry. Pursuant to an extensive congressional record, Congress found a substantial interest in preserving the beef industry from the brink of bankruptcy. That same rationale does not exist in the tree fruit industry.

In *Riley v. National Federation Of The Blind Of North Carolina*, 108 S.Ct. 2667 (1988), the Supreme Court struck down a state law limiting the percentage of proceeds a professional fund-raiser could charge for administering a fund-raising event. The professional fund-raiser had been required to disclose the average percentage of gross receipts actually turned over to the charities by the professional fund-raiser for all charitable solicitations conducted in that state within the previous twelve (12) months. The Supreme Court found that the state's asserted substantial interest in dispelling fraud was sufficient only to justify a "narrowly tailored regulation." Striking down the Act, the Court stated:

"... we do not suggest that states must stand by and allow their citizens to be defrauded. North Carolina has an anti-fraud law, and we presume that law enforcement officers are ready and able to enforce it. Further, North Carolina may constitutionally require fund-raisers to disclose certain financial information to the state, as it has since 1981. [Citation]. If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the state to

sacrifice speech for efficiency. [Citations]." *Id.*, at p. 2676.

Respondent has failed to establish, nor even convincingly argue, a substantial governmental interest which supports Wileman/Kash being forced to finance a "generic" advertising program which may lawfully impact protected speech. It is incumbent upon Respondent to prove that the interests it seeks to further are real and substantial. *Zauderer v. Office Of Disciplinary Counsel*, 105 S.Ct. 2265 (1985).

A careful analysis of the *Frame* case, *supra*, reveals differences of such substantial impact, that its decision on the Constitutionality question, although persuasive, should not be controlling herein. The Third Circuit specifically stated in that case. "*** we find the issue a close one ***." (Emphasis added). Were the Third Circuit to have had the facts of the present case, it well might have decided differently.

The Petitioners differing circumstances from *Frame, supra*, are reflective of:

- (1) As amended, and as here applicable, The Agricultural Marketing Agreement Act *permits* forced paid advertising; the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901-11 (Supp. III, 1985) *requires* (mandates) it.
- (2) The Agricultural Marketing Agreement Act was enacted (reenacted) in 1937, and although amended through the years, preceded the passage of the Administrative Procedure Act. The Beef Promotion and Research Act of 1985, did not. The former had many purposes to which authority to advertise was added — the Beef Promotion and Research Act did not — its principal stated purpose was to strengthen beef's place in the market place through a coordinated program of "self help" promotion and research.
- (3) The Beef Promotion and Research Act itself (and thereby Congress) established the rate of assessments.

Neither the Agricultural Marketing Agreement Act or the Marketing Orders do so. *The rate of assessments is determined by the Secretary of Agriculture.*

(4) The Beef Promotion and Research Act makes greater proscription of the conditions of its application and standards guiding regulatory action than does the Agricultural Marketing Agreement Act.

(5) The evidence in the present case relating to Marketing Orders reveals pro-forma and less than attentive oversight as to how the assessments were spent. In the *Frame* case, the court noted particularly, " * * * we find that the amount of government oversight of the program is considerable, and conclude that no law-making authority has been entrusted to the members of the beef industry." Additionally, the court found the relationship between the Secretary and the entities there involved to be a "close one." Also, no contracts for the implementation of any plans could be entered into without the Secretary's approval.

(6) The constitutionality of the Beef Promotion Act was upheld in *Frame* because the Government demonstrated that the Act was adopted to serve compelling state interests, that were ideologically neutral, and could not be achieved through means significantly less restrictive of free speech or associational freedoms. This was recognized as a "heavy burden." The Government has made no such demonstration here, and the reliance of the Respondent upon the rulemaking records whereby the Marketing Orders were amended to provide for forced "generic" advertising gives it little comfort in this regard.

(7) The Beef Promotion Act applies nationwide whereas the forced assessments under Marketing Order's 916 and 917 are applicable to a limited segment of the industry and many in the industry who benefit thereby are not compelled to pay such assessments.

(8) The Court recognized in *Frame* that there was a "slight incursion" on *Frame*'s associational and free speech rights. The incursion as to Wileman/Kash is more than slight.

(9) In *Frame* the Court noted:

We find it significant that the Beef Promotion Act expressly prohibits spending for political activity, 7 U.S.C. § 2905(10) ("The order shall prohibit any funds collected by the Board under the order from being used in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the order.").¹³ This prohibition on political expenditures avoids what the Court has identified as what would be a significant incursion on *Frame*'s constitutional rights, while ensuring that the extent of the interference here is no more than necessary to further the government's interest.

In the case of Wileman/Kash amounts of assessments were used for expenditures which the Court in *Frame* denounced.

* * * * *

(10) In *Frame*, it was never argued that strict scrutiny was appropriate under the equal protection analysis. These Petitioners have done so.

(11) The dissenting opinion of Circuit Judge Sloviter emphasizes the importance of sifting through proof to ascer-

Footnote to Quotation:

¹³In accordance with this mandate, the Order provides, "No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary amendments to this part," 7 C.F.R. § 1260.169(e), and also requires State beef councils to certify that they have not and will not use funds for the purpose of influencing governmental policy or action, 7 C.F.R. § 1260.201(b)(7).

tain if the Government has carried its "heavy" burden. Judge Sloviter found it had not, and,

" * * * I believe that it is sufficient to rest this dissent on the statute's incompatibility with the principles protected by the First Amendment. Specifically, I believe that the central provision of the Act which assesses a mandatory non-refundable fee for general promotional advertising of the benefits of beef consumption violate Frame's First Amendment right to freedom to refrain from engaging in commercial advertising. Even if the First Amendment rights implicated in this case are not absolute, I believe that the government has failed to show that the scheme is carefully tailored to pose no greater burden than necessary in light of the government interest asserted."

Thus, the Third Circuit Court of Appeals' response was to those challenges relating to: (i) the limits of Constitutional power enumerated in the Federal Constitution; (ii) The free speech and association clauses of the First Amendment; and, (iii) The equal protection and taking without just compensation guarantees incorporated within the Due Process clause of the Fifth Amendment. Although the issues presented in the instant Petition have some similarities to those addressed in *United States v. Frame, supra*, a comparison of the Beef Promotion And Research Act to the Agricultural Marketing Agreement Act magnifies the constitutional and factual differences which permeate the Agricultural Marketing Agreement Act and Marketing Orders 916 and 917, both as written and/or as applied.

The Beef Promotion And Research Act, designed to strengthen the beef industry's position in the marketplace, was structured by Congress in a manner to accomplish the promotion of the beef industry while maintaining congressional control by limiting the Secretary of Agriculture's ability to delegate the authority authorized by Congress

through the Beef Promotion Act. (See 7 U.S.C. §§ 2904(1)-(11)). In sharp contrast to the provisions of the Agricultural Marketing Agreement Act, Congress itself, when drafting the Beef Promotion Act, established an assessment rate of one dollar (\$1.00) per head of cattle to be paid by cattle producers and importers (7 U.S.C. § 2904(8)(C)). The Beef Promotion Act authorized the creation of a Beef Promotion Operating Committee and a Cattlemen's Beef Promotion And Research Board. Congress set forth the format and duties of the Cattlemen's Board and the Operating Committee, while restricting the Secretary's discretion in selecting the Board and Operating Committee members. The Cattlemen's Board and Operating Committee are expected to administer the regulations promulgated by the Secretary. Congress designated the number of members allowed on both the Board and the Operating Committee, the manner of their selection, and placed limitations on their power and authority.

The Beef Promotion Act divests both the Cattlemen's Board and the Operating Committee of any decisionmaking authority. Further, the Beef Promotion Act mandates that the Secretary of Agriculture *must* approve *all* budgets, plans, expenditures and contracts *before* they can be implemented. (7 U.S.C. §§ 2904(4)(C) and (6)(A)(B)).

In *United States v. Frame, supra*, the majority determined that the Beef Promotion Act did not unlawfully delegate legislative authority to the Secretary. That Court found:

"In the Beef Promotion Act, Congress has done more than provide standards for the administration of the Act; it has set forth with unusual specificity the terms of the Act's implementation. *Most importantly*, Congress itself has set the amount of assessments at \$1.00 per head of cattle, 7 U.S.C. § 2904(8)(C). Similarly, Congress has provided detailed procedures for determining the mem-

bership of the Cattlemen's Board and the Operating Committee. See 7 U.S.C. § 2904(4)(A)." *Id.*, at p. 16.

The Court further found:

"We find that the amount of government oversight of the program is considerable, and conclude that no lawmaking authority has been entrusted to the members of the beef industry. Both the Act and the Order render the actions of the Cattlemen's Board subject to the Secretary's pervasive surveillance and authority." *Id.*, at pp. 17-18.

The majority in *United States v. Frame, supra*, found no unlawful delegation of legislative authority in the Beef Promotion Act. The Court determined that Congress required the Secretary of Agriculture to retain *and exercise* the ultimate authority in the implementation of rules and regulations and those rules and regulations were not allowed to be delegated to administrative committees of competitors.

The instant matter does not deal with the issue of a committee performing only ministerial functions for the Secretary with respect to the establishment of the advertising budgets and the collection of advertising assessments. Congress has not provided nor established a pre-determined assessment rate within the Agricultural Marketing Agreement Act, instead:

"... Each handler subject [to the Marketing Order] shall pay to any authority or agency established under such Order, such handler's pro-rata share (as approved by the Secretary) of such expenses as a Secretary may find are reasonable and are likely to be incurred by such authority or agency, during any period specified by him, for such purposes as the Secretary may pursuant to such Order determine to be appropriate..." [7 U.S.C. § 610(b)(2)(ii)].

Congress gave the Secretary of Agriculture virtually no guidance nor limitations or restrictions on the expenses

which could be incorporated into the assessments imposed on the tree fruit industry by the Committees and the California Tree Fruit Agreement. Congress also failed to place any limitations on the monetary figure which the Secretary could allow the tree fruit Committees to designate as assessments.

Within the Beef Promotion Act, the Secretary must, per congressional mandate, approve all budgets, plans, expenditures and contracts before they may become effective. (7 U.S.C. §§ 2904(4)(C) and (6)(A)(B)). Such is certainly not the case within the provisions of the Agricultural Marketing Agreement Act. As Jonathan Field, Manager of the California Tree Fruit Agreement, testified in a separate proceeding (*In re: Gerawan Co., Inc.*, AMA Docket Nos. F&V 916-4 and 917-5):

The programs that we have are reviewed by a sub-committee on promotion. The sub-committee, then, makes recommendations as to how we should proceed in developing these programs. That recommendation, then, would go forward to the committees, usually at their May meeting.

At that May meeting, each individual commodity committee, then, will review peaches, plums and nectarines: Will review the programs as indicated, at a joint meeting. Then, at the individual commodity meetings in May, each committee, then, when they approve their budget, makes a special motion to approve the market development program. [Reporter's Transcript, AMA Docket Nos. F&V 916-4 and 917-5, May 31, 1989, at p. 199].

At no time, did Mr. Jonathan Field in his testimony indicate that the Secretary of Agriculture involved himself in any "plans, expenditures and contracts." As a matter of fact, the Secretary of Agriculture does not, in any way, involve himself in the advertising program put forth by the

tree fruit industry. The various tree fruit Committees, with the assistance of the California Tree Fruit Agreement (employees of the Committees), determine what is "good" for the tree fruit industry, determine how much will be spent, contract with advertising agencies, and collect assessments from handlers to fund the decisions and programs the tree fruit Committees impose on the industry.

Respondent contends that all decisions with respect to advertising are sent to the Secretary for approval. Although this is perhaps what was originally intended, and although a certain amount of paper work does go forward to him, it is clear that the Secretary's involvement, is, at best, minimal. For each harvest season 1979 through 1989, the record as a whole shows that the Secretary of Agriculture, with minor exceptions, merely "rubberstamped" a dollar figure budget submitted by the Committees for approval. No details were provided, no prior approval from the Secretary was sought or demanded. (Exh. Nos. 7, A-B. 21 through 32, 33(A) and 33(M)). The availability of information is not the equivalent of its scrutiny.

The Court in *United States v. Frame, supra*, in determining that there was no unlawful delegation of legislative authority to the Secretary of Agriculture, in the provisions of the Beef Promotion Act, made clear that Congress itself set the level of assessments at \$1.00 per head of cattle, and Congress itself established detailed procedures for determining membership on the Cattlemen's Board and Operating Committee.

In contrast, the Agricultural Marketing Agreement Act does not establish the level of assessments authorized to be imposed by the Secretary of Agriculture, but leaves to the discretion of the Secretary the task of establishing whatever dollar figure is deemed "reasonable." This partakes of a mere "rubber-stamp" procedure where the Secretary has always approved the proposed budgets of the Committees

with little or no inquiry as to the basis and purpose of those assessments nor any meaningful determination that the imposition of those assessments is reasonable and necessary and would "tend to effectuate the policies of the Act." (Ex. Nos. 7, A.B. 21 through 32, 33(A) and 33(M)).

The majority in *United States v. Frame, supra*, analyzed at length, the forced association and free speech First Amendment issues created as a result of the implementation of the Beef Promotion Act. The majority in *United States v. Frame, supra*, found that: "... Compelled contributions to the beef promotion program implicate Frame's right to be free from compelled association." The Court then explained:

"Accordingly, we will sustain the constitutionality of the Beef Promotion Act only if the government can demonstrate that the Act was adopted to serve *compelling state interests*, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms." *Id.*, at p. 1148.

The majority in *United States v. Frame, supra*, went on to rule that the Government's interest was substantially more than an "interest in advertising beef." The Court determined, based on the extensive congressional record, that without a beef promotion program, not only would the country's beef supply be jeopardized, but our nation's entire economy would be in peril (*United States v. Frame, supra*, at p. 1150). Clearly, with the Court envisioning the collapse of our nation's economic base without the implementation of a beef promotion program, it is not difficult to understand why the Court found a "compelling state interest."

In contrast, however, no such in depth congressional investigation was ever conducted prior to the passage of 7 U.S.C. § 608c(6)(I) authorizing the Secretary, in his discretion, to implement an advertising program. There was no evidence that the national economy would collapse without

commercials imploring consumers to "eat California fruit." In fact, in the Secretary's comments at the time he proposed the creation of a forced "generic" advertising program on the plum industry, his reasoning included:

"The records show that the consensus of the industry is that promotional activities for plums have been beneficial in increasing demand and should be continued. Plums compete for shelf space and retail promotion with many processed and fresh fruits, many of which are now nationally advertised and promoted. In competing for this space and attention, plums should benefit from a promotional program which offers the retailer an attractive quality product which the industry helps sell with an advertising and promotion campaign." (36 Fed. Reg. 8736, May 12, 1971; Exh. No. 7, A.B. 19).

The Secretary's desire to "offer the retailer an attractive quality product" must not be equated with a compelling state interest to preserve our national economy. As Judge Sloviter stated in her dissenting opinion in *United States v. Frame, supra*:

"While the government has a general interest in the health of the beef industry, it does not follow that the government has a substantial interest in compelling the beef industry to make and support such a promotion campaign . . . the messages represent the economic interest of 'one segment of the population,' . . . thus, not even if the standard by which the government's interest should be evaluated is a 'substantial' interest rather than a 'compelling' one, which the majority uses, I cannot conclude that the government's interest in a program of this kind is sufficiently substantial to permit it to compel speech." *Id.*, at p. 1178.

If mandatory assessments, to keep the beef industry from "decaying" and "to preserve our national economy," are

insufficient reasons, from one judge's viewpoint, to uphold forced "generic" advertising when First Amendment freedoms are infringed upon, certainly the decision to impose mandatory assessments so that the retailer may present an "attractive quality product" would "... make a mockery of the First Amendment protection accorded 'the decision of . . . what not to say.' See *Riley*, 108 S.Ct. at 2677." (*United States v. Frame, supra*, at pp. 1181-1182).

The majority in *United States v. Frame, supra*, found that the messages that were promoted by the Federal government were ideologically neutral and sought only to bolster the image of beef for purposes of increased sales. Within the beef industry that may or may not be true, however, such is certainly not the case with the tree fruit industry. As testified to by Petitioners Kashiki (Tr. 4147-4191), Chang (Tr. 2921-2931), and Elliott (Tr. 3881-3910), they are ideologically opposed to the "generic" promotion of tree fruit. Such a program promotes mediocrity within the industry and penalizes growers who provide a better product.

Also, many consumers seek out fruit which has not been sprayed with various pesticides. By forcing a handler to subsidize a "generic" tree fruit advertising program, Wileman/Kash's remaining advertising budget no longer allows them to promote the fact that their particular brand name products are not treated with pesticides. They are unable to provide the "free flow of information" which is essential to allowing the consumer to make an informed decision as to what to buy or not to buy. Therefore, a handler who desires to promote his pesticide-free fruit is precluded, from an economic standpoint, from conveying that message to those who desire that information.

The California Tree Fruit Agreement's "generic" advertising promotional program implies that all fruit, no matter who the grower, is equally nutritious, tasty and healthful. (Tr. 2956). This is not the message Wileman/Kash wish to

convey. Wileman/Kash desire to advertise their labels, to advertise their better quality, to advertise their pesticide-free and/or lack of pesticide residue fruit. They desire to reach the more discerning and/or demanding consumer. It is highly doubtful that forced "generic" advertising is conveying an ideologically neutral message, particularly to those consumers who are seeking more meaningful information than "buy California summer fruit."

The majority in *United States v. Frame, supra*, implied that in evaluating the government's compelling interest, it was necessary to evaluate whether or not significantly burdensome restrictions on free speech and association could be imposed and still satisfy the government's goal of promoting the beef industry. Yet, instead, the Court similarly ruled that it considered the legislation to be a minimum of infringement on Frame's First Amendment rights, with no discussion as to other available alternatives. The Court concluded with respect to this issue that:

"... Although we find that the Beef Promotion Act implicates the First Amendment rights of those obligated to participate, we hold the government has enacted this legislation in furtherance of an ideologically neutral compelling state interest, and has drafted the Act in a way which infringes on the contributor's rights no more than necessary to achieve the stated goal." *Id.*, at p. 1155.

The majority gave no explanation how it concluded that the First Amendment infringement was "no more than necessary to achieve the stated goal." Alternatives were not discussed nor alluded to. Perhaps, no less restrictive means were available to achieve the government's "substantial interest." That is not true with respect to the Agricultural Marketing Agreement Act and the imposition of forced assessments to promote its "generic" advertising program. As previously delineated, there are a substantial number of

"less restrictive means" available to achieve the government's goal in promoting the tree fruit industry.

Congress, as it does with other commodities, could have established an advertising format whereby Wileman/Kash would receive a credit against their advertising assessments for expending their own funds to promote their own specific brand names. This would satisfy the government's interest in promoting the tree fruit industry and yet allow Wileman/Kash the freedom of choice as to how to convey their message to the consumer. Further, assuming that the government had a compelling interest in promoting the tree fruit industry, Congress could have established a ceiling as to the amount of assessments applied to "generic" advertising. By so doing, Wileman/Kash could be assured that they would be assessed a fixed amount to be applied towards "generic" advertising, allowing them to use their remaining advertising funds to convey their message to the consumer in whatever manner Wileman/Kash determined to be most effective. This, at first blush, may sound as if it is simply an argument of Petitioners whereby they disagree with the Secretary's policy over discretionary matters. However, it is more than that, because it goes to the substance and legality of such matters.

In consideration of the impact on Wileman/Kash's First Amendment guarantees, Wileman/Kash would urge that the comments of Judge Sloviter in her dissenting opinion be followed.

"I do not view the compulsion that all sellers of cattle contribute financially to the industry message by proclaiming in Madison Avenue style the value of beef over the radio and television stations of the United States to be a regulatory program.

Of course, trade associations routinely perform such functions, but never before to my knowledge has any Court

held that industry members must be *forced* to contribute to such a program . . . " *United States v. Frame, supra*, at pp. 1171-1172.

Judge Sloviter goes on to state:

" . . . I believe that the central provision of the Act which assesses a mandatory non-refundable fee for general promotional advertising of the benefits of beef consumption violates Frame's First Amendment right to freedom to refrain from engaging in commercial advertising. Even if the First Amendment rights implicated in this case are not absolute, I believe that the government has failed to show that the scheme is carefully tailored to pose no greater burden than necessary in light of the government interest asserted." *Id.*, at p. 1172.

The majority in *United States v. Frame, supra*, although discussing Frame's Fifth Amendment equal protection arguments, made short work of rejecting those issues. Frame conceded that no fundamental right was involved, nor did he consider himself placed in a "suspect classification." Therefore, Frame *agreed* that the appropriate basis of review was the "rational or reasonable basis" test. The Court, in *United States v. Frame, supra*, at p. 1156, adopted the District Court's finding that a "rational basis" existed. At Footnote 14, on page 1157, the majority acknowledges that Frame never argued that "strict scrutiny" was appropriate under the equal protection analysis, and therefore neither the District Court nor the Court of Appeals considered whether strict scrutiny would be applicable to Frame's claim, or whether the Beef Promotion Act would pass Constitutional muster under the "strict scrutiny" or "compelling state interest" standard of review. However, it is well settled that when a group is treated differently by the government, in diminution of their fundamental rights, the discriminating legislation must serve a compelling state interest or be invalidated.

Wileman/Kash have no argument with the *rationale* of the majority under the factual scenario presented in *United States v. Frame, supra*. However, Wileman/Kash are asserting that their fundamental rights have been substantially impinged upon by the assessment programs within the legal and factual context of the Agricultural Marketing Agreement Act and the Secretary's Marketing Orders promulgated thereto. The standard of review, when considering the provisions of the Agricultural Marketing Agreement Act and its Marketing Orders, rises above that of "rational basis" scrutiny as was applied in *Frame, supra*, and must be viewed by applying the "strict scrutiny" and "compelling governmental interest" standard of review. Although Wileman/Kash agree with Frame's assertion that others involved in the industry should be required to share in the burden of funding a forced "generic" advertising program, the discrimination within the tree fruit industry extends far beyond what was set forth in *United States v. Frame, supra*. The Beef Promotion Act, although assessing \$1.00 per head of cattle sold, which obviously impacted each producer, it did so consistently. The Act encompassed all producers nationally, as well as imposing the identical assessment on all cattle and beef products imported into the United States (7 U.S.C. §§ 2901(b), 2903, 2904(8)(A)-(C)).

The Agricultural Marketing Agreement Act and the Secretary's Marketing Orders fail to equitably apply the assessment burden which is imposed. California handlers are the only handlers in the tree fruit industry forced to support a "generic" advertising program (Appendix "A," Respondent's Stipulated Response Nos. 50, 51 and 52). On its face, 7 U.S.C. § 608(c)(6)(1) discriminates against handlers of "California-grown peaches" in the exercise of their fundamental First Amendment rights. On its face, the Agricultural Marketing Agreement Act treats California handlers differently than handlers in other states.

Although, on its face, the Agricultural Marketing Agreement Act does not discriminate against handlers of Nectarines and Plums, the Secretary of Agriculture in imposing compelled subsidization of a "generic" advertising program only on California handlers creates the same discriminatory classification which exists on the face of 7 U.S.C. § 608(c)(6)(I) with reference to California-grown Peaches. The issues involving alleged violations of the implied equal protection guarantees of the Due Process Clause of the Fifth Amendment are not addressed in detail herein, as any determination, which would be applicable thereto, is not necessary for the resolution of this case.

The majority in *United States v. Frame, supra*, were not faced with a situation such as exists in the tree fruit industry. Had the Beef Promotion Act only assessed producers of cattle sold in Pennsylvania to promote a national beef advertising program, it is likely that the majority would have struck down that Act. Wileman/Kash are faced with just such discriminatory legislation. Respondent has failed to justify why a program which is specifically designed by the Secretary to benefit the tree fruit industry should not be paid for by all those who, in theory and in reality, benefit from such a program. The majority in *United States v. Frame, supra*, discusses Congress' intention to eliminate those who would receive a "free-ride" if support for a beef promotion program was only accomplished through voluntary contributions. Yet, the Agricultural Marketing Agreement Act provides a "free-ride" to all handlers and growers of tree fruit, not only nationally but internationally, with the exception of the California tree fruit handler. Clearly, Wileman/Kash are treated differently than other growers similarly situated in the exercise of their fundamental rights when the only individuals compelled to support a national "generic" advertising program are those doing business in California.

Respondent unconvincingly argues that the forced subsidization of a "generic" advertising program directly benefits the California handlers because it promotes only California tree fruit and the California Tree Fruit Agreement's commercials state "Eat California Summer Fruits." As explained above, without the consumer specifically requesting that the supermarket designate which fruit is California fruit, there is no way to distinguish a California-grown peach from that of any other state or country. Thus, all handlers outside the grasp of the California Tree Fruit Agreement receive a "free-ride" from the promotional program which Wileman/Kash are forced to support. (Tr. 3882).

Wileman/Kash would urge this tribunal to rule that the regulations as set out in 7 C.F.R. §§ 916.45 and 917.39 are a violation of Wileman/Kash's First Amendment rights regarding freedom of speech and association to the extent that said regulations force participation in the California Tree Fruit Agreement's "generic" advertising program.

Because this case has been decided on issues relating to the Secretary's failure to adhere to the provisions of the Administrative Procedure Act, and, thus, Petitioners' grievances can be resolved through statutory provisions, I shall not rule on the First Amendment Constitutional issue. However, if Petitioners were not to succeed in their nonconstitutional arguments, I would rule in their favor on their First Amendment rights.

Attorney's Fees

Title 5, Section 504 provides among other things that an agency that conducts an adversary adjudication *shall award*, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the *adjudicative officer of the agency* finds that the position of the agency as a party to the

proceeding was substantially justified or that special circumstances make an award unjust.

The Petitioners Wileman/Kash contend that pursuant to said provision they are to be reimbursed their legal fees and other expenses. That section applies not only to actions in the Federal District Court, but also to administrative proceedings held pursuant to 7 U.S.C. § 608(c)(15)(A), as Wileman/Kash are unable to proceed to the District Court without first exhausting their administrative remedies through the United States Department of Agriculture. Wileman/Kash contend, and the record as a whole supports that their Petitions were brought in good faith and that they have diligently proceeded in good faith. Moreover, they maintain that Respondent's purported defenses and actions in this case were brought in bad faith, in that the Respondent knew, or should have known, that said asserted defenses lacked merit. These contentions of the Petitioners not only have merit by reason of the legal principles which they have pursued, but they are reflected in the factual circumstances which have surrounded both the *Wileman/Kash I* and *Wileman/Kash II* proceedings: (1) for the first time in eight years, and after the *Wileman/Kash I* hearing, the Department published, among other things, purported rules relating to maturity and appeal procedures; (2) orders were issued from the Department that meetings and relationships previously existing between the Tree Fruit Reserve and the California Tree Fruit Agreement personnel were to be severed and a degree of separateness was to be achieved; (3) the Tree Fruit Reserve went back and reconstructed eight years of Minutes which previously had not been done; (4) the appeal procedures applicable to situations where a handler disagreed with the determinations relative to the maturity of his fruit were substantially revised in the 1988 rules in a manner which precluded the California Tree Fruit Agreement field personnel from being the one who could make the sole determination with respect to maturity of

fruits. Thus, some of the contentions raised in the *Wileman/Kash* proceedings have been sought to be corrected by reason of subsequent actions of the Department. Surely, this reflects that the Petitioners' contentions, indeed, were brought in good faith and based upon an objective view of the situation. As the presiding Administrative Law Judge in both proceedings, I have only commendation for the Petitioners' diligence and thoroughness.

As pointed out by the Petitioners, Respondent was obligated to deal in good faith with Wileman/Kash and to make a concerted and meaningful effort to correct any malfeasance, misfeasance, or legalized oversight conduct that had occurred without putting *Wileman/Kash* to the incredible expense of proving what Respondent knew, or should have known, all along. In addition, there have been or now are pending before the Department of Agriculture a number of section (15)(A) cases, some having some similarity to the issues in this case, reflecting that other handlers are voicing concerns relating to provisions of various Marketing Orders. These Petitioners have conscientiously done everything that was required of them in order to have their grievances administratively adjudicated in an expeditious manner (and under more conducive circumstances, this decision would have been issued 7 or 8 months earlier).

The Petitioners' claim for attorney's fees and expenses is timely and properly pled. Basically, the Respondent contends that the Petitioners failed to indicate any provision of the Agricultural Marketing Agreement Act, the applicable Rules of Practice, or any other authority of the Administrative Law Judge which would authorize the Judge to rule on such a claim in this proceeding.

The Petitioners have sighted numerous cases which would indicate, if not compel, that attorney's fees are not only authorized, but justified: *Washington v. Heckler*, 356 F.2d 959 (3rd Cir. 1985); *Pope v. Railroad Retirement Board*,

744 F.2d 868 (D.C. Cir. 1984); *Ferrell v. Pierce*, 743 F.2d 454 (7th Cir. 1984); *Cornella v. Schweiker*, 728 F.2d 978 (8th Cir. 1984).

Apparently the Department is taking the position that if a Court has reviewed [or will review] the Judicial Officer's decision in a proceeding, only the reviewing Court, rather than the Judicial Officer can award fees and expenses pursuant to a claim therefor. However, it would seem that the Judicial Officer is the final arbiter within the Department to rule on the matter. Since appeal of this decision to a Federal Court is almost certain, it is assumed that Petitioners will engage in the proper procedure to perfect their claim. In this regard, note is made of two recent decisions relating to what constitutes a final judgment: *Jabaay v. Sullivan* 3 AdL.3d 649 (7th Cir. Dec. 17, 1990); and *Meyers v. Sullivan* 3 AdL.3d 670 (11th Cir. Nov. 6, 1990).

The path of this case before the Department has been arduous and resembled an attempt to walk up a steep iced-covered hill. The Petitioners, *Wileman/Kash*, have assiduously pursued their course to obtain timely and effective relief, in the face of obstacles. The Petitioners cause has been just. The issues presented are of moment with respect to the regulatory process and as the Department was admonished in *C&K Manufacturing and Sales Co. v. Yeutter*, 3 AdL.3d 572 (D.C. Cir. Aug. 28, 1990): "Finally, the Court reaches the public interest, perhaps the most important interest in the statutory and regulatory scheme. * * * Obviously, the public has a strong interest in seeing that [the agency] is able to do its job in an unhindered fashion as possible. However, the public also has a strong interest in seeing that [the agency] utilizes proper procedures and reaches correct results as to public safety and health risk. * * * Furthermore, the public has a strong interest in the integrity of the administrative process. No citizen should have to live in fear that its government will be permitted to

stamp out its livelihood without notice and a real opportunity to be heard on the issues raised. This is an interest that [the United States Department of Agriculture] must not ignore."

In addition to the enormous amount of legal work and cost which have been expended in this proceeding over a long period of time, there have been developments which quite likely might not have occurred absent the filing of the Initial Petition in *Wileman/Kash I*. See, *Public Citizen Health Research Group v. Young* (D.C. Cir. July 31, 1990) No. 89-5055. In that case, the Petitioners therein became a catalyst which forced the agency to act. In the instant proceeding the Department did act after the good faith filing of the Petition in *Wileman/Kash I* and for the first time in many years published regulations applicable to the 1988 and subsequent harvest years. Nevertheless, it will be noted, inasmuch as this case has been consolidated with *Wileman/Kash I*, that the Government has conceded that prior to 1988 there were no published regulations which made reference to color chips.

There never was a proposed rule regarding the budget and the assessment ever published in the Federal Register until after the *Wileman/Kash I* trial (Tr. 2723) because the Department does not consider same to be rulemaking.

The Secretary, according to AMS's representative, Mr. Kimmel, does not " * * * engage(s) in the decision of how the committees will finance their purchases" or whether such purchases are made by the California Tree Fruit Agreement or the Tree Fruit Reserve. (Tr. 2728). The Secretary just approves them.

These Petitioners, *Wileman/Kash*, have had *bona fide* grievances emanating from the Marketing Orders. Their efforts to have their contentions administratively adjudicated have taken place over a span of years — with Petition-

ers doing everything required of them. I know of nothing else they could have done, nor anything which they failed to do.

Respondent argues that although errors in administering the Orders may have occurred, and that even if there were to be found some malfeasance by those responsible for administering or spending the assessments funds, the amounts involved are so small as to not justify granting relief to the Petitioners. I am unaware of any provision in the Agricultural Marketing Agreement Act or the Marketing Orders which permits malfeasance to be quantitative in terms of dollars as a measure of the right to have the Orders administered properly and legally.

The Respondent also resists the claim of Petitioners for attorney's fees and expenses under the Equal Access to Justice Act (5 U.S.C. § 504) because Respondent is confident that Petitioners will not prevail and because it is asserted that the position of the Government was justified. It is true that the United States Department of Agriculture believes itself compelled to defend Marketing Order's and their administration and interpretation. Such compulsion does not make Petitioners' claims any less worthy.

The position of the Respondent herein has been very carefully considered and it is recognized that it is consonant with the administration of a program which extends back some 50 years. The regulation of fruits and vegetables under the Agricultural Marketing Agreement Act has been in existence for many years, and is integrated to a certain extent with either preexisting programs which existed in the States prior to the Federal Marketing Orders or which came into being thereafter. It is recognized that the programs are a coordinated effort between the various State programs and the Federal Government. These programs are entrenched both from the passage of years, and by reason of procedures which have existed over a long period of time. It indeed

would have been an easy matter in this case to have indicated that by reason of the time factor and the ingrained procedures which existed relative to the subject Marketing Orders pertaining to the fruit here involved, that the complaints of the Petitioners were simply those reflecting a small minority who are not satisfied with the Orders. I do not believe that this is so. The Petitioners herein have *bonafidely* pursued legal principle which reflect the correctness of their position, particularly with respect to the necessity for adherence to the Administrative Procedure Act. The fact that it has been only in recent years that the legality of some of these Order provisions has been questioned, should not militate against the validity of arguments where it can be shown that the Order provisions are not in accordance with law. There are many reasons why handlers are reluctant to bring Petitions to question the administration and interpretation of Marketing Orders.

There are recent cases which dispel Respondent's position. In a case of first impression, the Ninth Circuit in *Abela v. Gustafson* No. 87-5658, 2 AdL.3d 73 (Nov. 6, 1989) the Court rejected the Government's arguments as to its role in naturalization proceedings being neither litigative nor administrative or that its position was substantially justified. Instead, the Court emphasized that: "Congress enacted the EAJA to prevent overwhelming governmental resources and huge litigation costs from deterring individuals in precisely petitioners' situation from vindicating their rights." In addition, the court found that there were no special circumstances making the award unjust. In fact, an examination by the Court of the agency's slowness and failure to act enhanced the justness of the award. The Ninth Circuit indicated: "The 'Government's 'position' whose justification we must examine is defined by statute to mean 'in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based' 28 U.S.C. § 2412(d)(2)(D)." (Em-

phasis added). The Ninth Circuit has stated that: 'We look to the record of both the underlying Government conduct at issue and the totality of circumstances present before and during litigation.' *Barry v. Bowen*, 825 F.2d 1330. We hold that the Government's unexplained failure to act on naturalization petitions, which forces petitioners to obtain a court order requiring the Government to calendar the petitioners, is a circumstance of which the court must take cognizance in determining whether to award attorney's fees. This circumstance fits within the statutory definition because it constitutes an agency's failure to act and it precipitates litigation. * * * The record in this case demonstrates that the INS unjustifiably delayed processing and calendaring many of appellees' petitions for naturalization. Many of the petitions have been pending, apparently without action, for two to seven years. The INS in some instances claim that it had delayed processing applications because it was awaiting receipt of transcripts of interviews that had occurred more than three years prior. We hold that the Government's prelitigation protracted delays and failure to act on appellees' petitions, which forced appellees to file a motion with the court to cause the Government to calendar naturalization hearings, were unjustified and the EAJA therefore required the District Court to award attorney's fees to Petitioners."

The record as a whole establishes procedural irregularity and non-compliance with the Administrative Procedure Act to such an extent as to constitute arbitrary and capricious behavior, an abuse of the Secretary's discretion; and substantive regulations formulated and implemented that were not in accordance with law. For this, the Respondent must account by way of returning to Petitioners those amounts derived from them or deprived to them by reason of improper and illegal agency's actions. The lack of regard for the Administrative Procedure Act is rampant and the non-compliance with its provisions obvious. The monetary

amounts associated with the Department's non-compliance with the Administrative Procedure Act and with the Order provisions of which the Petitioners should be relieved, can best be determined in a supplementary hearing wherein the Petitioners would be required to produce generally accepted financial statements. This will also be of advantage to Respondent who can then be in a position to question the veracity of such amounts.

Both parties hereto have submitted numerous proposals, requests, objections, and motions. They have all been duly considered and to the extent, if any, that they may be inconsistent with this Decision and Order they are denied.

For the foregoing reasons the following Order is issued.

ORDER

The Petitioners are to be relieved of the Order obligations of which they complained in their Petition and Amended Petition. The amount of such monetary relief is to be determined at a subsequent date.

This Decision and Order becomes final Thirty-Five (35) days after service thereof unless appealed within Thirty (30) days by a party to the Judicial Officer pursuant to the Rules of Practice and Procedure (7 C.F.R. §§ 900.65, 1.130 *et seq.*).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.
this 24th day May, 1991.

Dorothea A. Baker
Administrative Law Judge

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Supreme Court, U.S.

FILED

APR 5 1996

No. 95-1184

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONER

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1. a. Respondents err in asserting that "the Ninth Circuit did not address the question now pressed by [the Secretary of Agriculture]." Br. in Opp. 6-7. Our petition for a writ of certiorari presents the question whether it violates the First Amendment for the Secretary, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities. Pet. I. The Ninth Circuit unequivocally passed on that question, stating: "[W]e hold that forced contributions to pay for generic advertising programs contravene the First Amendment rights of the handlers." Pet. App. 21a.

b. Respondents also err in asserting that, with regard to the question presented, the Secretary "argued below the opposite of what [he] argues in [his] petition." Br. in Opp. 6.

Our petition advances two arguments on the merits. We argue that the generic advertising programs should be upheld under principles applied in the decisions of this Court involving the compelled funding of unions and integrated bars, such as *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990). Pet. 15-19. We also argue that the programs comport with the First Amendment under the test for restrictions on commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Pet. 20-21.

We similarly relied on both the *Abood/Keller* and the *Central Hudson* lines of cases in the district court. There, we argued that "the supposed infringements on First Amendment freedoms" resulting from the generic advertising programs "are exceedingly minimal" when "[c]ompared to the significant burdens on constitutional rights authorized under *Abood*."¹ We cited *Keller* in support of that argument, and explained that *Abood* and *Keller* involved political speech, whereas the present case involves commercial speech.² We also argued that the

¹ Memorandum of Points and Authorities in Support of Defs.' Mot. for Summ. J. at 58 (filed Nov. 21, 1991) [hereinafter Gov't Summ. J. Mot.].

² Memorandum of Points and Authorities in Opp. to Pls.' Mot. for Summ. J. and in Support of Defs.' Mot. for Summ. J. at 12 (filed Jan. 31, 1992). In response to our *Abood* argument, respondents argued that *Abood* "stands for the proposition that the government cannot force anyone to associate with, or contribute to, the advancement of ideas which [*sic*] they disagree." Pls.' Opp. to Defs.' Mot. for Summ. J. at 47 (filed Feb. 3, 1992). In reply, we stated that "the 'compelled association'

programs satisfy the First Amendment under the *Central Hudson* line of cases.³

After the district court granted summary judgment for the government on the First Amendment issue, and while the case was pending on appeal, the Ninth Circuit held in *Cal-Almond, Inc. v. United States Dep't of Agriculture*, 14 F.3d 429, 437 (1993), that the *Central Hudson* test was applicable to the generic advertising program administered under the AMAA marketing order for California almonds. In light of that holding, our brief for the Ninth Circuit panel in this case focused on our *Central Hudson* argument. See Gov't C.A. Br. 21-30. Contrary to respondents' contention (Br. in Opp. 5-6), however, we did not concede that *Central Hudson* furnished the appropriate test. In our petition for rehearing and suggestion for rehearing en banc, we urged the full Ninth Circuit to reconsider the applicability of the *Central Hudson* test to generic advertising programs authorized by the AMAA. See Gov't C.A. Pet. for Reh'g at 7-9.

In these circumstances, the arguments in our petition are properly before this Court. See *United States v. Williams*, 504 U.S. 36, 40-45 (1992); see also *Virginia*

line of cases that begins with *Abood* * * * has no applicability to a government-mandated, commercial advertising program." Reply to Pls.' Opp. to Defs.' Mot. for Summ. J. at 15 (filed Feb. 14, 1992) (emphasis added). Contrary to respondents' assertion (Br. in Opp. 7), that statement was not intended, and cannot in context reasonably be read, as a reversal of our earlier position that *Abood* supports the validity of the generic advertising programs. Instead, the statement was intended merely to reiterate our view that the *Abood* line of cases involved political, rather than commercial, speech and for that reason the analysis utilized in those cases does not squarely govern the validity of the programs (which accords with the view expressed in our petition at pages 18 and 24-25).

³ Gov't Summ. J. Mot. at 56-57.

Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1099 n.8 (1991); *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991).

2. Respondents' submission confirms that their First Amendment challenge is founded upon the requirement that they fund the commercial speech conducted under the generic advertising programs. See, e.g., Br. in Opp. 12, 14, 28. As we explain in our petition, the most analogous cases involve First Amendment challenges to union-shop agreements and integrated bars, such as *Abood* and *Keller*. Pet. 16-17. In opposing a standard of review based on *Abood* and *Keller*, respondents contend that, "when [the Secretary] compels commercial speech the scrutiny required is the commercial speech test" of *Central Hudson*. Br. in Opp. 10. That contention merely joins the issue of whether the *Central Hudson* test for government restrictions on commercial speech also applies when the government compels the funding of commercial speech. This case thus calls upon the Court to address that important and unsettled question.⁴

Respondents argue that this Court's decisions involving "fully protected speech" indicate that governmentally compelled funding of commercial speech should be reviewed under the same test that applies to governmental restrictions on commercial speech. Br. in Opp. 10. One of the cases cited by respondents (*id.* at 11), however, contradicts that very contention. The Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338 (1995), stated that, "[a]lthough the state may at

⁴ Respondents err in suggesting that the Court previously addressed the question of "compelled commercial speech" (Br. in Opp. 10 n.11) in *Board of Trustees v. Fox*, 492 U.S. 469 (1989). The issue in *Fox* was "whether governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end." *Id.* at 471 (emphasis added).

times 'prescribe what shall be orthodox in commercial advertising' * * *, outside that context it may not compel affirmance of a belief with which the speaker disagrees." *Id.* at 2347 (emphasis added) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)). *Hurley* thus reaffirms that principles applicable to fully protected speech have only limited application to commercial speech.

Respondents also err in relying (Br. in Opp. 11) on *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990), which upheld against a First Amendment challenge the generic promotion program for beef that is established by federal law and funded by mandatory industry assessments. See Pet. 21-23. The Third Circuit in *Frame* did not review the beef program under the *Central Hudson* test. On the contrary, the court expressly applied a "higher standard of scrutiny" than applied in *Central Hudson*. *Frame*, 885 F.2d at 1134. As we explain in our petition, the Third Circuit erred in that respect. Pet. 24-25. In any event, the decision does not support respondents' contention that the programs at issue here should be reviewed under the *Central Hudson* test.

Respondents also argue that, because the generic advertising programs are funded by mandatory assessments, they restrict respondents' commercial speech by reducing the amount of money respondents have to buy advertising. Br. in Opp. 12-14. As we explain in our petition, that argument proves too much. Pet. 16 n.9. Any regulatory provision that imposes costs on a regulated entity reduces the amount of money that the entity has to spend on advertising (or for any other purpose). That does not mean that any such provision constitutes a restriction on commercial speech that must satisfy the *Central Hudson* test.

3. Our petition explains that the generic advertising programs comport with the First Amendment whether they are reviewed under the principles of *Abood* and *Keller* or under the *Central Hudson* test. Pet. 18-21. The programs satisfy the First Amendment, in brief, because they serve a compelling governmental interest by promoting steady and increasing demand for farm commodities, thereby complementing other AMAA provisions that promote a steady supply of farm commodities of uniform quality; they are reasonably funded by mandatory assessments on members of the industry, who benefit from the "orderly marketing conditions" (7 U.S.C. 602(1)) established by the marketing orders, and many of whom would otherwise be "free riders"; and they do not unduly infringe on the First Amendment rights of handlers, since they merely promote products that the handlers themselves have voluntarily chosen to market, while leaving the handlers free to promote their own brands of the product.

Respondents contend that the programs violate the First Amendment primarily because they purportedly favor respondents' competitors, especially those who serve on the committees that administer the programs. Br. in Opp. 14-17, 20-21, 24-25. In support of that contention, they assert that "[t]he Ninth Circuit found * * * that respondents were being forced to support an advertising program that promotes the 'Red Jim' nectarine—a proprietary variety of one * * * committee member[]." *Id.* at 24. Respondents provide no citation to support that assertion, and the Ninth Circuit made no such finding.⁵ Nor did the Ninth Circuit credit the other claims of bias in the operation of the programs that respondents renew

⁵ The Ninth Circuit referred to the "Red Jim" variety only once, in paraphrasing the same claim regarding that variety that respondents make here. See Pet. App. 15a n.6.

here. See *id.* at 15-17, 21, 24 n.20. To the contrary, the Ninth Circuit found "no evidence of such insider control of the committees." Pet. App. 18a n.8. The district court likewise rejected respondents' "vague claims" of bias in the programs. *Id.* at 91a.

Respondents also argue that the government failed to prove that the programs are sufficiently effective to justify their asserted infringement on First Amendment rights. Br. in Opp. 17-18. Respondents base that argument (*id.* at 17) on the Ninth Circuit's holding that, under *Central Hudson*, the government had to "demonstrat[e] that the generic advertising program is better at increasing consumption than individualized advertising." Pet. App. 20a. As we explain in our petition, that holding is not only wrong; it also requires proof that will be nearly impossible to mount for any generic advertising program because of the speculative nature of the proof. Pet. 20-21. The Ninth Circuit's reasoning thus would apparently invalidate the operation in that circuit of many of the numerous statutorily created generic promotion programs funded by mandatory assessments.⁶

⁶ See Pet. 25 n.17 (citing ten federal marketing orders in addition to those at issue here that authorize generic promotion programs), 26 n.18 (citing seven federal statutes that authorize such programs), 26 n.19 (citing statutes in seven of the nine States in the Ninth Circuit authorizing such programs); see also Pet. 28-29 nn.21 & 22 (citing nine pending First Amendment challenges to generic promotion programs); *Goetz v. Glickman*, No. Civ. A 94-1299-FGT, 1996 WL 138038 (D. Kan. Feb. 28, 1996) (rejecting First Amendment challenge to beef promotion program upheld in *Frame*). As respondents note (Br. in Opp. 14 n.15), bills introduced in Congress after the filing of our petition included provisions that set forth findings on the purpose and effect of generic promotion programs for agricultural commodities. A similar provision is included in a bill that has passed both Houses of Congress but has not yet been signed by the President. See H.R. 2854, 104th Cong., 2d Sess. § 501 (passed Senate Mar. 28, 1996). The enactment of that

Respondents also rely on the Ninth Circuit's determinations that the programs interfere with the ability of handlers to "market their product as they prefer," and that the Secretary should "allow for credits to tree fruit handlers for their own individualized advertising programs." Br. in Opp. 27; Pet. App. 18a, 20a. The court's first determination merely reflects its disagreement with Congress's decision in the AMAA to authorize promotion programs funded by mandatory industry assessments. See 7 U.S.C. 608c(6)(I), 610(b)(2)(ii). The court's other determination ignores that Congress has chosen to authorize credits for the individual advertising of certain commodities, but not those at issue here. See Pet. 27 n.20; 7 U.S.C. 608c(6)(I). By basing its decisions on features of the programs that are rooted in statutory provisions, the Ninth Circuit effectively held those statutory provisions unconstitutional as administered by the Secretary (even though the court also held that the Secretary's administration of those provisions was not arbitrary or capricious under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, Pet. App. 9a-12a). For that reason alone, review by this Court is warranted.

4. Further review is also warranted because the decision below cannot be squared with the Third Circuit's decision in *Frame* upholding the generic promotion program for beef. Pet. 21-25. Respondents' attempts to distinguish *Frame* are unpersuasive.

Respondents assert that *Frame* was based on evidence that "the beef industry [was] on the verge of crumbling." Br. in Opp. 21. The court in *Frame* cited that evidence, however, only to support its determination that the beef

provision would not diminish the need for further review of the decision below nor, if further review were granted, would it appreciably complicate resolution of the question presented.

program served a sufficiently important governmental interest under the relevant First Amendment principles. 885 F.2d at 1134-1135. The Ninth Circuit similarly determined that the generic advertising programs at issue here serve a sufficiently important governmental purpose to withstand First Amendment review. Pet. App. 16a-17a. Thus, the Ninth Circuit's decision striking down the programs was not based on the factor—the importance of the governmental interest—to which evidence of industry conditions was considered relevant in *Frame*. That evidence therefore does not explain the different results in the two cases.

Respondents observe that the program upheld in *Frame* applied nationwide, whereas the programs at issue here apply only in California. Br. in Opp. 25. Respondents provided no evidence, however, to support their assertion (*ibid.*) that handlers outside of California benefit from the programs.⁷ Moreover, the court in *Frame* upheld the beef promotion program despite a similar assertion by the plaintiff in that case that the program benefited beef industry participants in addition to those who funded the program. See 885 F.2d at 1137.

Finally, the limited geographic scope of the programs reflects the statutory requirement that marketing orders under the AMAA be restricted "to the smallest regional

⁷ California produces approximately 90% of all domestically produced nectarines and plums and 50% of all domestically produced peaches. Gov't C.A. Br. 4 (citing administrative record). The prices for California tree fruit are substantially higher than those for tree fruit produced in other States because of California's superior climate. *Id.* at 23 n.23. A principal rationale of the marketing orders for California tree fruit has been to build on that advantage through quality control and advertising. *Ibid.* In these circumstances, it cannot be presumed that handlers of fruit produced outside of California benefit from the programs at issue here.

production areas * * * practicable" and consistent with the Act. 7 U.S.C. 608c(11)(B). In agreeing with respondents that the geographic limitation contributes to the unconstitutionality of the programs (Pet. App. 21a), the Ninth Circuit effectively held that statutory provision unconstitutional as applied in the present context. As discussed above, the Ninth Circuit likewise effectively held unconstitutional other AMAA provisions authorizing the programs. See p. 8, *supra*. In light of the importance of these and similar federal and state programs to the Nation's farm economy and the conflicting decisions of the courts of appeals, review by this Court is warranted.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

APRIL 1996

Supreme Court, U.S.

FILED

MAY 13 1996

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**SUPPLEMENTAL
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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1184

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**SUPPLEMENTAL
MEMORANDUM FOR THE PETITIONER**

Pursuant to this Court's Rule 15.8, the Solicitor General, on behalf of the Secretary of Agriculture, respectfully files this supplemental memorandum to inform the Court of the enactment of new federal legislation based on bills that were introduced after the filing of our petition and that are cited in respondents' brief in opposition and our reply brief.

In their brief in opposition, respondents noted that, "in both the House and Senate, Bills to reform and extend agricultural programs are under consideration." Br. in Opp. 14 n.15, citing S. 1541, 104th Cong.,

2d Sess. (1996), and H.R. 2973, 104th Cong., 2d Sess. (1996). Respondents observed that "[t]hese Bills include language stating that 'generic' advertising of agricultural commodities increases total market." Br. in Opp. 14 n.15, citing S. 1541, *supra*, § 961, and H.R. 2973, *supra*, § 602.

In our reply brief, we noted that a provision regarding generic advertising similar to the provisions cited by respondents was included in a third bill that had passed both Houses of Congress. Reply Br. 7 n.6, citing H.R. 2854, 104th Cong., 2d Sess. § 501 (passed Senate Mar. 28, 1996). We also stated that the bill had not yet been signed by the President. Reply Br. 7 n.6. The bill was signed into law, however, on the day that our reply brief went to press, as the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888 (enacted Apr. 4, 1996).

The provision regarding generic promotion programs, to which the brief in opposition and our reply referred, was enacted as Section 501 of the FAIR Act, 110 Stat. 1029-1031, and is reproduced in the appendix hereto (App., *infra*, 1a-5a). Subsection (a) of that provision defines "commodity promotion law[s]" to include "the marketing promotion provisions under section 8c(6)(I)" of the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 608c(6)(I), which is the Act at issue here. FAIR Act § 501(a)(1), 110 Stat. 1029; App., *infra*, 1a. Subsection (b) sets forth congressional findings concerning, *inter alia*, the need for and effectiveness of "generic commodity promotion programs established under commodity promotion laws." See, *e.g.*, FAIR Act § 501(b)(1), 110 Stat. 1030; App., *infra*, 2a. Subsection (c) generally requires every commodity board established under a

commodity promotion law to fund periodic, independent evaluations of the generic promotion program that it administers, to submit the results of those evaluations to the Secretary, and to make the results publicly available. FAIR Act § 501(c), 110 Stat. 1031; App., *infra*, 4a-5a. Finally, subsection (d) relates to the administrative expenses of such programs. FAIR Act § 501(d), 110 Stat. 1031; App., *infra*, 5a.

The FAIR Act also grants the Secretary new authority with regard to the generic promotion of agricultural commodities. See FAIR Act §§ 511-526, 110 Stat. 1032-1048. He may, on petition or his own initiative, issue orders establishing boards to develop and carry out, under his supervision, nationwide generic promotion programs funded by mandatory assessments on handlers (and importers, with respect to imported commodities). See FAIR Act §§ 514-517, 110 Stat. 1035-1043. In determining whether to issue such an order, the Secretary may take into account the existence of generic promotion programs established under other federal laws (such as the AMAA). FAIR Act § 514(b)(3), 110 Stat. 1035. He may also conduct an initial referendum to determine whether the order is favored by the persons to be covered by the order. FAIR Act § 518(a), 110 Stat. 1043. After an order goes into effect, the Secretary is generally required to hold such referenda periodically to determine whether the persons covered by the order favor its continuation. FAIR Act § 518(b), 110 Stat. 1043-1044. If the Secretary determines that the order is not favored by the persons voting in a referendum, he must suspend or terminate the order. FAIR Act § 522(a), 110 Stat. 1047; see generally H.R. Conf. Rep. No. 494, 104th Cong., 2d Sess. 406-407 (1996), repro-

duced at 142 Cong. Rec. H2820-H2821 (daily ed. Mar. 26, 1996).

As stated in our reply brief (at 7 n.6), the enactment of Section 501 does not diminish the need for further review in this case; nor, if review is granted, will enactment of Section 501 complicate resolution of the question presented. The same holds true for the provisions in the FAIR Act granting the Secretary *additional* authority to establish generic promotion programs.* Indeed, those provisions, together with Section 501, underscore the broad importance of the constitutional question presented by this case.

* * * * *

For the foregoing reasons and those stated in the petition and the reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MAY 1996

* We observe that, although the latter provisions are similar to provisions included in one of the bills cited by respondents, respondents did not argue that the enactment of those particular provisions would weigh against further review. See Br. in Opp. 14 n.15; H.R. 2973, *supra*, §§ 601-615.

APPENDIX

Section 501 of the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 1029, provides in pertinent as follows:

SEC. 501. COMMODITY PROMOTION AND EVALUATION.

(a) COMMODITY PROMOTION LAW DEFINED.

In this section, the term "commodity promotion law" means a Federal law that provides for the establishment and operation of a promotion program regarding an agricultural commodity that includes a combination of promotion, research, industry information, or consumer information activities, is funded by mandatory assessments on producers or processors, and is designed to maintain or expand markets and uses for the commodity (as determined by the Secretary). The term includes-

- (1) the marketing promotion provisions under section 8c(6)(I) of the Agricultural Adjustment Act (7 U.S.C. 608c(6)(I)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937;
- (2) Public Law 89-502 (7 U.S.C. 2101 et seq.);
- (3) title III of Public Law 91-670 (7 U.S.C. 2611 et seq.);
- (4) Public Law 93-428 (7 U.S.C. 2701 et seq.);
- (5) Public Law 94-294 (7 U.S.C. 2901 et seq.);
- (6) subtitle B of title I of Public Law 98-180 (7 U.S.C. 4501 et seq.);
- (7) Public Law 98-590 (7 U.S.C. 4601 et seq.);
- (8) subtitle B of title XVI of Public Law 99-198 (7 U.S.C. 4801 et seq.);

(1a)

(9) subtitle C of title XVI of Public Law 99-198 (7 U.S.C. 4901 et seq.);

(10) subtitle B of title XIX of Public Law 101-624 (7 U.S.C. 6101 et seq.);

(11) subtitle E of title XIX of Public Law 101-624 (7 U.S.C. 6301 et seq.);

(12) subtitle H of title XIX of Public Law 101-624 (7 U.S.C. 6401 et seq.);

(13) Public Law 103-190 (7 U.S.C. 6801 et seq.);

(14) Public Law 103-407 (7 U.S.C. 7101 et seq.);

(15) subtitle B;

(16) subtitle C;

(17) subtitle D; or

(18) subtitle E.

(b) **FINDINGS.** - Congress finds the following:

(1) It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.

(2) These generic commodity promotion programs, funded by the agricultural producers or processors who most directly reap the benefits of the programs and supervised by the Secretary of Agriculture, provide a unique opportunity for producers and processors to inform consumers about their products.

(3) The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor.

(4) The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.

(5) It has never been the intent of Congress for the generic commodity promotion programs established and funded by the commodity promotion laws to replace the individual advertising and promotion efforts of producers or processors.

(6) An individual producer's or processor's own advertising initiatives are typically designed to increase the share of the market held by that producer or processor rather than to increase or expand the overall size of the market.

(7) In contrast, a generic commodity promotion program is intended and designed to maintain or increase the overall demand for the agricultural commodity covered by the program and increase the size of the market for that commodity, often by utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ.

(8) The commodity promotion laws establish promotion programs that operate as "self-help" mechanisms for producers and processors to fund generic promotions for covered commodities which, under the required supervision and oversight of the Secretary of Agriculture-

(A) further specific national governmental goals, as established by Congress; and

(B) produce nonideological and commercial communication the purpose of which is to further the

governmental policy and objective of maintaining and expanding the markets for the covered commodities.

(9) While some commodity promotion laws grant a producer or processor the option of crediting individual advertising conducted by the producer or processor for all or a portion of the producer's or processor's marketing promotion assessments, all promotion programs established under the commodity promotion laws, both those programs that permit credit for individual advertising and those programs that do not contain such provisions, are very narrowly tailored to fulfill the congressional purposes of the commodity promotion laws without impairing or infringing the legal or constitutional rights of any individual producer or processor.

(10) These generic commodity promotion programs are of particular benefit to small producers who often lack the resources or market power to advertise on their own and who are otherwise often unable to benefit from the economies of scale available in promotion and advertising.

(11) Periodic independent evaluation of the effectiveness of these generic commodity promotion programs will assist Congress and the Secretary of Agriculture in ensuring that the objectives of the programs are met.

(c) INDEPENDENT EVALUATION OF PROMOTION PROGRAM EFFECTIVENESS. - Except as otherwise provided by law, each commodity board established under the supervision and oversight of the Secretary of Agriculture pursuant to a commodity promotion law shall, not less often than every 5 years, authorize and fund, from funds otherwise available to the board, an independent evaluation of the effectiveness of the generic commodity promotion programs and other

programs conducted by the board pursuant to a commodity promotion law. The board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this subsection.

(d) ADMINISTRATIVE COSTS. - The Secretary shall annually provide to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate information on administrative expenses on programs established under commodity promotion laws.

* * * * *

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

A. Introduction

Respondents respectfully file this supplemental brief pursuant to Supreme Court Rule 15.8 to call the Court's attention to *44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc. v. Rhode Island Liquor Stores Association*, 96 Daily Journal D.A.R. 5459, decided May 13, 1996. This recent case made determinations under the *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y.*,

447 U.S. 557 (1980) commercial speech rubric that are helpful to the disposition of the instant petition.

B. Regulation Of Commercial Speech To Manipulate Product Consumption Market-Wide Cannot Rely On Legislative Judgment; The Government Must Put Forth Evidence Which Demonstrates That The Regulation Sufficiently Directly Advances The Purported Aim

In *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. 5459, the Court reviewed Rhode Island's prohibition of retail price advertising which Rhode Island claimed was for the purpose of manipulating consumption of alcoholic beverages market-wide. Because Rhode Island did not produce evidence to support its claim that the regulation directly advanced its aim of reducing alcoholic beverage consumption, and the regulation was more extensive than necessary, the Court struck down the regulation under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y.*, 447 U.S. 557 (1980). *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at pp. 5464-5465

In striking down Rhode Island's prohibition of retail price advertising for alcoholic beverages, the Court began by reasoning that while generally the government must demonstrate that regulation impacting commercial speech advances the asserted interest "to a material degree," where the government suppresses truthful, nonmisleading information the government must bear a heavier burden and show that the regulation will "significantly" advance the purported aim. *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at p. 5464.

More important in context here, the Court underscored the need for evidence of direct advancement of the purported governmental aim of manipulation of product consumption. The Court noted that a prohibition against price advertising, like a collusive agreement among competitors,

will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market. *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at p. 5464. The Court also noted that demand, and thus consumption throughout the market, is somewhat lower when a higher noncompetitive price level prevails. *Id.*

However, the Court held that without any findings of fact, or indeed any evidentiary support at all, the Court could not agree that the price advertising ban would significantly reduce market-wide consumption of alcoholic beverages. *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at pp. 5464-5465. As a result, Rhode Island's regulation failed to directly advance the asserted interest in manipulating product consumption. *Id.*

The instant case is about an evidentiary hearing and an administrative record where the Department of Agriculture ("USDA") similarly failed to present any evidence to sustain its burden under *Central Hudson*, 447 U.S. 557. USDA failed to show that, under *Central Hudson*, 447 U.S. 557, its assessment funded generic advertising program (imposed only on California handlers of peaches and nectarines) both directly advanced the purported governmental aim and was sufficiently narrowly tailored to achieve this end.¹ See, App. to Pet. for Cert. p. 21a.

Even greater than Rhode Island's failure in *44 Liquormart, Inc.*, to present evidence showing the advertising ban would *significantly reduce* consumption of alcoholic beverages, here USDA failed to present any evidence that, under a lesser burden, its forced funded generic advertising

¹The Secretary imposes the generic advertising program under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. section 601 *et seq.* ("AMAA"), and the content of the generic advertising program is controlled by committees, consisting of respondents' competitors, appointed by the Secretary. See, Opp. to Pet. for Cert. p. 2.

program *materially increased* consumption of peaches and nectarines.² See, App. to Pet. for Cert. pp. 19a-22a. USDA also failed to demonstrate the program was narrowly tailored to achieve the desired objective. See, App. to Pet. for Cert. pp. 20a-21a. The decision in *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. 5459, supports the Ninth Circuit's determination to require USDA to substantiate direct material advancement of the purported aim of manipulating an increase in the consumption of the products.³

This is particularly true since the *44 Liquormart* Court rejected deferring to a legislative choice among means of

²USDA tried to make up for this by attaching a chart to its brief to the Ninth Circuit in an attempt to show that peach and nectarine production increased in the 1980s. See, App. to Pet. for Cert. p. 19a. The Ninth Circuit correctly pointed out that the chart provided no evidence as to causation—any increase may have been due to weather, cultivation techniques, or more likely the planting of additional trees. See, App. to Pet. for Cert. pp. 19a-20a.

³On May 20, 1996 a California Appellate Court ruled the California Kiwifruit generic advertising program unconstitutional as violative of the First Amendment. Similar to the Ninth Circuit's analysis in *Wileman Bros. & Elliott, Inc. v. Espy* (9th Cir. 1995) 50 F.3d 1367 and *Cal-Almond, Inc. v. U.S. Department of Agriculture* (9th Cir. 1993) 14 F.3d 429, the Court in *California Kiwifruit Commission v. Moss* (3rd Dist., May 20, 1996) 96 Daily Journal D.A.R. 5783, concluded that the Kiwifruit Commission had "presented no studies or evidence of any kind tending to show that the Commission's generic promotion... sells Kiwifruit more effectively than specific targeted marketing efforts of individual producers." *Id.*, at 5790. The court further found that "the Commission presented no evidence that individual promotion efforts are insufficient to advance the State's interests in expanding the Kiwifruit industry," and that the Commission's argument that the individual grower's advertising efforts were insufficient to advance the State's interests in expanding the Kiwifruit industry failed because the Commission presented no evidence that absent the compelled marketing program, growers could not/would not ban together voluntarily and use their combined resources to promote their Kiwifruit crops on a national and international level. *Id.*

achieving the governmental aim of manipulation of consumption of a product. In reliance on *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328, Rhode Island argued that because expert opinions as to effectiveness of price advertising "go both ways" the legislature made a reasonable choice when deciding to ban the advertising. The Court concluded that this argument failed because the analysis in *Posadas* was flawed. *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at p. 5465. The Court held that *Posadas* erroneously performed the First Amendment analysis when reasoning that because commercial speech concerns products and services that the government may freely regulate, greater deference must be afforded a legislative determination to regulate commercial speech to achieve the government's ends. *Id.*

USDA also has misplaced reliance on the existence of legislative judgments about the efficacy of USDA's regulations aimed at manipulation of product consumption. USDA argues in its petition that commercial speech enjoys only a limited measure of protection and therefore Congress should be afforded greater latitude in making regulations impacting commercial speech to achieve the governmental aim of manipulating product consumption. See, Pet. for Cert. p. 18.

Additionally, USDA filed a supplemental memorandum focusing on a bill signed into law on the day USDA's reply brief went to press—the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act) Pub. L. No. 104-127, 110 Stat. 888 (enacted April 4, 1996).⁴ USDA claims this bill underscores the importance of its Petition. See, Supp. Mem. For Petitioner p. 4.

⁴Respondents' Opposition to Petition for Writ of Certiorari noted that legislation was pending in both houses of Congress related to the Farm Bill. See, Opp. to Pet. for Cert. p. 14, n. 14.

Like the inability of Rhode Island's legislative judgment to prove that the regulation would directly advance the purported governmental aim of manipulation of product consumption in *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at p. 5465, any authority granted the Secretary of Agriculture under the AMAA or the recently enacted FAIR Act does not make up for the lack of evidence in the administrative record reviewed in this case.⁵

Finally, USDA argues in its petition and reply brief that respondents benefit from the AMAA and respondents have voluntarily chosen to market the products in question, therefore USDA's generic advertising program should be given deference. See, Pet. for Cert. p. 19; Reply Br. for Pet. p. 6. In *44 Liquormart Inc.*, 96 Daily Journal D.A.R. at p. 5466, the Court rejected this form of syllogism. The Court said that the state's licensing of liquor retailers did not change the First Amendment analysis of whether Rhode Island met the *Central Hudson* test. *Id.* The Court reasoned that "[e]ven though the government is under no obligation to provide a person, or the public, a particular benefit, it does

⁵The court in *California Kiwifruit Commission v. Moss*, *supra*, 96 Daily Journal D.A.R. at 5790, rejected the Commission's reference to legislative declarations expounding on the necessity of forced generic advertising to expand the Kiwifruit industry. The Court commented that legislative declarations are meaningless:

"A mere assertion that a regulation directly advances, or is necessary to advance, a governmental interest is insufficient to justify it; rather, a governmental body seeking to sustain a regulation on commercial speech must demonstrate that 'the harms it recites are real' and that its regulation 'will in fact alleviate them to a material degree.' [Citations]. Furthermore, where a law is subjected to a colorable First Amendment challenge, the difference afforded to legislative findings does not foreclose independent judicial review of the facts to assure that, in formulating its judgment, the legislative body has drawn reasonable inferences based on substantial evidence. [Citations]."

not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right [citation omitted]." *Id.* Thus, even assuming, *arguendo*, a benefit is conferred on respondents by the AMAA, it does not mean respondents surrender their First Amendment rights. Moreover, in contradistinction to USDA's press for more deference, *44 Liquormart, Inc.* shows that the Court is not leaning toward less scrutiny of government regulation impacting commercial speech, but instead toward stricter scrutiny.^{6,7}

C. Conclusion

USDA's failure to present evidence to sustain its burden under *Central Hudson*, the recent bills referenced by USDA and respondents, USDA's belated attempt on a motion for reconsideration in the Ninth Circuit to argue *Central Hudson* should not have been applied to the generic advertising

⁶See, e.g., *44 Liquormart, Inc.*, 96 D.A.R. at p. 5470 (Thomas J., concurring opin.) [Where government asserted interest is to manipulate choices in marketplace, regulation should be per se illegitimate]; (Scalia J., concurring opin. at p. 5469 [sharing J. Thomas's discomfort with *Central Hudson*, but case does not present wherewithal to declare *Central Hudson* wrong or wherewithal to say what ought to replace it]; (O'Connor J., concurring opin. at p. 5474) [Because state failed to establish reasonable fit between abridgement of speech and goal under less strict scrutiny that generally applies in commercial speech cases, Court need not question whether test employed since *Central Hudson* should be displaced].

⁷Justice Nicholson applied a strict scrutiny standard to the Kiwifruit forced generic advertising program. Justice Nicholson concluded that the issue before the court was not whether the Kiwifruit Commission could disseminate a particular message, but "whether the state may force a grower to accept and subsidize the Commission as his mouthpiece." Justice Nicholson found mandatory subsidization of the Kiwifruit Commission to be an infringement upon the grower's rights of freedom of association. *California Kiwifruit Commission v. Moss*, *supra*, 96 Daily Journal D.A.R. at 5786.

program, and the concurring opinions in *44 Liquormart Inc.*, 96 Daily Journal D.A.R. 5459 teaching that revisiting the propriety of *Central Hudson* should await a day when the issue is properly before the Court, weigh against review of this case.

For all the foregoing reasons and the reasons in respondents' opposition brief, the petition should be denied.

Dated: May 1996

Respectfully Submitted,

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

A. Introduction

Respondents respectfully file this supplemental brief pursuant to Supreme Court Rule 15.8 to call the Court's attention to *44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc. v. Rhode Island Liquor Stores Association*, 96 Daily Journal D.A.R. 5459, decided May 13, 1996. This recent case made determinations under the *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y.*,

447 U.S. 557 (1980) commercial speech rubric that are helpful to the disposition of the instant petition.

B. Regulation Of Commercial Speech To Manipulate Product Consumption Market-Wide Cannot Rely On Legislative Judgment; The Government Must Put Forth Evidence Which Demonstrates That The Regulation Sufficiently Directly Advances The Purported Aim

In *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. 5459, the Court reviewed Rhode Island's prohibition of retail price advertising which Rhode Island claimed was for the purpose of manipulating consumption of alcoholic beverages market-wide. Because Rhode Island did not produce evidence to support its claim that the regulation directly advanced its aim of reducing alcoholic beverage consumption, and the regulation was more extensive than necessary, the Court struck down the regulation under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y.*, 447 U.S. 557 (1980). *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at pp. 5464-5465

In striking down Rhode Island's prohibition of retail price advertising for alcoholic beverages, the Court began by reasoning that while generally the government must demonstrate that regulation impacting commercial speech advances the asserted interest "to a material degree," where the government suppresses truthful, nonmisleading information the government must bear a heavier burden and show that the regulation will "significantly" advance the purported aim. *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at p. 5464.

More important in context here, the Court underscored the need for evidence of direct advancement of the purported governmental aim of manipulation of product consumption. The Court noted that a prohibition against price advertising, like a collusive agreement among competitors,

will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market. *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at p. 5464. The Court also noted that demand, and thus consumption throughout the market, is somewhat lower when a higher noncompetitive price level prevails. *Id.*

However, the Court held that without any findings of fact, or indeed any evidentiary support at all, the Court could not agree that the price advertising ban would significantly reduce market-wide consumption of alcoholic beverages. *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at pp. 5464-5465. As a result, Rhode Island's regulation failed to directly advance the asserted interest in manipulating product consumption. *Id.*

The instant case is about an evidentiary hearing and an administrative record where the Department of Agriculture ("USDA") similarly failed to present any evidence to sustain its burden under *Central Hudson*, 447 U.S. 557. USDA failed to show that, under *Central Hudson*, 447 U.S. 557, its assessment funded generic advertising program (imposed only on California handlers of peaches and nectarines) both directly advanced the purported governmental aim and was sufficiently narrowly tailored to achieve this end.¹ See, App. to Pet. for Cert. p. 21a.

Even greater than Rhode Island's failure in *44 Liquormart, Inc.*, to present evidence showing the advertising ban would *significantly reduce* consumption of alcoholic beverages, here USDA failed to present any evidence that, under a lesser burden, its forced funded generic advertising

¹The Secretary imposes the generic advertising program under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. section 601 *et seq.* ("AMAA"), and the content of the generic advertising program is controlled by committees, consisting of respondents' competitors, appointed by the Secretary. See, Opp. to Pet. for Cert. p. 2.

program *materially increased* consumption of peaches and nectarines.² See, App. to Pet. for Cert. pp. 19a-22a. USDA also failed to demonstrate the program was narrowly tailored to achieve the desired objective. See, App. to Pet. for Cert. pp. 20a-21a. The decision in *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. 5459, supports the Ninth Circuit's determination to require USDA to substantiate direct material advancement of the purported aim of manipulating an increase in the consumption of the products.³

This is particularly true since the *44 Liquormart* Court rejected deferring to a legislative choice among means of

²USDA tried to make up for this by attaching a chart to its brief to the Ninth Circuit in an attempt to show that peach and nectarine production increased in the 1980s. See, App. to Pet. for Cert. p. 19a. The Ninth Circuit correctly pointed out that the chart provided no evidence as to causation—any increase may have been due to weather, cultivation techniques, or more likely the planting of additional trees. See, App. to Pet. for Cert. pp. 19a-20a.

³On May 20, 1996 a California Appellate Court ruled the California Kiwifruit generic advertising program unconstitutional as violative of the First Amendment. Similar to the Ninth Circuit's analysis in *Wileman Bros. & Elliott, Inc. v. Espy* (9th Cir. 1995) 50 F.3d 1367 and *Cal-Almond, Inc. v. U.S. Department of Agriculture* (9th Cir. 1993) 14 F.3d 429, the Court in *California Kiwifruit Commission v. Moss* (3rd Dist., May 20, 1996) 96 Daily Journal D.A.R. 5783, concluded that the Kiwifruit Commission had "presented no studies or evidence of any kind tending to show that the Commission's generic promotion... sells Kiwifruit more effectively than specific targeted marketing efforts of individual producers." *Id.*, at 5790. The court further found that "the Commission presented no evidence that individual promotion efforts are insufficient to advance the State's interests in expanding the Kiwifruit industry," and that the Commission's argument that the individual grower's advertising efforts were insufficient to advance the State's interests in expanding the Kiwifruit industry failed because the Commission presented no evidence that absent the compelled marketing program, growers could not/would not ban together voluntarily and use their combined resources to promote their Kiwifruit crops on a national and international level. *Id.*

achieving the governmental aim of manipulation of consumption of a product. In reliance on *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328, Rhode Island argued that because expert opinions as to effectiveness of price advertising "go both ways" the legislature made a reasonable choice when deciding to ban the advertising. The Court concluded that this argument failed because the analysis in *Posadas* was flawed. *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at p. 5465. The Court held that *Posadas* erroneously performed the First Amendment analysis when reasoning that because commercial speech concerns products and services that the government may freely regulate, greater deference must be afforded a legislative determination to regulate commercial speech to achieve the government's ends. *Id.*

USDA also has misplaced reliance on the existence of legislative judgments about the efficacy of USDA's regulations aimed at manipulation of product consumption. USDA argues in its petition that commercial speech enjoys only a limited measure of protection and therefore Congress should be afforded greater latitude in making regulations impacting commercial speech to achieve the governmental aim of manipulating product consumption. See, Pet. for Cert. p. 18.

Additionally, USDA filed a supplemental memorandum focusing on a bill signed into law on the day USDA's reply brief went to press—the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act) Pub. L. No. 104-127, 110 Stat. 888 (enacted April 4, 1996).⁴ USDA claims this bill underscores the importance of its Petition. See, Supp. Mem. For Petitioner p. 4.

⁴Respondents' Opposition to Petition for Writ of Certiorari noted that legislation was pending in both houses of Congress related to the Farm Bill. See, Opp. to Pet. for Cert. p. 14, n. 14.

Like the inability of Rhode Island's legislative judgment to prove that the regulation would directly advance the purported governmental aim of manipulation of product consumption in *44 Liquormart, Inc.*, 96 Daily Journal D.A.R. at p. 5465, any authority granted the Secretary of Agriculture under the AMAA or the recently enacted FAIR Act does not make up for the lack of evidence in the administrative record reviewed in this case.⁵

Finally, USDA argues in its petition and reply brief that respondents benefit from the AMAA and respondents have voluntarily chosen to market the products in question, therefore USDA's generic advertising program should be given deference. See, Pet. for Cert. p. 19; Reply Br. for Pet. p. 6. In *44 Liquormart Inc.*, 96 Daily Journal D.A.R. at p. 5466, the Court rejected this form of syllogism. The Court said that the state's licensing of liquor retailers did not change the First Amendment analysis of whether Rhode Island met the *Central Hudson* test. *Id.* The Court reasoned that "[e]ven though the government is under no obligation to provide a person, or the public, a particular benefit, it does

⁵The court in *California Kiwifruit Commission v. Moss*, *supra*, 96 Daily Journal D.A.R. at 5790, rejected the Commission's reference to legislative declarations expounding on the necessity of forced generic advertising to expand the Kiwifruit industry. The Court commented that legislative declarations are meaningless:

"A mere assertion that a regulation directly advances, or is necessary to advance, a governmental interest is insufficient to justify it; rather, a governmental body seeking to sustain a regulation on commercial speech must demonstrate that 'the harms it recites are real' and that its regulation 'will in fact alleviate them to a material degree.' [Citations]. Furthermore, where a law is subjected to a colorable First Amendment challenge, the difference afforded to legislative findings does not foreclose independent judicial review of the facts to assure that, in formulating its judgment, the legislative body has drawn reasonable inferences based on substantial evidence. [Citations]."

not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right [citation omitted]." *Id.* Thus, even assuming, *arguendo*, a benefit is conferred on respondents by the AMAA, it does not mean respondents surrender their First Amendment rights. Moreover, in contradistinction to USDA's press for more deference, *44 Liquormart, Inc.* shows that the Court is not leaning toward less scrutiny of government regulation impacting commercial speech, but instead toward stricter scrutiny.^{6,7}

C. Conclusion

USDA's failure to present evidence to sustain its burden under *Central Hudson*, the recent bills referenced by USDA and respondents, USDA's belated attempt on a motion for reconsideration in the Ninth Circuit to argue *Central Hudson* should not have been applied to the generic advertising

⁶See, e.g., *44 Liquormart, Inc.*, 96 D.A.R. at p. 5470 (Thomas J., concurring opin.) [Where government asserted interest is to manipulate choices in marketplace, regulation should be per se illegitimate]; (Scalia J., concurring opin. at p. 5469 [sharing J. Thomas's discomfort with *Central Hudson*, but case does not present wherewithal to declare *Central Hudson* wrong or wherewithal to say what ought to replace it]; (O'Connor J., concurring opin. at p. 5474) [Because state failed to establish reasonable fit between abridgement of speech and goal under less strict scrutiny that generally applies in commercial speech cases, Court need not question whether test employed since *Central Hudson* should be displaced].

⁷Justice Nicholson applied a strict scrutiny standard to the Kiwifruit forced generic advertising program. Justice Nicholson concluded that the issue before the court was not whether the Kiwifruit Commission could disseminate a particular message, but "whether the state may force a grower to accept and subsidize the Commission as his mouthpiece." Justice Nicholson found mandatory subsidization of the Kiwifruit Commission to be an infringement upon the grower's rights of freedom of association. *California Kiwifruit Commission v. Moss*, *supra*, 96 Daily Journal D.A.R. at 5786.

program, and the concurring opinions in *44 Liquormart Inc.*, 96 Daily Journal D.A.R. 5459 teaching that revisiting the propriety of *Central Hudson* should await a day when the issue is properly before the Court, weigh against review of this case.

For all the foregoing reasons and the reasons in respondents' opposition brief, the petition should be denied.

Dated: May 1996

Respectfully Submitted,

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FILED

APR 25 1996

In The
Supreme Court of the United States

October Term, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,

Petitioner,

vs.

WILEMAN BROS. & ELLIOTT, INC., *et al.*,

Respondents.

*On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit*

**BRIEF FOR AMICI CURIAE IN SUPPORT OF
RESPONDENTS' OPPOSITION TO THE UNITED
STATES SOLICITOR GENERAL'S PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities.

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This brief in opposition to the Petition for Writ of Certiorari filed by the Solicitor General of the United States on January 24, 1996 is presented on behalf of the undersigned with consent of all parties. *Amici Curiae* supports Respondents and respectfully requests this Court to deny the Petition for Writ of Certiorari.

INTEREST OF AMICI CURIAE

Cal-Almond, Inc., Gold Hills Nut Company, Inc., Central Valley Grower Packing, Hocker Nut Farm, Jardine Organic Ranch, Rotteveel Orchards, Frazier Nut Farms, Inc., Theron Shamgochian, Inc. dba Monte Cristo Packing Company, Beards Quality Nut Company, Amaretto Orchards and Bal Nut, Inc. are all almond handlers regulated by the Almond Marketing Order (7 C.F.R. § 981.1, *et seq.*) issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.*, and are required under the Act and the Order to pay assessments for mandatory promotion and advertising, similar to the mandatory advertising and promotion program presented on the Petition for Writ of Certiorari. These almond handlers are all currently challenging, and several have successfully challenged in the past, the Almond Marketing Order advertising and promotion program regulations and assessments. Cal-Almond successfully convinced the Ninth Circuit Court of Appeals to rule that the assessments for promotion and advertising violated the handlers' rights guaranteed under the First Amendment of the United States Constitution, in a case prominently cited by the Solicitor General in the case herein. *Cal-Almond, Inc., et al. v. United States Department of Agriculture*, 14 F.3d 429 (9th Cir. 1993).

Bidart Bros. is currently challenging the California Apple Commission advertising and promotion assessments. John I. Haas, Inc. is currently challenging the State of Washington Hop Commission advertising and promotion assessments. Duarte

Nursery, Inc. is currently challenging the California Grape Rootstock Improvement Commission assessments for grape rootstock research and the dissemination of that information. Matsui Nursery, Inc., Kohara Nursery, Inc., Figone Nursery and Fogbelt Growers are currently challenging the California Cut Flower Commission promotion and advertising assessments and program. Donald B. Mills, dba DBM Mushrooms is currently challenging the Federal Mushroom Promotion, Research and Consumer Information (7 U.S.C. § 6101, *et seq.*) assessments for advertising and promotion. David Moss, dba TJ Farms, is currently challenging the California Kiwifruit Commission assessment for promotion and advertising. Gallo Cattle Company is considering a challenge to the National Dairy Promotion Program (7 U.S.C. § 4501, *et seq.*) and the California Milk Advisory Board promotion and advertising program and assessments.

All *Amici Curiae* contend that the Ninth Circuit Court of Appeals decision in *Wileman Bros. & Elliott, Inc., et al. v. Espy*, 58 F.3d 1367 (9th Cir. 1995) was correctly decided by the Ninth Circuit and believe that the Government has failed to satisfy any of the *certiorari* criteria appearing in Supreme Court Rule 10.1. Many of the names of *Amici Curiae* were mentioned in Footnotes 21 and 22 of the Solicitor General's Petition for Writ of Certiorari. *Amici Curiae* offer this brief in support of the Respondents' Opposition to the Solicitor General's Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Government has failed to satisfy any of the *certiorari* criteria appearing in Supreme Court Rule 10.1.

USDA ordered Respondents to pay millions of dollars a year to a Board of their competitors to support a program of

advertising and promotion they bitterly opposed. The Ninth Circuit found this particular program violated Respondents' First Amendment rights to free speech. Reduced to its bare essentials this is a "give us your money and we'll speak for you, — whether you like it or not" — program.

First, the Ninth Circuit decision does not conflict with any decision of this Court. It has been settled since at least 1980 that commercial speech cases are subject to the four part analysis set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of NY*, 447 U.S. 557, 100 S. Ct. 2343, and most recently applied by this Court in its unanimous opinion, *Rubin v. Coors Brewing Co.*, ___ U.S. ___, 115 S. Ct. 1585 (1995). The only dispute in this case involves the third and fourth prongs of the *Central Hudson* test to the unique facts of this case, *i.e.*, whether the Government's mandatory assessments for promotion and advertising "directly advance" its asserted interest in expanding the consumption of peaches, plums and nectarines, and raising income to producers, and whether this program is narrowly tailored to achieve that goal.

Second, the Ninth Circuit correctly applied the analysis in *Central Hudson* in reaching the conclusion — and based upon substantial evidence — that the Government did not prove that the program and the assessments imposed for the same substantially advanced the governmental interest, and the Ninth Circuit correctly addressed whether the Government's program was narrowly tailored to achieve that governmental purpose, and held it did not.

Third, the Ninth Circuit Court of Appeals decision is not in conflict with the Third Circuit's decision in *United States v. Frame*, 885 F.2d 1119 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), as that case dealt with whether or not the Beef Promotion and Research Act of 1985 (7 U.S.C. § 2901 *et seq.*)

which imposes mandatory assessments on cattle producers and importers to finance a national beef promotion campaign, violated *Frame's* right of *free association*. The Third Circuit never analyzed the *Frame* case under *Central Hudson*, as the dissent in that case argued that it should, because the majority held that since it was applying the "free association" test (which is a more stringent standard than commercial speech), and since it found that *Frame's* freedom of association rights were not violated by the law, then the program could not, violate commercial free speech rights, as those rights receive less scrutiny than "free association" scrutiny. Moreover, the Court in *Frame* never addressed the *Central Hudson* prong requiring the Government to prove that the Program at issue substantially advances the governmental interest asserted, instead merely commenting that it was "designed" to serve that goal. *Id.* At 1133-34 and n. 12. The *Central Hudson* analysis requires the Court itself to determine whether or not the program substantially advances the governmental interests, not whether Congress (or an agency) *thought* that it would. *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792, 1798-1800 (1993).

Fourth, the Ninth Circuit has not decided a question of federal law that is of such importance that it should be settled by this Court. The Ninth Circuit decided this case on the merits of the evidence presented by the Government and the Respondents relating solely to whether or not the Government's program of mandatory assessments for peach, plum and nectarine advertisements substantially advanced the governmental goal of expanding consumption and raising producer revenue. The Ninth Circuit found that it did not — *as applied*. The Court limited its holding to the specific program before it (peaches, plums and nectarines), and to the evidence presented before USDA (handlers, like Respondents, must exhaust administrative remedies before the Secretary of Agriculture before resort to the District Court can be had, 7 U.S.C. § 608c(15)(A); *United States*

v. Ruzicka, 329 U.S. 287 (1946)). The Ninth Circuit ruling would not at all control (nor dictate the result of) any court with respect to any other agricultural industry that has a mandatory promotion and advertising program paid for with producer or handler assessments.

Thus, the Government has failed to satisfy any of the *certiorari* criteria appearing in Supreme Court Rule 10.1, and therefore the Petition for Writ of Certiorari should be denied.

ARGUMENT

I.

THE NINTH CIRCUIT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THE COURT, AND THEREFORE CERTIORARI IS NOT WARRANTED UNDER SUPREME COURT RULE 10.1(c).

Since at least 1980, when this Court decided *Central Hudson*, *supra*, the law has been clear that commercial speech cases are subject to a four part analysis.¹ The *Central Hudson*

1. Therein this Court stated:

"In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, *supra*, 447 U.S. at 566.

four part test has been applied in every one of this Court's commercial speech cases for the last decade.² The Government does not contend in its Petition that this four part test should be changed. Instead, the Government argues (Pet. pp. 15-16) that the *Central Hudson* test should not be applied to this type of commercial speech case. The Government claims that in this type of program there is no restriction on speech³, but merely compelled assessments for government commercial speech,⁴ but

2. See *Rubin v. Coors Brewing Co.*, ___ U.S. ___, 115 S. Ct. 1585 (1995); *Florida Bar v. Went-For-It, Inc.*, ___ U.S. ___, 115 S. Ct. 2371 (1995); *Ibanez v. Florida Dept. Of Business & Professional Regulations, etc.*, ___ U.S. ___, 114 S. Ct. 2084 (1994); *Edenfield v. Fane*, ___ U.S. ___, 113 S. Ct. 1792 (1993); *United States v. Edge Broadcasting Co.*, 509 U.S. ___, 113 S. Ct. 2696 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. ___, 113 S. Ct. 1505 (1993); *Board of Trustees of the State University of NY v. Fox*, 492 U.S. 469, 475, 109 S. Ct. 3028 (1989); *Posadas de Porto Rico Associates v. Tourism Co. Of Porto Rico*, 478 U.S. 328, 106 S. Ct. 2968 (1986).

3. This Court has long held that compelled contribution for others' speech is protected under the free speech clause as equally as restrictions on speech (*Aboud v. Detroit Board of Education*, 431 U.S. 209, 235-36 (1977); *Lehnert v. Ferris Faculty Assoc.*, ___ U.S. ___, 111 S. Ct. 1950 (1991)) and financial burdens imposed on speakers is also equally protected against (*Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, ___ U.S. ___, 112 S.Ct. 467, 508 (1991); *Forsyth County, Georgia v. The Nationalist Movement*, ___ U.S. ___, 112 S.Ct. 2395, 2404 (1992)).

4. The Solicitor General's argument (Pet. p. 16, n.9) that compelled contributions for commercial speech, while they might reduce Respondents' funds available for their own promotion and advertising "proves too much" because the same would be true whether the Board used them for advertising or other expenses and therefore does not raise a First Amendment issue, is disingenuous and not supported by any cases. Indeed the compelled contributions are specifically used for others' speech, and no First Amendment protection was sought by Respondents with respect to compelled assessments for nonspeech related expenditures. This Court recently held in *United States*

(Cont'd)

then argues (Pet. pp. 20-21) that even if *Hudson* applied, the Government program satisfied the four part test. The Government argues that the Ninth Circuit application of *Central Hudson* imposed too strict of a standard on the Government. However, this Court unanimously rejected exactly this same exception in *Rubin v. Coors Brewing Co.*, *supra*, 115 S.Ct. at 1589 n.2.

The Solicitor General also argues that Congress should be afforded greater latitude in this type of case (Pet. p. 18). Again, this Court denounced a similar argument in *Coors Brewing Co.*, *supra*, 115 S.Ct. at 1589-90 n.2, wherein the Government argued that the legislature should have broader latitude to "regulate speech that promote socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech." The Court rejected any argument to relax the *Central Hudson* standard. *Id.*

Thus, the commercial speech test used by the Ninth Circuit is not in conflict with any decision of this Court, and *certiorari* is not warranted under Supreme Court Rule 10.1(c).

Moreover, the Ninth Circuit's application of the four-part *Central Hudson* test to the particular facts of this case does not conflict with any decision of this Court. Particularly, the Solicitor General argues (Pet. p. 20) that the Ninth Circuit erred when applying the second part of the test, by requiring the Government to "demonstrate that the generic advertising

(Cont'd)

v. National Treasury Employees Union, ___ U.S. ___, 115 S. Ct. 1003 (1995) that a federal statute prohibiting the receipt of honoraria by Government employees for giving speeches or writing violated their First Amendment rights, despite the fact the employees were not "prohibited" from speaking; "... its prohibition on compensation unquestionably imposes a significant burden on expressive activity. [citation omitted.]" *Id.* at 1014. See also, footnote 3, *supra*.

program is better at increasing consumption than individualized advertising.' " However, the Ninth Circuit did nothing more than correctly apply the second prong of the *Central Hudson* test, as more directly dealt with by this Court in *Edenfield v. Fane*, *supra*, which held that the Government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*, 113 S.Ct. at 1800. Later, this Court in *Ibanez v. Florida Dept. Of Business & Professional Regulation etc.*, *supra*, 114 S.Ct. 2084 at 2089 held that it would not adopt "unsupported assertions" by the Government.

This Court one year later in the *Coors Brewing Co.* Case, applied its "*Edenfield*" scrutiny to this prong of *Hudson* in deciding that the Government had not satisfied its burden of proving that the regulations would curb "strength wars." *Id.*, 115 S. Ct. At 1592.

The Ninth Circuit's application in this case did nothing more than apply this Court's long settled commercial speech jurisprudence, by requiring the Government to prove that if its going to compel the payment of the Respondents' assessment to finance *others'* advertising and promotion, it must show that it can do a better job with that money than the handlers can do in promoting their product in their own targeted markets. After all, if the Government cannot prove that it can perform a better job promoting peaches, plums and nectarines than the individual handlers who do have a financial incentive to promote their product, the regulations do not "substantially advance" the governmental interest, — a mere statement of the obvious. The Ninth Circuit merely applied the evidence to the *Central Hudson* test and the First Amendment prevailed. Thus, the Ninth Circuit decision does not conflict with any decision of this Court. This

Court's string of commercial speech cases from *Central Hudson* forward through *Coors Brewing Co.* and *Florida Bar v. Went-For-It*, makes clear that the commercial speech test is a real life inquiry not merely one of congressional "belief." See, e.g., *United States v. Edge Broadcasting Co.*, *supra*, 509 U.S. ___, 113 S. Ct. 2696; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. ___, 113 S. Ct. 1505. The Ninth Circuit's conclusion is evidentiary in nature and clearly not in conflict with any decision of this Court. Therefore *certiorari* is not warranted.

II.

THE NINTH CIRCUIT DECISION IS NOT IN CONFLICT WITH THE THIRD CIRCUIT COURT OF APPEALS.

The Solicitor General argues that the Third Circuit's holding in *United States v. Frame*, *supra*, 885 F.2d 1119 (3rd Cir. 1989) would have upheld the generic advertising program that the Ninth Circuit struck down in the present case (Pet. pp. 21-22), but the Third Circuit made no such holding. In that case, there was a First Amendment challenge to the provisions of the Beef Promotion and Research Act of 1985 (7 U.S.C. § 2901 *et seq.*) that imposed mandatory assessments on cattle producers and importers to finance a national beef promotion campaign. In that case, the Third Circuit applied the free association test as this Court enunciated in *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244 (1984), which required the Government to demonstrate that the act was adopted to serve a compelling state interest, that was ideologically neutral, and that could not be achieved through means significantly less restrictive of free speech or associational freedoms. *Frame* at 1134. The *Frame* court looked specifically to the facts of the case and the weak objections made by *Frame* to the program.⁵

5. *Frame* was a cattle auctioneer who was required to collect the one
(Cont'd)

The Third Circuit analyzed the economic decay of the beef industry, the program was intended to prevent the collapse of a vital sector of the national economy (*Frame* at 1134-35), and determined that there was a compelling governmental interest for the program. *Frame* at 1134-35. The Court then determined that the program was ideologically neutral, as the Beef Board only sought to bolster the image of beef. (*Frame* at 1135) The Court also found that the degree of infringement on *Frame's* First Amendment right "appears slight." *Frame* at 1135-36. The Court also noted that *Frame* "has failed to characterize his objection to the advertisements in a manner that would allow a reviewing court to reasonably infer a dispute over anything more than mere strategy." *Frame* at 1136-37.

The *Frame* Court concluded: "In conclusion, although we find that the Beef Promotion Act implicates the First Amendment rights of those obligated to participate, we hold that the Government has enacted this legislation in furtherance of an ideologically neutral compelling state interest, and has drafted the Act in a way that infringes on the contributors' rights no more than necessary to achieve the stated goal." *Frame* at 1137.

The *Frame* decision is not at odds with the Ninth Circuit's case sought to be reviewed here. The Court did not analyze the case under the *Central Hudson* test (except for a brief passing in footnote 12 of the opinion, *Frame* at 1134). The *Frame* Court never analyzed whether the program substantially advanced that governmental interest, as opposed to merely stating that the Act was "carefully designed to serve that goal." (*Frame* at 1134, n. 12)

(Cont'd)

dollar per head of cattle sold and pay it to the Board. Unlike the facts in the Ninth Circuit case (*Wileman, supra* at 1377-1380), *Frame* was not promoting his product (cattle) nor did he offer evidence the program was ineffective or that he could do a better job with the money promoting the product.

Since the *Frame* case and the Ninth Circuit case can be read in harmony, certiorari is not warranted under Supreme Court Rule 10.1(b).

III.

THE NINTH CIRCUIT HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The Ninth Circuit has not decided an important question of federal law which has not been, but should be decided by this Court, and therefore certiorari is not warranted under Supreme Court Rule 10.1(c). As discussed above, the four part analysis to be applied in commercial speech cases has been firmly settled since at least 1980 and unquestionably remains viable to day. (*See* footnote 2, *supra*).

The federal judiciary needs no Supreme Court guidance on this well settled test. That the "directly advances" test requires more than a "reasonable belief" by Congress is a founding axiom in this Court's last decade of commercial speech cases and is conclusively resolved by *Edenfield*, *Coors Brewing Co.*, and *Ibanez, supra*.

The Ninth Circuit's decision is extremely narrow and does not present an important question of federal law which should be decided by this Court. The decision invalidates the Government's *past* nectarine, peach and plum marketing order assessments for promotion and advertising of those commodities. It was *not* a *facial* challenge decision. It does not preclude the respective boards and the Secretary of Agriculture to impose the assessments again, nor would it preclude the Government in the future from proving that the program does

substantially advance the governmental interest. It further allows the Board to have provisions allowing handlers to receive credit for their own promotional expenditures to insure the program is narrowly tailored. After all if the "interest" the Government asserts is to expand consumption and increase industry revenues, for the Government to mandate payment to it for such promotion (speaking) *Central Hudson* merely requires the Government to prove the unremarkable task that it can do it better than those in the business who have the financial incentive to sell as much as they can at the best possible price. "The First Amendment mandates that we presume that speakers, not the Government, know best both what they want to say and how to say it." *Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 790-91 (1988). The Government can point to nothing that would indicate "voluntary" speech by those with an incentive to speak, i.e., handlers in the business to make money for themselves and their producers, would not accomplish the same "interest" and *do it* better. Furthermore, the ability of producers to voluntarily associate with each other through cooperatives to promote world class brand names such as Sunkist, Ocean Spray and Sun Maid is in no way implicated by the Ninth Circuit decision.

The Ninth Circuit decision is not binding on any other governmental mandatory promotion and advertising program, whether it be a federal program or a state program — as the federal or state government, respectively, can make a showing that other agricultural programs meet the *Central Hudson* test applied by the Ninth Circuit here. All other federal promotion and advertising programs, and state promotion and advertising programs remain in full force and effect, and can be defended by the respective governments when and if other challenges are made. In addition, most of those regulated would be unable to mount any credible challenge to the programs if they do not promote or advertise the products themselves. Many of these

programs are producer funded programs, with the producers not in the business of marketing the product, and the producers therefore are not funding their own expenditures for their own promotional and advertising programs. Thus, despite the doom and gloom painted by the Solicitor General as to how many programs are affected by these decisions, any challenge would only be successful if the Government program is ineffective, or not more effective than what an individual handler or producer could do on their own if left with his or her money to do it in their own targeted markets.

The Solicitor General's statement (Pet. p. 27) that the Ninth Circuit's decision "would apparently invalidate the operation in that circuit of many of the statutorily created generic promotion programs funded by mandatory assessments" is not borne out by the test used by the Ninth Circuit, and perhaps is just an admission by the Solicitor General's office that the Government cannot prove that these programs are effective, i.e., they do not "substantially advance" the Government's asserted interest in orderly marketing, increasing consumption and producer returns.

The Solicitor General's statements (Pet. p. 27) that: "The Ninth Circuit did not base its decision in this case on any features peculiar to the programs at issue here," is meritless, because not only did the Ninth Circuit specifically base its decision on the facts peculiar to the peach, plum and nectarine promotion program (*Wileman* at 1377), but the case it relied upon, *Cal-Almond, Inc., et al. v. United States Department of Agriculture*, *supra*, 14 F.3d 429 (9th Cir. 1993) did as well. (*Id.* at 437-439). These were particular decisions rendered with respect to the particular industries of peaches, plums, nectarines and almonds, and based upon the evidence adduced at the hearings before the Secretary of the United States Department of Agriculture. They were both "as applied" challenges, not only as to the

"substantially advanced" prong but the "reasonable fit" prong.⁶

Based upon all of the above, certiorari is not warranted under Supreme Court Rule 10.1(c).

6. As the *Wileman* Court stated: "The complexity of the legal issues in this case have been matched by their prolixity." *Wileman* at 1373. (And see full discussion at 1377-80 revealing how fact intensive the inquiry was including the fact the ALJ's first decision was 400 pages and the second was 369 pages, *id.* at 1373.) See also the same type of discussion in *Cal-Almond*, *supra* at 437-440 and accompanying footnotes.

CONCLUSION

This case does not meet any of the certiorari criteria set forth in Supreme Court Rule 10.1. The Ninth Circuit's decision represents application of well settled commercial speech principles to a particular factual situation, in a manner entirely consistent with every decision of this Court. Review of this particular case by the Supreme Court would not materially advance commercial speech law. There are no compelling legal or factual issues. The Ninth Circuit's decision does not fill a gap in the law or extend existing law. Further, the Ninth Circuit decision is not in conflict with the Third Circuit's decision in *United States v. Frame*.

Further, this Court has already entertained numerous commercial speech cases since 1993 (*see footnote 2, supra*). The Petition should be denied.

Respectfully submitted,

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Dated: March 25, 1996

MOTION FILED

MAR 21 1996

No. 95-1184

(4)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER,

v.

WILEMAN BROS & ELLIOTT, INC., ET AL.
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE
AND BRIEF OF AMICI CURIAE IN SUPPORT OF
THE U.S. SOLICITOR GENERAL'S
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**MOTION FOR LEAVE TO FILE
BRIEF OF AMICI CURIAE**

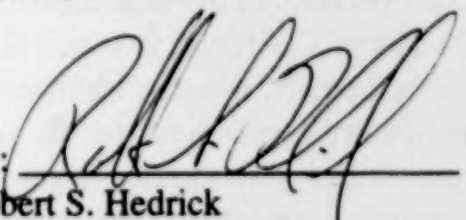
The Amici (set forth individually in Appendix A) hereby respectfully move for leave to file the attached brief of Amici Curiae. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondents was requested but has not been given.

The interest of the Amici in this case arises from the fact that they are individual producers and agricultural groups who support commodity promotion and research programs. Some are commodity promotion and research programs themselves, including several currently involved as parties to cases pending in the U.S. District Court for the Eastern District of California in which the same issue is before the Court, namely, whether statutorily created programs using mandatory assessments for the generic promotion of agricultural commodities impermissibly infringe on the First Amendment rights of producers. Bidart Bros. v. California Apple Comm'n., No. CV-F-94-6018-OWW (E.D. Cal.); Duarte Nursery, Inc. v. California Grape Rootstock Improvement Comm'n., No. CV-F-95-5428-OWW (E.D. Cal.); Matsui Nursery, Inc. v. California Cut Flower Comm'n., No. CV-S-96-102 EJG (E.D. Cal.). One entity among the Amici is currently a party to a case in California state court in which identical issues have been raised. California Kiwifruit Comm'n. v. Moss, No. C018368 (3d Dist. Cal.App.).

In the instant case in the Court of Appeals, the arguments focused primarily on the proper application of the test articulated in Central Hudson Gas & Electric Corp. v. Public Service Comm'n., 447 U.S. 557 (1980). Further, the

discussion in the Court below was limited to commodity promotion and research programs created under federal law. The Amici believe that the brief they are requesting permission to file will assist the Court by calling into question the applicability of the Central Hudson standard at all, and through presentation of information regarding the breadth and importance of these programs operating under both state and federal law, and how their operations are being impacted by the Ninth Circuit's decision in the instant case. The Amici believe this will assist the Court in seeing the national importance and commensurate need for Supreme Court review in this matter.

Dated: March 22, 1996 Respectfully Submitted,
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This brief in support of the Petition for a Writ of Certiorari filed by the Solicitor General of the United States on January 24, 1996, is respectfully presented on behalf of the Amici.

I. SUMMARY OF ARGUMENT

The Ninth Circuit incorrectly relied upon the standard set forth in Central Hudson Gas and Electric Corp. v. Public Service Comm'n. of New York, 447 U.S. 557 (1980) in declaring the federal peach and nectarine programs at issue in Wileman Bros. & Elliott, Inc., et al. v. Espy, 58 F.3d 1367 (9th Cir. 1995) ("Wileman") to be unconstitutional. Further, even if the Central Hudson test was somehow appropriate, it was misapplied through the use of a comparative efficacy analysis to determine whether the programs "directly advance" the governmental interest.

The Amici write to emphasize the devastating impact of the Ninth Circuit's First Amendment analysis on agricultural commodity promotion and research programs throughout the United States. If not reversed, this standard has the potential to end all programs under both federal and state law in the Ninth Circuit. The decision will also imperil all national federal programs which authorize assessments for commodities produced in the Ninth Circuit and leave unreasonable uncertainty and confusion in the nation's agricultural industry for many years to come.

The Ninth Circuit's error was caused by a fundamental misunderstanding of the governmental purpose underlying agricultural commodity promotion and research programs. There is clear legislative intent establishing that these programs are authorized to generate industry-wide benefits rather than measurable gain to any specific individual. The failure of the Ninth Circuit to recognize and give appropriate deference to the correct governmental interest results in the articulation of a "standard" that exacerbates the uncertainty left in the wake of its earlier decision in Cal-Almond, Inc. v. USDA, 14 F.3d 429 (9th Cir. 1993) ("Cal-Almond I"). Specifically, the Wileman holding:

- disregards the governmental nature of commodity promotion and research programs and the fact that governmental speech does not implicate First Amendment freedoms.

- is at odds with 40 years of U.S. Supreme Court jurisprudence concerning the compelled support aspects of union or agency shop agreements.

- creates questions regarding the application of the strict scrutiny standard as articulated in Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

- is founded on a use of the intermediate test from Central Hudson for a purpose quite different from that for which the test was developed.

- relies on an application of the Central Hudson test which is wholly inconsistent with any analysis ever utilized by this Court.

- results in the creation of an impossibly stringent standard with no legal or policy justification.

- leaves commodity promotion and research programs, including the Amici, unreasonably exposed to continuing costly litigation by failing to clearly articulate an appropriate standard.

Finally, there is in the wake of the Wileman decision considerable legal confusion over what question was asked and what was answered. In the union or agency shop context this Court has dealt differently with challenges to the facial validity of compelled financial support, as such, and claims based on specific activities funded by mandatory assessments. Exactly which situation is at issue here is not clear. The Amici believe only this Court can resolve this uncertainty by articulating a clear distinction between the "facial" type challenge to compelled financial support, without more, and the "as applied" claims based on the use of mandatory assessments for specific activities.

II. INTRODUCTION/INTEREST OF THE AMICI

The Amici are mandatory agricultural commodity promotion and research programs ("Program Amici") operating under state law throughout the United States, members of the California tree fruit industry, including peach and nectarine growers, who are directly affected by the decision in Wileman, members of the California almond industry who are directly affected by the decisions in Cal-Almond I and Cal-Almond, Inc. v. USDA, 67 F.3d 874 (9th Cir.

1995) ("Cal-Almond II")¹ and numerous agricultural groups which support the continued existence of these programs². There are today more than 250 commodity promotion and research programs operating under state law in the United States. O. D. Forker and R. W. Ward, Commodity Advertising: The Economics and Measurement of Generic Programs, 183, Lexington Books (1993).

These programs have combined budgets of approximately \$500 million. In California alone, the total "farm-gate" value of commodities investing in these programs exceeds \$12 billion. In Washington, commodities covered by state programs represent more than \$4 billion in farm-gate value. Nationally, it has been estimated that the farm revenue derived from commodities covered by research and promotion programs is in excess of \$100 billion. H. W. Kinnucan, Economics of Mandated Commodity Promotion Programs: An Overview and Guide to the Literature, 2 (1995).

While the specific structures of the numerous programs operating in the various states differ slightly and may be distinguishable in some aspects from their federal counterparts, they are all patterned after programs like the federal marketing orders at issue in the instant case. Accordingly, as set forth in detail below, all of the Program Amici are currently subject to significant adverse impacts resulting directly from the Ninth Circuit's decision in Wileman.

Like the federal programs at issue in Wileman, the Program Amici rely on mandatory assessments and operate under authority granted by the legislative branch of their respective state governments. They are not implemented, however, until approved by a vote of those

¹ The original 1993 Cal-Almond Ninth Circuit opinion dealt with the First Amendment issues. The 1995 Cal-Almond II case dealt with the remedies required by the first decision after remand to the District Court. Cal-Almond II held that the assessments for generic advertising, like those imposed in Wileman, must be refunded to those whose First Amendment rights were violated. Cal-Almond II was decided on October 10, 1995. A request for rehearing before the panel and a suggestion for hearing en banc, filed by Cal-Almond, Inc. and the other Plaintiffs-Appellees was denied on February 20, 1996. A final judgement has not yet been entered in the case which has so far involved the two appeals.

² A complete list of the Amici is set forth in Appendix A.

who will be subject to the assessments. They exist at the sufferance of those who implemented them and may be voted out of existence at regularly scheduled referenda or a vote held upon a petition from producers³.

Also similar to the programs at issue in Wileman is the idea of producer management with governmental supervision. Typically, producers make up the program Board of Directors and guide its policies. Members of these policy making boards are generally either elected by those within the industry or nominated by industry members for appointment by the United States Secretary of Agriculture or by the head of the relevant state's department of agriculture.

The authority of the industry board is however, subject to significant governmental oversight. Typical statutory schemes authorizing these programs require budgets to be approved by government officials. It is also common to require statements of contemplated activities or planned actions to be submitted to the government officer overseeing the program for approval as well.

In addition to governmental review of future actions, these programs are generally subject to cease and desist orders to halt acts which are beyond program authority or contrary to the public interest. This authority generally also allows government officials to remove any member of the governing board or to demand termination of program employees under specified conditions.

The intent of the Congress and various state Legislatures enacting the laws authorizing these programs provides yet another similarity between the Program Amici and those marketing orders at issue in Wileman. In enacting the Agricultural Marketing Adjustment Act of 1937 (7 U.S.C. § 601, et seq.) Congress declared these programs to be necessary to prevent:

... (D)isruption of the orderly exchange of commodities in interstate commerce (which) impairs the purchasing power of

³ Although most programs directly affect producers, some impact handlers, processors or shippers. Throughout this brief those subject to these programs are referred to simply as "producers."

farmers and destroys the value of agricultural assets which support the national credit structure 7 U.S.C. § 601.

This sentiment has been echoed by states across the nation. For example, the California Legislature, also in 1937, pointed to a need for state programs such as the Amici to alleviate conditions which "result in an unreasonable and unnecessary economic waste of the agricultural wealth of this state" and "prevent producers from retaining a fair return from their labor, their farms and the commodities which they produce." California Food and Agricultural Code Section 58651. California underscored this intent and reaffirmed the need for these programs last year with the adoption of Assembly Bill 1563 (Stats. 1995, c. 727) which reads in part:

(These programs) (a)re now more necessary and valuable than ever before as a result of declining support from the federal government and the increasing competition attributable to the global market place. California Food and Agricultural Code Section 63901(e).

The Washington State Legislature cited similar concerns in adopting that state's Agricultural Enabling Act of 1961 declaring that the programs were necessary to:

. . . (P)rovide methods and means . . . for the maintenance of present markets and for the development of new or larger markets, both domestic and foreign, for agricultural commodities produced within this state and for the prevention, modification or elimination of trade barriers which obstruct the free flow of such agricultural commodities to market; . . . (and) eliminate or reduce economic waste in the marketing and/or use of agricultural commodities; . . . (and) restore and maintain adequate purchasing power for the agricultural producers of this state Washington Revised Code Section 15.65.040.

The Program Amici are also similar to the programs at issue in Wileman in their use of the funds collected. Promotional activities typically account for the bulk of the money spent with lesser amounts going to production and market research and producer relations.

Although the amounts vary greatly from program to program reflecting specific industry needs, it is not unusual to see promotional activities comprising 65-75 percent of program expenditures. Kinnucan, *supra*, 2. It is precisely because the producers directing these programs have identified promotion as their industries' greatest need that the Amici are extremely concerned by the Ninth Circuit's decision in Wileman.

In addition to programs operating under state law and federal marketing orders like those at issue in Wileman, several commodity groups operate national promotion programs established under commodity-specific federal legislation. Commodities with active national programs include dairy, beef, soybeans, pork, cotton, potatoes, eggs, sheep, honey and watermelons, as well as mushrooms, pecans and limes. See United States v. Frame, 885 F.2d 1119 at 1122 (3d Cir. 1989). These national programs operate through mandatory assessments specific to each individual commodity.

Each of these national commodity programs has a nexus in California where all of these commodities are produced. Therefore, a decision by the Ninth Circuit necessarily impacts all of these national marketing orders. This underscores the fact that the potential impact of both the Cal-Almond I and the Wileman decisions is national in scope. These decisions could cause the dismantling of the advertising programs under all federal marketing orders, federal free-standing legislation and many state enacted programs.

In the California peach and nectarine industries directly affected by the programs at issue in the instant case, most producers do not market their own fruit to the consumer. If the generic advertising program is done away with, these producers will be without adequate resources to increase consumer awareness and consumption of their product. In the almond industry, only the largest producers with established brands would have the resources necessary to promote their products on a national scale.

In studies and tests concerning the demand for almonds, which included information on advertising expenditures, it has been determined that advertising has had a significant positive impact on the demand (and price) for California almonds. It has been estimated that annual marginal rates and returns related to almond

advertising were generally well over three hundred percent (300%).⁴ As demand increases, more acres are planted leading to an overall rise in productivity, thus creating the stability that is one of the stated goals of the Agricultural Adjustment Act of 1937. (7 U.S.C. § 601, et seq.)

Agricultural commodity promotion and research programs across the country have proven to be very effective in raising consumption and stabilizing prices through increased public awareness. These programs have met the stated goals of the authorizing legislation, and should not be dismantled by the erroneous application of the Ninth Circuit's overly restrictive Cal-Almond I and Wileman standard.

III. ARGUMENT

The Amici believe the Wileman decision rests in large part on the Ninth Circuit's misconception of the governmental interest underlying commodity promotion and research programs. The Ninth Circuit appears to have based its decision on a belief that the government's purpose was to produce a measurable benefit to a specific individual. A careful reading of the statutes reveals an intent to confer benefit on an industry-wide, rather than individual, scale.

The State of California has specifically declared that commodity promotion and research programs operating under that state's laws are "intended to provide benefit to the entire industry." California Food and Agricultural Code Section 63901(c). Washington has set forth similar intent in authorizing creation of the Washington Apple Commission "because the stabilizing of the apple industry" was necessary to accomplish the Legislature's goals. Washington Revised Code Section 15.24.900(6).

The Ninth Circuit's fundamental misunderstanding of the governmental interest to be advanced by these programs resulted in a misapplication of the Central Hudson standard. The result is an unclear decision which is inherently flawed in the following respects:

⁴ Statement of Jason E. Christian, Professor Ag Economics, U.C. Davis; Reprinted in Kinnucan, *supra*, 828.

1. The holding does not provide any finality to the question of a program's constitutionality. Obviously, under the "test" articulated in Wileman, a program may find itself constitutional as to one grower and at the same time unconstitutional as to another. Similarly, a program may be valid one year and invalid the next due entirely to market forces beyond anyone's control.

2. The holding provides no guidance to the volunteer directors of these programs as to how to conduct themselves to avoid impermissible constitutional infringement. Under the Ninth Circuit approach, the constitutional validity of a program appears to turn as much on the marketing skills, or imagination, of the challenger as on any attribute of the challenged program.

3. The holding may have eliminated the ability for growers to create new programs or affect significant changes to existing ones. A new program obviously has no track record or established history of efficacy which can be compared to the efforts of a challenger. Accordingly, application of the Wileman "test" could make it impossible to create any new programs. Similarly, it is unclear whether an existing program making substantial changes to better serve its producers would be able to rely on its history of effectiveness, or would instead, be treated as a new program. See In Re: Cal-Almond, Inc., et al., 94 AMA Docket No. F&V 981-1, Decision and Order, filed June 15, 1995.

The flaws inherent in the Ninth Circuit decision leave significant unanswered questions and create unreasonable uncertainty. This situation has a chilling effect on these vital programs. Many boards of directors are now apprehensive of making adjustments to their programs in response to changing market conditions and industry needs for fear of finding themselves without a sufficient history of effectiveness.

Further, challengers have used the Wileman holding to obtain preliminary injunctions creating escrow accounts into which their assessments are paid pending final adjudication. This loss of funding can have a crippling effect and severely hampers the program's ability to continue implementation of efficacious activities on behalf of producers. This "death by inches" all occurs before any final adjudication on the merits. See e.g., Bidart Bros. v. California Apple

Comm'n., No. CV-F-94-6018-OWW, Slip Op. at 14 (E.D. Cal., Dec. 1, 1994).

Potential challengers view the decision of the Ninth Circuit as creating a virtually impossible standard and have declared open season on these programs. As the Solicitor General points out (Petition at 21 and 29), challenges to state and federal programs are pending across the country. Further, in a recently published law review article, counsel for many program challengers declares that more litigation should be expected. The article goes so far as to state that "challenges are likely with respect to milk, artichokes, cut flowers and nursery plants." B. Leighton, The Socialization of Agricultural Advertising: What Perestroika Didn't Do the First Amendment Will, 5 S.J. Agri. L. Rev. 49, 51-52, fn. 19. As noted by the Solicitor General (Petition at 29, fn. 22) the threat to cut flowers has become reality. Matsui Nursery Inc., et al. v. California Cut Flower Comm'n., No. CV-S-96-102 EJG (E.D. Cal. filed January 17, 1996.)

The Amici are in agreement with the Solicitor General's assertion that the correct standard to be applied in analyzing these programs is that found in Abood v. Detroit Board of Education, 431 U.S. 209 (1977) and Keller v. State Bar of California, 496 U.S. 1 (1990). The Amici believe however, that there is in fact a two-step test set forth in those cases.

The line of cases descending from Railway Employees' Dept. v. Hanson, supra, 351 U.S. 225 (1956) and Lathrop v. Donohue, 367 U.S. 820 (1961) teaches that before resort is had to the "chargeable activities" test set forth by the Solicitor General (Petition at 18) the Court must first determine the validity of compelled financial support as such. Hanson, supra, 351 U.S. at 238; see also Ellis v. Railway Clerks, 466 U.S. 435, 439 (1984) ("(Petitioners) do not contest the validity of the union shop as such, nor could they (citing Hanson). They do contend, however, that they can be compelled to contribute no more than their pro rata share of the expenses of negotiating agreements and settling grievances ..."); Chicago Teachers Union v. Hudson, 475 U.S. 292, 294 (1986); Keller v. State Bar of California, supra, 496 U.S. at 8-9; Lehnert v. Ferris Faculty Ass'n., 500 U.S. 507, 516-517 (1991).

The initial test for the validity of compelled financial support, as

such, has been identified as requiring only that the regulation be "rational." Roberts v. U.S. Jaycees, supra, 468 U.S. 609, 637-638 (1984) (O'Connor, J., concurring in part and concurring in the judgment). However, the Amici believe that the "Hanson test" as applied in Keller requires that the regulation in question be a relevant and appropriate legislative response to a substantial governmental interest. Hanson, supra, 351 U.S. at 233-234 and Keller, supra, 496 U.S. at 8-9. Accordingly, the Amici believe this is the standard by which the concept of compelled financial support of agricultural commodity promotion and research programs, as such, should be judged.

IV. CONCLUSION


The uncertainty created by the Wileman decision and the multiplicity of lawsuits that it encourages will unnecessarily subject the Amici to unreasonable legal costs to defend against repeated claims. The situation will also divert producer dollars from the statutory mandate of these programs by tying them up in pre-judgment escrow accounts to the point that the programs and the will of a majority within the industry will be hamstrung by a vocal minority. The Wileman approach will encourage vexatious claims and dilatory tactics as challengers attempt to limit the effectiveness of the programs and theoretically strengthen their arguments.

For all of the reasons set forth herein, the Amici respectfully, and strenuously, recommend that the Court grant the U.S. Solicitor General's Petition for a Writ of Certiorari.

Dated: March 22, 1996

Respectfully Submitted,

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APPENDIX A

American Mushroom Institute
 California Alfalfa Seed Advisory Board
 California Apple Commission
 California Asparagus Commission
 California Artichoke Advisory Board
 California Avocado Commission
 California Cantalope Advisory Board
 California Celery Advisory Board
 California Cherry Advisory Board
 California Cling Peach Advisory Board
 California Cut Flower Commission
 California Date Commission
 California Dry Bean Advisory Board
 California Egg Commission
 California Forest Products Commission
 California Fresh Carrot Advisory Board
 California Grape and Treefruit League
 California Grape Rootstock Improvement Commission
 California Kiwifruit Commission
 California Melon Research Board
 California Pear Advisory Board
 California Pepper Commission
 California Pistachio Commission
 California Plum Marketing Board
 California Potato Research Board
 California Strawberry Commission
 California Table Grape Commission
 California Tomato Advisory Board
 California Walnut Commission
 California Wheat Commission
 Tony Campos
 Campos Bros. Farms
 Ken Cunningham
 Harris Woolf California Almonds
 Hughson Nut Marketing

Idaho Potato Commission
 International Apple Institute
 Lodi-Woodbridge Winegrape Commission
 National Potato Council
 North American Blueberry Council
 Panoche Creek Farms
 Paramount Farms
 Pennsylvania Apple Marketing Program
 Ned Ryan
 Ryan Perreira Almond Co.
 Virginia Apple Growers Association
 Washington Apple Commission
 Washington Potato Commission

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No. 95-1184

Supreme Court, U.S.

FILED

MAR 21 1996

CLERK

In The
Supreme Court of the United States

October Term, 1995

—◆—
DANIEL R. GLICKMAN,
SECRETARY OF AGRICULTURE,

Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.,

Respondents.

—◆—
On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit
—◆—

BRIEF OF AMICI CURIAE OF THE ATTORNEYS
GENERAL OF THE STATES OF ARIZONA,
CALIFORNIA, FLORIDA, GEORGIA, MICHIGAN,
NEBRASKA, NEW JERSEY, OREGON, VERMONT,
VIRGINIA, AND WASHINGTON IN SUPPORT OF
THE U.S. SOLICITOR GENERAL'S PETITION
FOR WRIT OF CERTIORARI
—◆—

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INTEREST OF AMICI

The States of Arizona, California, Florida, Georgia, Michigan, Oregon, Vermont, Virginia and Washington, through their Attorneys General, submit this *amicus curiae* brief in support of the United States' petition for *certiorari* to review the Ninth Circuit decision in *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (1995). The Ninth Circuit invalidated a federal marketing order provision that authorizes the use of mandatory assessments on the sale of peaches, plums, and nectarines for the purpose of conducting generic advertising and promotion of those crops.

Amici have vital interests in this matter because they have adopted marketing acts generally modelled after the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), on which this case turned, including the use of mandatory assessments for generic promotion of the covered agricultural commodity.¹ The success of these programs is vitally important to the economic health of amici states.

Arizona, which has a \$6.3 billion industry, has three agricultural marketing programs. These programs have a combined annual budget of approximately \$613,600, including \$362,000 which is spent on advertising and promotional activities.

California has over 20 billion dollars in farm receipts from sale of agricultural commodities. It has 36 marketing

¹ See, e.g., statutes cited in footnote 19 of the Secretary of Agriculture's petition.

programs,² which in the aggregate last year spent \$135 million. One hundred and two million dollars of the combined budgets was spent on generic advertising and education.

The estimated size of *Georgia's* agricultural economy in farm gate receipts is \$5 billion dollars. It has eleven agricultural commodity commissions. The commissions combined budgets total almost six million dollars, of which approximately \$2,500,000 is spent for promotion.

Agriculture in the state of *Michigan* is a \$37 billion industry. In 1994, the total cash receipts for all livestock crops and livestock products totaled nearly \$3.41 billion. There are 15 legislatively established agricultural commodity marketing programs in the state of Michigan. These programs utilize \$12,429,559.48 in producer "checkoff" funds, of which \$5,835,041.00 are utilized for generic promotion activities.

New Jersey has farm receipts in excess of \$768,000,000. It has eight individual commodity councils, with a combined budget of \$426,559. The total budget for these marketing programs is \$426,550.

Oregon has an agricultural economy in excess of three billion dollars. It has 27 marketing programs which conduct generic promotion. In the aggregate these programs spend over \$13 million dollars, four to five million of which is spent on promotion.

Vermont has an agricultural industry with farm gate receipts totalling approximately \$500 million. It has three

² The programs for respective states are listed in the appendix to this brief.

marketing orders with a combined budget of \$2.73 million dollars, of which approximately \$2.58 million was used for marketing and promotion.

Virginia's agricultural economy yields \$2.2 billion in farm gate sales. Virginia has 13 commodity boards that conduct generic promotions using mandatory assessments. The budgets of these boards total \$2,613,434, of which \$1,689,813 is expended on promotion programs.

Washington has 24 commodity marketing commissions having a 1995 total farm gate value for the commodities covered by these programs of over 4 billion dollars. These marketing commissions had combined budgets of 47 million dollars, of which 33 million was spent on advertising and promotion.

Florida and *Nebraska* also have major agricultural economies supported by generic promotion that is funded by mandatory assessments.

Amici agree with the Secretary of Agriculture that the Ninth Circuit erred in using the *Central Hudson* test.³

³ This test was enunciated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Com'n*, 447 U.S. 557, 566 (1980). The *Central Hudson* test applies only to governmental regulation of "commercial free speech," not to regulation affecting "commercial free association." It is this latter interest that is implicated when agricultural growers or handlers are required to pay for generic advertising and promotion. The applicable test for this interest is the one most recently applied by this Court in *Lehnert v. Ferris Faculty Assn.* 500 U.S. 507, 519 (1990). Under the *Lehnert* test, once the court finds that a state has a "substantial" or "vital" interest in coordinating attainment of an objective through a certain organization and in avoiding "free

Even were the *Central Hudson* test applicable to the issue of assessments for generic advertising, however, the Ninth Circuit has created serious additional problems for *amici* through two additional errors. First, in *Wileman Bros.* and in its earlier opinion in *Cal-Almond v. U.S. Dept of Agriculture*, 14 F.3d 429 (9th Cir. 1993), on which the *Wileman Bros.* opinion relies, the Ninth Circuit has used the wrong yardstick to determine whether a particular promotional program materially advances the targeted state interest (applying the second prong of the *Central Hudson* test). It has not measured the effectiveness of a marketing board's promotional program as against the true state interest, *i.e.*, whether the program supports the market for the commodity as a whole. Rather, the lower court has asked whether the promotional program advances the individual assessee's *private* interest in expanding its own *share* of the market. This measure encourages challenges and makes them difficult for the state to defend. Second, in *Wileman Bros.*, the Ninth Circuit has further added to the states' burden in defending these commodity promotional programs by requiring a high standard of scientific proof that each program has been effective in achieving the objective. This is directly contrary to this Court's teachings in *Florida State Bar v. Went For It*.⁴

riders", it asks only whether the activities are germane to the purpose the organization is required to carry out on behalf of those assessed.

⁴ ___ U.S. ___, 115 S.Ct. 2371, 2378 (1995)

"[W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First

Requiring marketing programs to meet an individualized standard of effectiveness for each assessee and requiring a high standard of proof has resulted in a burgeoning of challenges to the state programs.⁵ These challenges are increasingly burdening federal courts to take advantage of *Cal-Almond* and *Wileman Bros.* Moreover, since the test of these programs according to the Ninth Circuit is keyed to the cost/benefit calculus of individual handlers and whatever promotional strategy they might propose for themselves, marketing programs have no idea how to tailor a program that will withstand constitutional scrutiny. The Washington Hop Commission, for example, has struggled with this as it has attempted to adopt rules to govern its program.

The demise of generic promotional programs would drastically affect agricultural economies. For example, after the plum portion of one of the marketing orders under review in *Wileman Bros.* was dissolved,⁶ there was

Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether. [citations]"

⁵ See list of actions filed against the State of California in footnote 22 of the Secretary of Agriculture's petition to this Court.

⁶ See, Secretary of Agriculture's petition at 7.

an estimated 37% resulting loss of income to California's plum industry.⁷

SUMMARY OF ARGUMENT

The lower court erroneously poses the constitutional question as whether the generic product promotional program advances the individual interest of a purveyor to compete for a larger share of the market, rather than whether it advances the government's interest in enlarging and supporting the market as a whole.

In supporting and stabilizing the market as a whole, marketing program promotion is more effective in expanding and stabilizing the market than the aggregate of private promotional efforts even assuming, unrealistically, that each purveyor would spend as much on promotion as it is assessed for the program and would direct its promotion to supporting the market as a whole rather than securing a larger portion of the existing market for itself.

⁷ Plus or minus 1½ percent. Rod Freed, "The Impact of Various Economic Factors on Grower Price and Maximizing Crop Value by Optimizing the Marketing Mix for California Tree Fruit Agreement" (June, 1993) at p. 22. Study in files of California Tree Fruit Agreement, the agency administering the federal marketing order, at 975 I Street, Reedley, California. See, also Boyd M. Buxton, "The Economic Effects of Terminating the Federal Marketing Order for Plums", *Fruit and Tree Nuts*, FATS-2780, August 1994 (the loss to the plum industry was "substantial.")

The superior performance of the marketing programs stems from several factors, including the following: (1) threshold effects favor larger, more stable programs; (2) marketing programs are more effective in the international market; and (3) marketing program's use of market research makes them more effective. Because of the free rider problem, the advantages of the promotional programs conducted with mandatory assessments cannot be secured by voluntary assessments.

Even though marketing program promotion is effective, it is hard to conceive any program which could meet the high standards of proof the Ninth Circuit apparently demands because of the complexities and uncertainties in measuring promotional program effects on large-scale markets.

ARGUMENT

A. THE NINTH CIRCUIT TEST ERRONEOUSLY ASKS WHETHER THE GENERIC ADVERTISING PROGRAM ASSISTS A PARTICULAR SELLER IN COMPETING WITH OTHER SELLERS FOR A SHARE OF THE MARKET RATHER THAN ASKING WHETHER THE PROGRAM MEETS THE GOVERNMENT OBJECTIVE OF EXPANDING THE MARKET AS A WHOLE.

Although the Ninth Circuit correctly determined that the government interest intended to be served by generic advertising was in providing greater stability in the markets for agricultural products (*Wileman Bros.*, 58 F.3d at 1378; *Cal-Almond*, 14 F.3d at 437), it then lost sight of the

justifying governmental interest when it asked whether the generic advertising program under review advanced that interest. Rather than asking whether the program supported the market as a *whole*, it demanded that the government program prove that it could sell any *individual* handler's fruit or almonds better than the handler could achieve itself using its own money and its own promotional strategy. The Court treated as legitimate a complaint that handlers "believe that the advertising program helps their competitors more than it helps them. . . ." (58 F.3d at 1377) and considered as legitimate alternatives to the program's generic promotion advertising strategies proposed by individual handlers that were designed to compete with other handlers rather than enhance total demand.⁸

Because the government objective is to expand the aggregate demand for the commodity,⁹ the appropriate

⁸ In *Wileman Bros.*, for example, appellant Gerawan Farms proposed it might use the money more effectively to develop its own brand. 58 F.3d at 1379. In *Cal-Almond*, the Court pointed to testimony by Cal-Almond's president that he found the best way to sell his almonds was by bringing potential customers to the plant and showing them how clean and efficient his processing facilities are, and the generic advertising did not help him do that. 14 F.3d at 439, n.10.

⁹ See, e.g. O.D. Forker and R.W. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs*, Lexington Books, an imprint of Macmillan, Inc., New York, 1993, at 157; emphasis added. Hereinafter, "Forker & Ward 1"

See, also, the wording in the relevant statutes of *amici*:

1. **California:** The California Marketing Act of 1937 (Cal. Food & Agr. Code § 58601 *et seq.*) provides in pertinent part:

test is solely whether the program achieves that end and not whether it advances the interest of any particular handler or grower.

A marketing order may contain provisions for the establishment of plans for advertising and sales promotion *to maintain present markets or to create new or larger markets* for any commodity which is grown in this state, or for the prevention, modification, or removal of trade barriers which obstruct the free flow of any commodity to market."

Cal. Food & Agr. Code § 58889(a). (Emphasis added.) Additionally, California also has 27 separately established agricultural marketing councils and commissions. As to these councils and commissions, the California Legislature has expressly found:

[They] are not enacted, and *are not intended to produce measurable benefit, on an individual basis, and their successes should be evaluated accordingly by analyzing the extent to which the commissions and councils have improved the overall conditions for the particular commodity* subject to the commission's or council's jurisdiction.

Cal. Food & Agr. Code § 63901(c). (Emphasis added.)

2. **Washington:** The purposes of the Agricultural Enabling Act of 1961 (Wash. Rev. Code § 010 *et seq.*), under which half of Washington's commissions are established include:

[T]o provide methods and means . . . for the *maintenance of present markets and for the development of new or larger markets*, both domestic and foreign, for agricultural commodities produced within this state and for the prevention, modification or elimination of trade barriers which obstruct the free flow of such agricultural commodities to market. . . .

Wash. Rev. Code § 15.65.040. (Emphasis added.)

B. MARKETING PROGRAM PROMOTION IS MORE EFFECTIVE IN EXPANDING AND STABILIZING THE MARKET THAN THE AGGREGATE OF PRIVATE PROMOTIONAL EFFORTS.

Even assuming, unrealistically, (1) that each individual handler or grower were to spend as much money for promotion as its assessed contribution for the program promotion, and (2) that the handler or grower would expend its promotional budget on efforts to expand the market as a whole, rather than on expanding its share of the market, the objective of supporting the market as a whole could not be served as well as it is served by the marketing boards, for reasons discussed below.

1. The "threshold for effectiveness" factor favors the very large, stable advertising program.

A minimum amount of advertising is required to have impact. A study of the Washington Apple Commission's program, for example, indicates a level of \$200,000 per month for television advertising is needed to achieve an initial meaningful response.¹⁰ The threshold effect clearly hampers effective advertising with smaller budgets; choices must be made about what markets and what media to advertise in, and there is no assurance that the coverage is sufficient to elicit a response. Even beyond the initial threshold, not every advertising dollar spent is equally effective. For example, it was found in market

¹⁰ O.D. Forker and R.W. Ward, "Commodity checkoff programs: A self-help marketing tool for the nation's farmers?", *Choices*, Fourth Quarter, 1993.

research for the California Avocado Commission that the quantitative impact of a dollar spent on generic advertising was much higher when the per capita expenditures were higher than \$100 per thousand population.¹¹ The participants in each industry must aggregate their advertising dollars in order to have the greatest effectiveness per dollar spent.

There are also threshold-type effects in terms of continuity of an advertising program. It was found, for example, when the National Dairy Board initiated its generic advertising program, that there was a major increase in effectiveness during the second year. Forker and Ward I, *supra*, at 201. Thus, program stability is another attribute of marketing programs that makes their programs more effective in enlarging the market than uncoordinated private efforts.

2. Government-sponsored promotion is more effective in competing in the world market.

As highlighted in a 1995 General Accounting Office report,¹² the General Agreement on Tariffs and Trade (GATT) requires reducing export subsidies and domestic price supports and increases access to protected markets.

¹¹ H.F. Carman and R.D. Green, "Commodity Supply Response to a Producer Financed Advertising Program: The California Avocado Industry," *Agribusiness*, Vol. 9, No.6, pp. 605-621 (1993).

¹² General Accounting Office, *Agricultural Marketing, Comparative Analysis of U.S. and Foreign Promotion and Research Programs*, GAO/RCED-95-171 Agricultural Marketing, 1995, p.2. Hereinafter, "GAO Report."

In this changing environment, government-sponsored generic advertising programs are likely to become a more important tool for enhancing agricultural competitiveness in both domestic and foreign markets. GAO report, *supra*, p. 1. While the Uruguay Round of GATT limits the extent to which countries can provide subsidies to the agricultural sector, it does not limit the extent to which they can support market development activities. *Id.*, p. 13.

The importance of the world market for our agricultural sales cannot be overemphasized. It is thought, for example, that the largest potential growth area for American beef products may not be in the United States, but in foreign markets, and the Beef Board has directed efforts at emerging foreign markets. *Id.* at 98. Foreign promotion can be very cost effective. For example, a study of returns on the Soybean Board export promotion program indicates net returns of an impressive \$58 per dollar spent. Forker and Ward I, *supra*, at 239. Marketing program financing of foreign promotion is increasingly important, since federal export promotional subsidies are decreasing, having decreased from about \$327 million in 1992 to \$134 million in 1994. GAO, *supra*, at 7.

A number of foreign competitors have developed expertise in developing export markets over a long history of exporting, providing them a potential competitive advantage in the global marketplace. *Id.* at 13. Also, the government-sponsored marketing boards of other countries may spend more on foreign promotion. The German Wine Institute, for example, devotes a full 50% of its promotional activities to the export market. *Id.* at 52. The marketing boards of other countries also engage in a wider array of activities supporting export than their

American counterparts. For example, New Zealand's Dairy, Kiwifruit, and Apple and Pear Boards purchase and market all products intended for export. *Id.* at 12.

As the market becomes more distant and complex, the need for our producers and handlers to organize to conduct effective promotion, as well as to effectively protect the industry against direct and indirect trade barriers of other countries, becomes increasingly important. California and Washington statutes expressly include activities to protect against trade barriers as part of promotion activities. See excerpts in n. 5, *supra*. Also, the Uruguay round of GATT means that foreign countries now have increased access to some U.S. markets that were previously protected from import competition. Programs for those products will increasingly need to promote their products in the domestic market in light of increased foreign competition. *Id.* at 13.

3. Marketing board programs are made more effective through market research

Agricultural marketing programs make extensive use of market research to measure consumers' perceptions and consumption patterns in order to tailor their marketing approaches.¹³ Because market research is expensive, it is unlikely to be carried out by the individual business, yet it plays a very important role in putting together an effective approach to consumers. The Florida Tomato Exchange, for example, found that television ads were

¹³ GAO Report, pg. 2.

clearly more effective than magazine ads in changing consumer behavior. Forker & Ward I, *supra*, at 241-242.

Market research permits the commodity advertising programs not only to expand the commodity market, but also to provide important services to consumers. A good example of this is research carried out for the National Dairy Board. The Board contracted with a research firm to conduct door-to-door surveys on the nutritional qualities of milk and its importance in a healthy diet for women between the ages of 25 and 44.¹⁴ It learned that only about 25-percent of the target group met or exceeded the recommended dietary allowance for calcium, and that fat content was the top reason that this group does not drink more milk, a rich source of calcium. *Id.* at 29. These consumers appeared not to understand that low-fat milks are nutritionally comparable, except for fat, with whole milk. *Id.* at 32. In sum, resources sufficient to conduct market research is an advantage marketing boards have over the aggregation of disjointed private efforts.

4. The effectiveness of government-sponsored generic advertising has been demonstrated by reduction in taxpayer-funded price supports.

The success of commodity promotion programs has been demonstrated by associated reductions in government price supports.¹⁵ A recent study of cotton

¹⁴ U.S.D.A, *Report to Congress on the National Dairy Promotion and Research Program and the National Fluid Milk Processor Promotion Program*, July, 1995, pp. 28-34.

¹⁵ See, H.W. Kinnucan and E.T. Belleza, "Price and Quantity Impacts of Canada's Dairy Advertising Programs."

promotion, for example, indicates that net Treasury outlays for price support decline \$2.46-\$6.07 per dollar increase in promotion, provided the promotion increase is optimally allocated to the domestic and export market.¹⁶ In fact, the very reason for Congress's creating the National Dairy Board was to reduce the need for the Commodity Credit Corporation to purchase milk at the established support price level.¹⁷ Thus, actual experience demonstrates that generic promotions can expand target markets and reduce public subsidies.

C. THE ADVANTAGES OF THE PROMOTIONAL PROGRAMS CONDUCTED WITH MANDATORY ASSESSMENTS CANNOT BE SECURED BY VOLUNTARY ASSESSMENTS.

The *Wileman Bros.* and *Cal-Almond* decisions threaten programs where participation is mandatory. They would not affect a voluntary program. Yet the same advantages cannot be realized through a voluntary program as through a mandatory program. A mandatory program is more effective not only because it ultimately will have more money to spend for promotion, but also

Agricultural and Resource Economics Review, Vol. 24 (1995); H.W. Kinnucan, P.A. Duffy, and K.Z. Ackerman, "Effects of Price vs. Non-Price Export Promotion; the Case of Cotton." *Review of Agricultural Economics* Vol. 17 (1995), pp. 91-100.

¹⁶ L. Ding and H.W. Kinnucan. "Market Allocation Rules for Nonprice Promotion: U.S. Cotton." paper in review with *Journal of Agricultural and Resource Economics*.

¹⁷ Senate Report No. 98-163 on Dairy and Tobacco Adjustment Act of 1983, P.L. 98-180.1675-1677.0.

because the inequity of carrying "free riders" ultimately undermines a program.

Until the mid-1980s, marketing assessment refunds were authorized or required for most federal programs. It was found that after some portion of the producers had requested refunds, others felt they were carrying an unfair burden, so they also requested a refund, further eroding support. Heavy refund requests prompted groups to ask Congress to eliminate the refund provisions, and such legislation was passed in 1990. Forker & Ward I, *supra*, at 92.

Thus, where contribution is voluntary, the "free rider" problem creates both initial limitations and a demoralizing inequity which leads to further erosion of financial support. This Court has, of course, recognized that avoidance of the "free rider" is a vital state interest justifying agency shop and mandatory bar requirements, where the same constitutional interests are at issue. See United States' petition, at 17-18.

D. EVEN USING THE CORRECT MEASURE OF EFFICACY, I.E., BENEFIT TO THE AGGREGATE MARKET RATHER THAN TO AN INDIVIDUAL'S MARKET SHARE, THE STANDARD OF PROOF SET IN WILEMAN BROS. WILL BE VERY DIFFICULT TO MEET BECAUSE OF THE COMPLEXITIES AND UNCERTAINTIES IN MEASURING PROMOTIONAL PROGRAM EFFECTS ON LARGE-SCALE MARKETS

Assuming that the constitutional test indeed requires resolving methodological disputes over promotion strategies, it is hard to conceive what program could pass

muster under the stringent standard of proof required by *Wileman Bros.* The Ninth Circuit held the government failed to meet its burden because the handlers seeking to get out of paying assessments asserted "methodological holes" in the studies the government offered, characterizing them as demonstrating only that advertising works. 58 Fed.3d at 1379.

Measuring the subtleties of a promotional program's effectiveness is not an easy matter. The market for any commodity is large and complex, and many factors other than a particular advertising program will effect market size. This is well-illustrated by a study of the results of the beef promotion program conducted during the time that the beef market was collapsing.¹⁸ It showed that while the program had been successful, it accounted for only 3 per cent of the total changes in beef prices from 1987 to 1992. Forker & Ward I, *supra*, at 88. Moreover, it had only succeeded in limiting the market shrinkage. *Id.* at 211-212. Nevertheless, the program was cost effective, reaping between \$.50 and \$5.71 increase in sales per dollar spent. *Id.* at 211.

Measuring promotional impact on a market requires the use of very complicated models. *Id.* at 196. Moreover, econometric modelling becomes even more complex in the arena of the world market. The model must take into account the interactions among various parts of the world markets, so data requirements expand and the potential

¹⁸ This is the promotional program treated in *U.S. v. Frame*, 885 F.2d 119 (3d Cir. 1989.)

for error that can influence the outcome increases concomitantly. Also, because of the large number of factors which must be accounted for concurrently, the model becomes less sensitive to the effects of the advertising strategy. *Id.* at 239.

Accordingly, although generic advertising in the world market is of increasing importance to the health of American agriculture, it may not generally be possible to measure its effects to the degree of certainty which the Ninth Circuit apparently demands.¹⁹

CONCLUSION

Amici urge this Court to accept the Secretary of Agriculture's petition for *certiorari* in this case because, *inter alia*, of the practical mischief which the Ninth Circuit *Wileman Bros.* opinion poses for their state programs for maintaining and expanding the health of their agricultural economy, as well as for the impact on their agricultural economies by any loss of generic advertising that is carried out by federal programs, which may be

¹⁹ On the other hand, there should be no trouble in meeting the standard most recently applied by this court in *Florida State Bar v. Went For It, supra*, 115 S.Ct. 2371 (1995) (see note 3, *supra*.) Under the test which *amici* view as the correct test, most recently articulated by this court in *Lehnert v. Ferris Faculty Assn*, *supra*, 500 U.S. 507, the questions are different (see note 2, *supra*).

even more effective, because of their larger scale, than state programs.

Respectfully submitted,

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Dated: March 21

APPENDIX

STATE OF ARIZONA

Arizona Beef Council
Arizona Grain Council
Arizona Wine Commission

STATE OF CALIFORNIA

California Apple Commission
California Apricot Advisory Board
California Artichoke Advisory Board
California Asparagus Commission
California Avocado Commission
California Dry Bean Advisory Board
California Beef Council
California Cantaloupe Advisory Board
California Fresh Carrot Advisory Board
California Cherry Marketing Program
California Egg Commission
California Fig Advisory Board
California Cut Flower Commission
California Forest Products Commission
California Kiwifruit Commission
California Melon Research Advisory Board
California Milk Producers Advisory Board
California Manufacturing Milk Advisory Board
California Fluid Milk Processor Advisory Board
California Cling Peach Advisory Board
California Pear Advisory Board
California Pistachio Commission
California Plum Advisory Board (California Plum
Marketing Board)
California Prune Board
California Rice Handlers' Advisory Board
California Wild Rice Board
California Salmon Council
California Seafood Council

App. 2

California Strawberry Commission
California Table Grape Commission
California Tomato Board
California Walnut Commission
California Wheat Commission
Dairy Council of California
Lake County Winegrape Commission
Lodi-Woodbridge Winegrape Commission

STATE OF GEORGIA

Agricultural Commodity Commission for Apples
Agricultural Commodity Commission for Canola
Agricultural Commodity Commission for Cotton
Agricultural Commodity Commission for Eggs
Agricultural Commodity Commission for Milk
Agricultural Commodity Commission for Peaches
Agricultural Commodity Commission for Peanuts
Agricultural Commodity Commission for Pecans
Agricultural Commodity Commission for Soybeans
Agricultural Commodity Commission for Sweet Potatoes
Agricultural Commodity Commission for Tobacco

STATE OF MICHIGAN

Michigan Apple Committee
Michigan Asparagus Advisory Board
Michigan Bean Commission
Michigan Beef Industry Commission
Michigan Fresh Market Carrot Committee
Michigan Cherry Committee
Michigan Corn Marketing Committee
Michigan Dairy Market Program
Michigan Mint Committee
Michigan Onion Committee
Michigan Plum Advisory Board
Michigan Potato Industry Commission
Michigan Red Tart Cherry Advisory Board

App. 3

Michigan Soybean Committee
Michigan Special Fed Veal Committee

STATE OF NEW JERSEY

New Jersey Apple Industry Advisory Council
New Jersey Asparagus Industry Advisory Council
New Jersey Blueberry Industry Advisory Council
New Jersey Dairy Industry Advisory Council
New Jersey Poultry Industry Advisory Council
New Jersey Sweet Potato Commission
New Jersey White Potato Industry Advisory Council
New Jersey Wine Industry Advisory Council

STATE OF VERMONT

Vermont Apple programs
Vermont Beef programs
Vermont Milk programs

STATE OF VIRGINIA

Virginia Bright Flue-Cured Tobacco Board
Virginia Cattle Industry Board
Virginia Corn Board
Virginia Dark Fired Tobacco Board
Virginia Egg Board
Virginia Horse Industry Board
Virginia Irish Potato Board
Virginia Peanut Board
Virginia Pork Industry Board
Virginia Small Grains Board
Virginia Soybean Board
Virginia State Apple Board
Virginia Sweet Potato Board

STATE OF WASHINGTON

Washington Apple Commission
Washington Dairy Products Commission

App. 4

Washington Fruit Commission
Washington Beef Commission
Washington Wine Commission
Washington Potato Commission
Washington Seed Potato Commission
Washington Wheat Commission
Washington Fryer Commission
Washington Barley Commission
Washington Hop Commission
Washington Dry Pea & Lentil Commission
Washington Blueberry Commission
Washington Raspberry Commission
Washington Egg Commission
Washington Asparagus Commission
Washington Farmed Salmon Commission

MOTION FILED

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No. 95-1184

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
Petitioner,
v.

WILEMAN BROS. & ELLIOTT, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
AND BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF STATE
DEPARTMENTS OF AGRICULTURE
IN SUPPORT OF PETITIONER**

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Respondents.

On Petition for a Writ of Certiorari to the
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for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Association of State Departments of Agriculture (NASDA) hereby respectfully moves for leave to file the attached brief of *amicus curiae* in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondents was requested but not given.

The interest of NASDA in this case arises from the fact that its members are the Departments of Agriculture of all 50 states plus the territories of Guam, American Samoa, Puerto Rico, and the Virgin Islands. The vast majority of these are directly involved in the operation of commodity promotion and research programs similar to those at issue in this case. NASDA members are routinely called upon in carrying out their statutory man-

dates to advise these programs as well as provide guidance to state legislators seeking to authorize new programs. Significantly, NASDA members have been named as party defendants in litigation involving the same issues raised in this case. *Bidart Bros. v. California Apple Comm'n*, No. CV-F-94-0618-OWW (E.D. Cal.); *Duarte Nursery, Inc. v. California Grape Rootstock Improvement Comm'n*, No. CV-F-95-5428-OWW (E.D. Cal.); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, No. CV-S-96-102 EJG (E.D. Cal. filed January 17, 1996).

In the instant case in the Court of Appeals, the argument focused exclusively on commodity research and promotion programs operating under federal law. The amicus believes there is a significant potential for this case to unreasonably interfere with states' abilities to carry out long-standing statutory mandates to preserve, protect and enhance their agricultural economies. NASDA members are uniquely well suited to bring this aspect of this case to the Court's attention and thereby underscore the need for Supreme Court review.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1995

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 v.

WILEMAN BROS. & ELLIOTT, INC., et al.,
 Respondents.

On Petition for a Writ of Certiorari to the
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 for the Ninth Circuit

BRIEF OF *AMICUS CURIAE*
 NATIONAL ASSOCIATION OF STATE
 DEPARTMENTS OF AGRICULTURE
 IN SUPPORT OF PETITIONER

This brief is presented on behalf of the National Association of State Departments of Agriculture (NASDA) in support of the Petition for a Writ of Certiorari filed by the Solicitor General of the United States on January 24, 1996. It is presented with the consent of the attorney for Petitioner. The consent of the attorney for the Respondents was requested but not given.

INTEREST OF THE *AMICUS CURIAE*

The *amicus*, the National Association of State Departments of Agriculture (NASDA), is a non-profit association whose members are state agencies charged with the

responsibility, among others, of promoting, protecting and preserving their states' agricultural wealth. NASDA includes departments from all 50 states and the territories of Guam, American Samoa, Puerto Rico and the Virgin Islands and represents their interests on issues of national concern. NASDA also provides a forum for the free exchange of ideas among its members and acts as a national clearing house for information of interest to them.

The vast majority of NASDA members oversee the activities and work cooperatively with at least one commodity promotion and research program similar to those at issue in *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995). Forty-three states operate legislatively authorized commodity promotion and research programs. O.D. Forker and R.W. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs*, Lexington Books (1993) 140-141, Table 5-16.

In these states, NASDA members work regularly with the legislators who authorize these programs and the producers who implement the programs and then guide their policies and activities. It is not surprising, therefore, that NASDA members are seeing first hand the daily impacts of the uncertainty created by the *Wileman* decision. Accordingly, they are particularly well suited to communicate this aspect of the *Wileman* case.

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of the case in Petitioner's brief.

ARGUMENT

The Ninth Circuit erred in deciding *Wileman*. In declaring the promotion activities of federal marketing orders for California-grown peaches and nectarines to be unconstitutional, the Ninth Circuit inappropriately relied upon the standard articulated in *Central Hudson Gas and*

Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980). Even if somehow the *Central Hudson* standard is appropriate, the Ninth Circuit applied the test in a fashion which is wholly inconsistent with this Court's jurisprudence.

The decision in *Wileman* has thrown nearly six decades of state agricultural policy into disarray. The production and marketing of agricultural commodities is the bedrock upon which many state economies are built. The agricultural industry provides stable tax revenues, enhances the quality of life in rural communities, creates significant employment opportunities and produces an abundant supply of high quality food and fiber for the nation and the world.

The well-being of this segment of state economies is increasingly challenged by declining federal support and growing competition in the global marketplace. Accordingly, the continuation of commodity promotion and research programs is critical to state efforts to preserve, promote and enhance the agricultural segment of their economies.

The Ninth Circuit decision has left the states wondering what their existing programs can and cannot do and has cast serious doubt upon the ability to create new programs where necessary. Finally, it raises doubt as to whether there remains after *Wileman* any way for a state to advance what even the Ninth Circuit concedes to be a substantial governmental interest. See, *Cal-Almond, Inc. v. USDA*, 14 F.3d 429, 437 (9th Cir. 1993).

Since the mid-1930's states have enacted laws authorizing agricultural producers to engage in collective self-help programs to stabilize agricultural industries and to increase consumer acceptance of various commodities. The Solicitor General has set forth some of the statutory schemes existing within the Ninth Circuit at page 19 of

the Petition. There are, however, numerous statutorily authorized programs operating in states beyond that Court's jurisdictional boundaries. See, e.g., Chapter 573 (commencing with Section 573.101), Florida Statutes Annotated (Harrison, 1992); Sections 290.651, et seq., Michigan Compiled Laws, Annotated (West, 1984); Chapter 104 (commencing with Section 104.001) of Texas Agric. Code Annotated (Vernon, 1995) and Article 25 (commencing with Section 292) of New York Agric. & Mkts. Law (McKinney, 1991).

In the wake of the *Wileman* decision, the challenges to these programs and the accompanying uncertainty have expanded beyond the boundaries of the Ninth Circuit as well. As noted by the Solicitor General, the National Beef Promotion and Research Act (7 U.S.C. § 2901, et seq.) has been challenged in the District of Kansas (*Goetz v. Espy*, No. 94-1299 (D.Kansas filed August 2, 1994)). Additionally, two state-authorized programs for cherries have been challenged in the Western District of Michigan (*Dukesherer Farms, Inc. v. Michigan Cherry Committee*, No. 1-95-CV-742 (W.D.Mich. filed October 19, 1995)). The spread of these challenges is causing considerable confusion which is significantly interfering with NASDA members' ability to effectively and efficiently carry out their statutory mandates.

As advisors to the more than 200 state-authorized programs currently operating in the United States, NASDA members are often called upon to assist programs in determining what they can and cannot do within the bounds of their statutory authority and other laws. The *Wileman* decision has made this role nearly impossible because the "test" articulated by the Ninth Circuit offers no guidance as to how a program should conduct itself to avoid impermissible constitutional infringement.

NASDA members and the programs they advise are left to speculate that perhaps what the Ninth Circuit has said through its *Wileman* decision is that before a pro-

gram can act, it must go through an incredibly convoluted, time-consuming and practically impossible exercise. First, it appears a program must attempt to forecast the impacts of its planned activities. Next, it must endeavor to evaluate all possible factors impacting the marketplace, predicting both the type and magnitude of the impact. Third, the program must attempt to anticipate every conceivable promotional activity that could possibly be undertaken by any individual within the affected industry and estimate the effectiveness of those efforts. Finally, the program must compare its own forecast of effectiveness to every possible individual activity (and perhaps every possible combination of those activities), taking into account the myriad of forces affecting the market, including many which are beyond anyone's control.

It appears that only after engaging in this exercise and concluding that every possible program activity will be more efficacious than every possible individual effort in every possible set of circumstances can a program be reasonably certain of withstanding scrutiny under the *Wileman* "standard." Obviously, such an exercise is for all practical purposes impossible. Even if it were feasible, the costs in time and personnel resources would put it beyond the reach of nearly every segment of the agricultural industry. Logic dictates that this simply cannot be the standard.

NASDA members are also frequently looked to for guidance by state legislators seeking advice regarding agricultural issues, including the enactment of statutes authorizing new commodity promotion and research programs. Here, too, the questions left unanswered by the Ninth Circuit are significantly interfering with statutorily mandated functions.

Despite the discussion of the three-part *Central Hudson* test, the *Wileman* decision rests almost entirely on the "comparative efficacy" analysis used by the Ninth Cir-

cuit to determine whether the program directly advances the government interest. *Wileman*, *supra*, 58 F.3d at 1379. Accordingly, it appears that a fundamental piece of evidence that must be presented in any future attempt to satisfy the *Wileman* "standard" would be a record of past accomplishments demonstrating the effectiveness of a program's activities. In light of this, NASDA members can only guess as to whether or how any new program could possibly survive this analysis.

Any new program a state legislature may authorize in order to advance substantial and arguably compelling (see, *U.S. v. Frame*, 885 F.2d 1119, 1134 (3d Cir. 1989)) state interests will obviously begin its life with no track record. If challenged early in its existence, it will face the same "Catch-22" so familiar to new job seekers who cannot find a job because they have no experience and are unable to gain any experience because they cannot find a job. Similarly, a new program may not survive the *Wileman* "standard" because it has no track record. At the same time, it will be denied the opportunity to develop a track record because it cannot pass the *Wileman* "standard."

NASDA members are left wondering: Did the Ninth Circuit mean there can be no new programs? If so, it seems strange to have apparently "grandfathered" certain existing programs while barring the door to new ones. Further, it seems inconceivable that the Ninth Circuit would by implication deny states this decades old mechanism for advancing what even that Court agrees is an important interest. Again, logic and common sense lead inescapably to the conclusion that the "standard" articulated in the *Wileman* case cannot be that by which these important state programs are to be judged.

CONCLUSION

Based on the foregoing, it can be seen that the erroneous decision of the Ninth Circuit in *Wileman* is significantly interfering with the orderly conduct of vital state programs. The decision has cast a pall over nearly sixty years of state effort to advance substantial interests in the preservation of the agricultural segments of their economies. This unreasonable interference is the direct result of the inappropriate application of the *Central Hudson* standard by the Ninth Circuit and is disrupting state programs throughout the country. For these reasons, NASDA, on behalf of its members, respectfully requests this Court to grant the U.S. Solicitor General's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 95-1184

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, Secretary of Agriculture,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.; KOBASHI
FARMS, INC.; TANGE BROS., INC.; NAGAO FARMS;
NILMEIER FARMS; CHOSEN ENTERPRISES; GEORGE
HUEBERT FARMS; WILMER HUEBERT FARMS; KOBASHI
FARMS, NAKAYAMA FARMS, INC.; and MIHARA FARMS,
Respondents.

**On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit**

**RESPONDENTS' OBJECTIONS TO MOTIONS FOR
LEAVE TO FILE BRIEFS OF AMICI CURIAE AND
OPPOSITION TO AMICI CURIAE BRIEFS FILED IN
SUPPORT OF PETITION FOR WRIT OF
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No. 95-1184

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NILMEIER FARMS; CHOSEN ENTERPRISES; GEORGE
HUEBERT FARMS; WILMER HUEBERT FARMS; KOBASHI
FARMS, NAKAYAMA FARMS, INC.; and MIHARA FARMS,
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On Petition For Writ Of Certiorari To The
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RESPONDENTS' OBJECTIONS TO MOTIONS FOR
LEAVE TO FILE BRIEFS OF AMICI CURIAE AND
OPPOSITION TO AMICI CURIAE BRIEFS FILED IN
SUPPORT OF PETITION FOR WRIT OF
CERTIORARI

INTRODUCTION

Respondents object to the motions for leave to file amicus curiae and amici curiae briefs, and oppose the amicus curiae and amici curiae briefs filed in support of the Petition for Writ of Certiorari. Three amici curiae briefs have been filed in support of the Solicitor General's Petition: (1) On

March 25, 1996 Respondents received the Motion for Leave to File Brief of Amici Curiae and Brief of Amici Curiae from various California, Washington, and Idaho state agricultural commodity commissions and boards in Support of the U.S. Solicitor General's Petition for Writ of Certiorari ("Program Amici")¹; (2) On March 25, 1996 Respondents received the Brief of Amici Curiae of the Attorneys General of various states in support of the U.S. Solicitor General's Petition for Writ of Certiorari ("Attorneys General"); and (3) On March 28, 1996 Respondents received the Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae National Association of State Departments of Agriculture in Support of Petitioner ("NASDA").

These amici duplicatively represent the same state government agencies and burden the Court, repeat the same arguments as Petitioner, do not aid the Court in disposition of the Petition, defeat Petitioner's argument that USDA's forced funded generic advertising cannot meet the *Central Hudson Gas and Electric Corp. v. Public Service Comm'n. of New York*, 447 U.S. 557 (1980) commercial speech test, and misleadingly list state boards and commissions without clarifying that many do not engage in mandatory assessment funded generic advertising of agricultural products and as such are not impacted by the Ninth Circuit decision.

¹ Some individual growers and industry members are listed as represented but no point of view is shown on their behalf distinct from the state agencies' interest.

ARGUMENT

A. The Amici Briefs Overlap Substantially in Their Representation of the Same State Government Agencies Thereby Burdening The Court and Confusing The Issues

Respondents did not consent to the NASDA and Program Amici briefs because they overlap substantially in their representation of the same governmental agencies without providing unique points of view and thus burden the Court and confuse the issues.

The Program Amici and NASDA motions each list the same pending cases and complain that because their members are parties to those cases they have an interest in the Solicitor General's Petition. The Program Amici motion lists *Bidart Bros. v. California Apple Comm'n.*, No. CV-F-94-6018-OWW (E.D. Cal.); *Duarte Nursery, Inc. v. California Grape Rootstock Improvement Comm'n.* No. CV-F-95-5428-OWW (E.D. Cal.); *Matsui Nursery, Inc. v. California Cut Flower Comm'n.* No. CV-S-96-102-EJG (E.D. Cal.) and one California state court case captioned *California Kiwifruit Comm'n. v. Moss*, No. C018368 (3d Dist. Cal.App.). See, Program Amici Motion p. 1. Except for the state court kiwi case, the NASDA motion lists all the same cases and states that NASDA members are parties to those cases. See, NASDA motion.

The Program Amici list various state agricultural commissions and boards represented. See, App. A to Program Amici motion and brief. Twenty of the commissions and boards listed by the Program Amici are also listed by the Attorneys General. See, App. to Attorneys General Brief pp. 1-4. These commissions and boards are arms of the state departments of agriculture and NASDA is an organization

whose membership consists of state departments of agriculture (plus agencies of United States territories).

The NASDA, Program Amici, and Attorneys General briefs thus needlessly substantially duplicate the representation of the same governmental agencies in a concerted effort to take several bites at the apple, and in an attempt to inflate a view that the petition presents an important question. This overlapping of the briefs, however, does not help in analyzing the disposition of the Petition, confuses the issues, and wastes valuable Court time. The motions for leave to file should be denied.

B. The Amici Repeat The Same Arguments As Petitioner And Do Not Otherwise Show That USDA Met Its Burden Under *Central Hudson*

NASDA and the Program Amici merely say "me too" to the arguments raised by USDA in the Solicitor General's petition and provide no help in the disposition of the Petition.² First, both NASDA and the Program Amici repeat Petitioner's argument that the Ninth Circuit should not have used *Central Hudson Gas and Electric Corp. v. Public Service Comm'n. of New York*, 447 U.S. 557 to analyze USDA's mandatory assessment funded generic advertising program for California peaches, plums, and nectarines imposed only on California handlers. Amici ignore that USDA argued the opposite before the Ninth Circuit and contended that *Central Hudson* was the appropriate test, and ignore that the Ninth Circuit opinion does not address this issue. See, Opp. to Pet. for Cert. pp. 5-8.

²The desires of amici concerning the outcome of the litigation are not evidence, and do not influence the Court's decision, and are looked to solely for aid in analyzing the legal questions before the Court. See, e.g., *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 434 n. 16 (1984) (discussing amici at merits stage).

Neither NASDA nor the Program Amici provide good reason to disregard this Court's teachings that the character of the speech compelled by the government determines the applicable scrutiny so that *Central Hudson* applies to compelled funding of commercial speech. See, Opp. to Pet. for Cert. pp. 9-14. NASDA and the Program Amici ignore that *Central Hudson* and the test now urged in the Solicitor General's Petition are both intermediate scrutiny and fail to explain how substituting one intermediate scrutiny test for another will end their averred uncertainty about whether their programs can survive the *Central Hudson* test. See, Opp. to Pet. for cert. pp. 19-20.³

Second, the Program Amici, NASDA, and the Attorneys General share in USDA's misunderstanding of the Ninth Circuit's disposition of this case under *Central Hudson*. "[Under *Central Hudson*] the government carries the burden of showing that the challenged regulation advances the government's interest 'in a direct and material way' [Citation Omitted]." *Rubin v. Coors Brewing Company*, ___ U.S. ___, 115 S.Ct. 1585, 1592. "That burden 'is not satisfied by mere speculation and conjecture . . .'" [Citation Omitted]." *Id.* The Ninth Circuit applied this requirement to the case at hand and found USDA failed to meet its burden. See, App. to Pet for Cert. p. 16a.

The amici repeat the Petitioner's arguments, however, and contend that the Ninth Circuit does not understand that government compelled funding of agricultural commodity advertising is aimed at increasing the whole market, not individual shares of market, and therefore the Ninth Circuit

³The amici complain about the Ninth Circuit's decision in *Cal-Almond, Inc. v. USDA* 14 F.3d 429 (9th Cir. 1993) which applied *Central Hudson* to USDA's generic advertising program for almonds. The government did not seek a Writ of Certiorari in that case, yet amici argue as if it too is subject to review. Seeking review in this case is not a device for review of *Cal-Almond*, 14 F.3d 429.

misconceived its analysis. Contrary to amici contentions, the Ninth Circuit understood the purported government aim. See, App. to Pet for Cert. pp. 16a-17a. The Ninth Circuit found that USDA hindered Respondents' protected commercial speech marketing efforts. See, App. to Pet. for Cert. p. 18a. USDA burdened Respondents' abilities to engage in their own commercial speech and failed to show that USDA's programs nonetheless materially advanced the purported aim of promoting the peach and nectarine growing industries which, under USDA's reasoning, was not occurring sufficiently through the efforts of individual advertising. USDA provided no evidence showing (that despite this burden on Respondents) USDA's purported aim was directly advanced. See, App. to Pet for Cert. pp. 18a-20a.

If USDA demonstrated anything, it was that it may have hurt increase in market by hindering Respondents' marketing efforts. This cannot be said to directly advance in a material way the purported government aim. Like the government's failure to present convincing evidence that its labeling ban inhibited "strength wars" among alcoholic beverage companies in *Rubin v. Coors*, ___ U.S. ___, 115 S.Ct. 1585, 1593, here USDA failed to prove that its regulation directly advanced its interest.

The Attorneys General brief supports the Ninth Circuit's decision on this point. The Attorneys General assert that government-mandated advertising increases market better than "uncoordinated private efforts," based on the premise that a threshold advertising spending level is required to realize an increase in market. Att. Gen. brief pp. 10-11. If the purported governmental aim is to achieve an increase in market that cannot occur through private efforts because private efforts do not sufficiently reach a threshold level of spending to increase market, then the government should show that its program in fact does do better than what occurs with only private individuals doing the advertising.

Otherwise, the governmental aim cannot be said to have been directly advanced.

Third, the amici arguments do not change the fact that USDA forced Respondents to pay for advertising their competitors' particular varieties thus USDA's argument that its program should have survived scrutiny under *Central Hudson* fails. See, Opp. to Pet. for Cert. pp. 14-19.

C. Read Together The Amici Briefs Defeat Petitioner's Argument That USDA's Compelled Agricultural Commodity Advertising Programs Cannot Meet The *Central Hudson* Test

The amici arguments undercut USDA's complaint that it cannot meet the *Central Hudson* test. While USDA, NASDA, and the Program Amici complain that government-mandated agricultural commodity advertising programs cannot meet the *Central Hudson* test, the Attorneys General argue that government forced funded agricultural commodity advertising does increase and support markets better than what the Attorneys General call "uncoordinated private efforts."⁴ Assuming, *arguendo*, the Attorneys General are correct, then USDA, the Program Amici, and NASDA's argument about their purported inability to meet the *Central Hudson* test fails.⁵

⁴The Attorneys General cite to studies not relied upon in litigation of this case by the USDA. See, Attorneys General Amici Curiae Brief table of authorities pp. iii-v. The studies have no bearing on the evidence in this case. See, *Sony Corp. v. Universal City Studios*, 464 U.S. at 434 n. 16. The Ninth Circuit simply pointed out that USDA had no studies or evidence to support its contentions. See, App. to Pet. for Cert. pp. 19a-20a.

⁵Moreover, arguing that, as amici and USDA do, *Central Hudson* should not apply because the government cannot survive the scrutiny of *Central Hudson* begs the question, and does not justify review on a claim that a different intermediate scrutiny test should apply.

D. Many Commissions and Boards Listed by the Attorneys General Do Not Engage In Mandatory Assessment Funded Generic Advertising Thus Any Suggestion That All The Programs Referenced Are Somehow Adversely Impacted By The Ninth Circuit Decision Is Misleading

The Attorneys General list state agencies and agricultural marketing, promotional, and advertising programs and recite, anecdotally, information about some of the programs. The Attorneys General did not explain the difference between marketing, promotion, and advertising and give the false impression that all these programs are impacted by this case. Respondents' anecdotal information suggests many listed boards and commissions do not engage in forced funded generic advertising.

For example, the California Wheat Commission, listed by both the Attorneys General and the Program Amici, is a body that derives its funding from mandatory grower assessments. The commission, however, has a program whereby any grower can request a *total* refund of all assessments paid to the commission. The only caveat is that the grower must request this refund within 90 days after it is paid. The commission does not engage in any promotional advertising activities. The commission only engages in research.

The Michigan Red Tart Cherry Advisory Board, listed by the Attorneys General, does not engage in mandatory assessment funded generic advertising. This advisory board is strictly an information and statistical gathering entity. There is no state government promotion or research done to promote red tart cherries. The committee is oriented to the benefit of growers. The information is used by the growers, packers, and handlers.

The New Jersey Wine Industry Advisory Council, listed by the Attorneys General, does not assess growers for generic advertising. Twenty cents per gallon is charged

either to the distributor or to the retail customer. Approximately \$20,000 is spent annually for advertising/marketing. The advertising/marketing consist of brochures, sponsoring wine and food festivals and promoting specific events.

The Washington Red Raspberry Commission, listed by the Attorneys General, derives its funding from mandatory assessments — ½ cent per pound paid by grower to the processor. Approximately 30 percent of these funds are used in research at Washington State University. There is no television, radio, or print advertising. Approximately 40 percent is spent on "promotions," described as working with food editors and other educational programs.

The Arizona Beef Council does not engage in generic advertising of beef supported by state law imposed assessments. (The council does participate in the USDA beef promotion program discussed in *United States v. Frame*, 885 F.2d 1119; See, e.g., 7 U.S.C. § 2904(4)(A)). The Arizona Wine Commission does not impose assessments for generic advertising. A point of sale charge is imposed, however, and revenue is used for wine promotion. In sum, listing programs and various state agencies without clarifying that not all engage in mandatory assessment funded generic advertising like the USDA programs in this case is misleading.

E. Conclusion

The amici unnecessarily substantially duplicate representation of the same governmental entities thereby burdening the Court and confusing the issues. The motions for leave to file brief of amici curiae and brief amicus curiae should be denied. The amici arguments support Respondents' position that the Petition should be denied.

Respectfully Submitted,

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Attorneys for Respondents

AUG 22 1996

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**JOINT APPENDIX
Volume I**

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NOTATION RE ITEMS PREVIOUSLY SUBMITTED

The following opinions, decisions, orders and other parts of the record have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari and within the appendix to the brief in opposition to the petition for a writ of certiorari.

I.

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II.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
(FRESNO)

CIVIL DOCKET FOR CASE No. 90-CV-473

Assigned to: Judge Oliver W. Wanger
Referred to: Magistrate Judge Dennis L. Beck

Jury Demand: Defendant
Demand: \$6,000,000 Nature of Suit: 891
Lead Docket: 91-CV-625 Jurisdiction: US
Dkt# in Other Defendant
Court: None
Filed: 07/27/90

WILEMAN BROTHERS AND ELLIOTT INC., A CALIFORNIA
CORPORATION, AND KASH INC, A CALIFORNIA
CORPORATION, PLAINTIFF

v.

DEPARTMENT OF AGRICULTURE, CLAYTON YUETTER,
SECRETARY OF AGRICULTURE, DEFENDANT

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WILEMAN BROTHERS
AND ELLIOTT INC
counter-claimant

Thomas Elmer Campagne
(See above)
[COR LD NTC ret]

KASH INC
counter-claimant

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WILEMAN BROTHERS AND ELLIOTT INC., A CALIFORNIA
CORPORATION; KASH INC., A CALIFORNIA
CORPORATION, PLAINTIFF

v.

DEPARTMENT OF AGRICULTURE, CLAYTON YUETTER,
SECRETARY OF AGRICULTURE, DEFENDANT

GERAWAN FARMING INC; WILEMAN BROTHERS AND
ELLIOTT INC; KASH INC, COUNTER-CLAIMANT

v.

UNITED STATES OF AMERICA, COUNTER-DEFENDANT

RELEVANT DOCKET ENTRIES

7/27/90 1 COMPLAINT summons issd (1); fee
status pd; Receipt # 129370; Notice re:
Consent forms. w/attached Exh "A" (kp)
[1:90cv473]

8/5/91 — ORDER by Judge Wanger consolidating
cases 1:87-cv-392 with member cases 1:88-
cv-568, 1:90-cv-88, 1:90-cv-473, 1:91-cv-318,
1:91-cv-319; plaintiffs shall file their
amended complaint by 10/7/91; cross-
motions due 11/8/91; opposition to
motions due 11/22/91; cross-replies due
12/10/91; any motions in 87-392 & 90-473
shall be heard 9:00 1/17/92; administrative
record due 10/7/91; order with stipulation
to be lodged by 8/15/91 (cc: all counsel)
(kp) [Entry date 08/06/91] [1:87cv392]

8/5/91 — ORDER by Judge Wanger granting
motion by plaintiff to Expedite the the
Administrative Process [52-1]; re Cases
AMA Docket #'s F&V 916-1; 917-3, 916-2,
917-2, 916-3, 917-4, and that the written
record of final decision shall be filed by
10/2/91 with the court (cc: all counsel) (kp)
[Entry date 08/06/91] [1:87cv392]

8/28/91 19 ORDER by Judge Oliver W. Wanger
consolidating cases 1:90-cv-473 with
member cases 1:87-cv-392, 1:88-cv-268,
1:90-cv-88, 1:91-cv-318, 1:91-cv-319, 1:88-cv-
568 (cc: all counsel) (kp) [1:90cv473]

10/7/91 24 1st AMENDED COMPLAINT [1] by plaintiff in 1:90-cv-00473 (kp) [Entry date 10/08/91] [1:90cv473]

1/26/93 113 MEMORANDUM, Opinion and Order: by Judge Oliver W. Wanger granting motion by USA for summary judgment before Judge Wanger [38-1], denying motion by plaintiffs for summary judgment before Judge Wanger [36-1]; Case mgmt ddl for order from defendants counsel reflecting this order 2/5/93 (cc: all counsel) (cb) [Entry date 01/28/93] [1:90cv473]

1/27/93 114 MODIFIED MEMORANDUM OPINION AND ORDER re cross-motions for summary judgment order [113] (cb) [Entry date 01/28/93] [1:90cv473]

2/2/93 115 ORDER by Judge Oliver W. Wanger granting motion by USA for summary judgment before Judge Wanger [38-1], denying motion by plaintiffs for summary judgment before Judge Wanger [36-1]; Case mgmt ddl for filing of documentation establishing amount of assessments owed by plaintiffs (cc: all counsel) (cb) [Entry date 02/04/93] [1:90cv473]

3/12/93 135 AMENDED COMPLAINT for enforcement of mandatory assignments and for injunctive relief by plaintiff USA in 1:90-cv-00088 (cb) [Entry date 03/18/93] [1:87cv

392 1:88cv568 1:90cv473 1:90cv88 1:91cv318 1:91cv319]

4/7/93 139 ANSWER to First Amended complaint [135] and COUNTERCLAIM; jury demand; cntdft Gerawan Farming Inc, Wileman Bros Elliott, Kash Inc, and against USA to case(s) 1:90-cv-00473, (cb) [Entry date 04/12/93] [1:90cv473]

9/14/93 168 JUDGMENT ENTERED: by Judge Oliver W. Wanger dismissing case (1:91-cv-00686 1:91-cv-00625 1:91-cv-00318 1:91-cv-00319 1:88-cv-00568 1:90-cv-00088 1:87-cv-00392) (1:90-cv-00088) (cc: all counsel) (cb) [1:87cv392 1:88cv568 1:90cv473 1:90cv88 1:91cv318 1:91cv319 1:91cv625 1:91cv686]

10/13/93 177 NOTICE OF APPEAL by plaintiff from Dist. Court decision [168-2] (fee status: paid) (lm) [Entry date 10/18/93] [1:90cv473]

GENERAL DOCKET FOR
NINTH CIRCUIT COURT OF APPEALS

No. 93-16977

Nsuit: 2891 Agricultural Acts (USdf)
Case type information:

- (1) civil
- (2) US

Lower Court information:

District: Lead: 0972-1: CV-90-00473-OWW
[14 lower court entries omitted]

WILEMAN BROTHERS &, ELLIOTT, INC., KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
TANGE BROS., INC.; NAGAO FARMS; NILMEIER FARMS;
CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS,
WILMER HUEBERT FARMS; KOBASHI FARMS;
NAKAYOMA FARMS, INC.; AND MIHARA FARMS,
PLAINTIFFS-APPELLANTS

v.

MICHAEL ESPY, SECRETARY OF AGRICULTURE,
DEFENDANT-APPELLEE

Appeal From Eastern District of California
(Fresno)

Filed: 10/28/93
Docket: June 20, 1996

10/28/93 DOCKETED CAUSE AND ENTERED
APPEARANCES OF COUNSEL. CADS
SENT (Y/N): y setting schedule as follows:
CADS due 11/12/93, ; appellant's designation
of RT is due 11/8/93; appellee's designation
of RT is due 11/17/93; appellant shall order
transcript by 11/29/93; court reporter shall
file transcript in DC by 12/28/93, ; certi-
ficate of record shall be filed by 1/4/94 ;
appellant's opening brief is due 2/4/94;
appellees' brief is due 3/15/94; appellants'
reply brief is due 3/29/94; [93-16977] (rei)

2/13/95 ARGUED AND SUBMITTED TO Thomas
TANG, Diarmuid F. O'SCANNLAIN,
Robert R. Merhige [93-16977] (mlm)

6/27/95 FILED OPINION: AFFIRMED IN PART,
REVERSED IN PART, AND REMAND-
ED. Each party shall bear its own costs.
(Terminated on the Merits after Oral Hear-
ing; Affirmed (in part) and Reversed (in
part); Written, Signed, Published. Thomas
TANG; Diarmuid F. O'SCANNLAIN,
author; Robert R. Merhige.) FILED AND
ENTERED JUDGMENT. [93-16977] (ot)

9/18/95 Filed order and amended opinion (Judge
Thomas TANG, Diarmuid F. O'SCAN-
NLAIN, Robert R. Merhige) (Orig. opinion
id: The opn filed on June 27, 1995 at slip op.
7401 is amended as follows: (see case file)....
The petitions for rehearing are denied and
the suggestion en banc is rejected.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each part to bear its own costs. [93-16977] (ot)

- 10/3/95 Filed order FOR PUBLICATION (Thomas TANG, Diarmuid F. O'SCANNLAIN): The Order and Amended Order filed on Sep 18, 1995 at slip op. 11753 is [sic] further amended as follows: Slip op. 11759: Delete the last two full paragraphs of the order. [93-16977] (ot)
- 10/17/95 Filed order (Thomas TANG, Diarmuid F. O'SCANNLAIN, Robert R. Merhige): denying petition for rhrq and the suggestion for enbanc rehearing is rejected. [93-16977] (ot)
- 10/25/95 MANDATE ISSUED [93-16977] (crw)
- 6/6/96 Filed Supreme Court order, certiorari denied on 6/3/96. Supreme Court No. 95-1393 [93-16977] (crw)
- 6/7/96 Received notice from Supreme Court, Supreme Court No. 95-1184: petition for certiorari GRANTED on 6/3/96. Motions granted to file amicus curiae brief by American Mushroom Institute, Nat'l Assoc. of State Depts. of Agri. (mlm)

APPENDIX TO WILEMAN/KASH II DECISION

INDEX TO PETITIONERS' AND RESPONDENT'S TRIAL EXHIBITS

- EXHIBIT 1: Index to Petitioners' and Respondent's Trial Exhibits
- EXHIBIT 2: *Rough Draft of Post-Hearing Preliminary and Tentative Findings of Fact*, Administrative Law Judge Dorothea A. Baker, March 16, 1988, Issued in the Related Case; of Wileman Bros. & Elliott, Inc. and Kash, Inc. (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3)
- EXHIBIT 3: *Decision and Order*, Administrative Law Judge Dorothea A. Baker, Issued in the Related Case of Wileman Bros. & Elliott, Inc. and Kash, Inc. (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3)
- EXHIBIT 4: Petitioners' Amended 7 U.S.C. §608c(15) (A) Administrative Petition
- EXHIBIT 4(A): Petitioners' Application For Interim Relief (Application Pursuant To §900.70, Title 7 C.F.R.; AMA Docket Nos. 916-3 and 917-4)

- EXHIBIT 4(B): Judicial Officer Campbell's Order Denying Interim Relief (AMA Docket Nos. F&V 916-3 and 917-4)
- EXHIBIT 5: Respondent's Answer to Petitioners' Amended 7 U.S.C. §608c (15)(A) Administrative Petition
- EXHIBIT 6: Petitioners' Administrative Hearing Brief
- EXHIBIT 7: Petitioners' Appendix to Administrative Hearing Brief (A.B. refers to "Appendix to Brief"):
- A.B.1. Petitioners' Index To Appendix to Administrative Hearing Brief
 - A.B.2. Federal Register Dated April 8, 1988, Setting Forth the Proposed Rule Regarding Changes to the Size and Maturity Regulations for California Plums.
 - A.B.3. Federal Register Dated April 25, 1988, Extending Time Period for Filing Written Comments on the Proposed Size and Maturity Regulations for California Plums.
 - A.B.4. Federal Register Dated April 18, 1988, Setting Forth the Proposed Rule

- Regarding Changes to the Size and Maturity Regulations for California Nectarines
- A.B.5. Federal Register Dated April 18, 1988, Setting Forth the Proposed Rule Regarding Changes to the Size and Maturity Regulations for California Peaches.
 - A.B.6. Federal Register Dated May 27, 1988, Setting Forth Interim-Final Rule Regarding Maturity Requirements and Variance Procedures for California Plums.
 - A.B.7. Federal Register Dated May 27, 1988, Setting Forth Interim-Final Rule Regarding Size Regulations for California Nectarines.
 - A.B.8. Federal Register Dated May 27, 1988, Setting Forth Interim-Final Rule For Size Regulations for California Peaches.
 - A.B.9. Federal Register Dated June 21, 1988, Proposed Assessment Rates for California Nectarines,

Plums and Peaches for 1988 Harvest Season.

- A.B.10 Federal Register Dated July 19, 1988, Final Assessment Rates for California Nectarines, Plums and Peaches for the 1988 Harvest Season.
- A.B.11 First Amended Complaint For Enforcement of Mandatory Assessment And For Injunctive Relief, U.S.A. v. Wileman Brothers, et al.
- A.B.12 Defendants' Answer To First Amended Complaint, Defendants' Counterclaim Against The United States, And Defendants' Request For Jury Trial, U.S.A. v. Wileman Brothers, et al.
- A.B.13 Memorandum Of Points And Authorities In Support of Cross-Motion For A Stay Of The Complaint, U.S.A. v. Wileman Brothers, et al.
- A.B.14 Supplemental Argument In Support Of Defendants Cross-Motion For Stay Of Complaint, etc., U.S.A.

v. Wileman Brothers, et al.

- A.B.15 Reporter's Transcript of Proceedings Regarding Plaintiffs Motion For Summary Judgment And Motion To Dismiss and Defendant's Cross-Motion For Summary Judgment And For Stay of Proceedings. U.S.A. v. Wileman Brothers, et al.
- A.B.16 Memorandum Decisions Re: (1) Plaintiff's Motion for Summary Judgment; (2) Plaintiff's Motion To Dismiss Counterclaims; (3) Defendant's Motion For Partial Adjudication and/or Judgment on the Pleadings; and (4) Defendants' Motion For Stay of the Action, U.S.A. v. Wileman Brothers, et al.
- A.B.17 Tree Fruit Reserve Letter of July 7, 1989, Requesting Support In Overturning Judge Baker's Decision.
- A.B.18 Laws of the 89th Congress, Produce Marketing Orders/Advertising.

- A.B.19 Federal Register Dated May 12, 1971, Setting Forth Recommended Decision Regarding Amendment of the Marketing Agreement And Order for California Pears, Plums and Peaches.
- A.B.20 Federal Register Dated March 3, 1971, Setting Forth Recommended Decision Regarding Amendment of the Marketing Agreement and Order for California Nectarines.
- A.B.21 Federal Register Dated July 16, 1979, Setting Forth Final Rule For Assessment Rates for 1979 Harvest Season for California Nectarines, Plums and Peaches.
- A.B.22 Federal Register Dated August 12, 1980, Setting Forth Final Rule For Assessment Rates for 1980 Harvest Season for California Nectarines, Plums and Peaches.
- A.B.23 Federal Register Dated August 10, 1981, Setting Forth Final Rule For Assessment Rates for

- 1981 Harvest Season For Peaches, Plums and Nectarines.
- A.B.24 Federal Register Dated February 28, 1983, Setting Forth Final Rule For Assessment Rates for 1982 Harvest Season For Nectarines.
- A.B.25 Federal Register Dated August 4, 1983, Setting Forth Final Rule For Assessment Rates For The 1983 Harvest Season For Peaches, Plums and Nectarines.
- A.B.26 Federal Register Dated August 14, 1984, Setting Forth Final Rule For Assessment Rates For 1984 Harvest Season For Peaches, Plums and Nectarines.
- A.B.27 Federal Register Dated January 3, 1985, Setting Forth Assessment Rates For 1984 Harvest Season For California Plums.
- A.B.28 Federal Register Dated July 12, 1985, Setting Forth Final Rule Establishing Assessment Rates For 1985 Harvest

Season For Peaches,
Plums and Nectarines.

A.B.29 Federal Register Dated
March 14, 1986, Setting
Forth Amendments to the
Assessment Rates for
1985 Harvest Season For
California Nectarines.

A.B.30 Federal Register Dated
October 17, 1986, Setting
Forth Final Rule Re-
garding Assessment Ra-
tes For 1986 Harvest
Season For California
Nectarines, Plums and
Peaches.

A.B.31 Federal Register Dated
February 26, 1987, Set-
ting Forth Amendment to
the Final Rule Regarding
Assessments For 1986
Harvest Season For Cali-
fornia Plums.

A.B.32 Federal Register Dated
August 20, 1987, Setting
Forth Final Rule For
Assesment Rates of 1987
Harvest Season For Cali-
fornia Nectarines, Plums
and Peaches.

A.B.33 Federal Register Dated
March 27, 1989, Setting
Forth Final Rule Re-

garding Maturity Modifi-
cations and Variance Pro-
cedures For California
Nectarines.

A.B.34 Federal Register Dated
March 27, 1989, Setting
Forth Maturity Require-
ments and Variance Pro-
cedures For California
Plums.

A.B.35 Federal Register Dated
March 27, 1989, Setting
Forth Final Rule For
Maturity Requirements
and Variance Procedures
For California Peaches.

- EXHIBIT 8: Respondent's Pre-Hearing Brief
- EXHIBIT 9: Administrative Law Judge Do-
rothea A. Baker's Notice of
Hearing, September 7, 1989
- EXHIBIT 10: Respondent's Motion to Dismiss
Portions of the Amended Petition
- EXHIBIT 11: Supplement to Respondent's Mo-
tion to Dismiss Portions of the
Amended Petition
- EXHIBIT 12: Petitioners' Opposition to Re-
spondent's Motion to Dismiss
Portions of the Amended Petition
- EXHIBIT 13: Petitioners' Request for Issuance
of Subpoenas, Subpoena Duces
Tecum, and Production of Docu-
ments [7 CFR §900.62(a)&(b)]

- EXHIBIT 14: Certification by Counsel Re: Petitioners' Requests for Subpoenas, Subpoena Duces Tecum, and Production of Documents
- EXHIBIT 15: Memorandum of Pre-Hearing Telephone Conference Calls, Administrative Law Judge Dorothea A. Baker, October 5, 1989
- EXHIBIT 16: Respondent's Response and Motion to Quash Petitioners' Request for Subpoenas, Subpoena Duces Tecum, and Production of Documents
- EXHIBIT 17: Subpoena Duces Tecum, with Attached Proof of Service to Grant Bennett, Grant Bennett Accountants, a Professional Corporation
- EXHIBIT 18: Subpoena Duces Tecum, with Attached Proof of Service, to Jon Field, Manager CTFA and Secretary-Treasurer, Tree Fruit Reserve
- EXHIBIT 19: Subpoena Duces Tecum, with Attached Proof of Service, to Albert Peterson, Director, Tree Fruit Reserve and Chairman, Peach Committee
- EXHIBIT 20: Subpoena Duces Tecum, with Attached Proof of Service, to Mickey George, Chairman, Nectarine Administrative Committee

- EXHIBIT 21: Subpoena Duces Tecum, with Attached Proof of Service, to Patrick Pinkham, Director, Tree Fruit Reserve and Chairman, Plum Commodity Committee
- EXHIBIT 22: Subpoena Duces Tecum, with Attached Proof of Service, to LeRoy Giannini, Past Chairman Nectarine Administrative Committee
- EXHIBIT 23: Subpoena Duces Tecum, with Attached Proof of Service, to Gary Van Sickle, CTFA Supervising Field Agent
- EXHIBIT 24: Subpoena Duces Tecum, with Attached Proof of Service, to Byron Hirata, Supervisor, Shipping Point Inspector
- EXHIBIT 25: Subpoena Duces Tecum, with Attached Proof of Service, to Dale Janzen, CTFA Field Agent
- EXHIBIT 26: Subpoena Duces Tecum, to Dave Parker, CTFA Assistant Manager
- EXHIBIT 27: Declaration of Karen L. Tully, dated, October 24, 1989
- EXHIBIT 28: Letter from LeRoy G. Giannini to Virgil Rasmussen and Albert Peterson, dated March 29, 1989
- EXHIBIT 29: Minutes, Executive Committee, Tree Fruit Reserve, dated No-

vember 15, 1988 (Duplicate of Exhibit 165)

EXHIBIT 30: Articles of Incorporation and By-Laws, Tree Fruit Reserve

(A): Auto Purchase Contract by Janzen For Buyer Tree Fruit Reserve, dated March 22, 1989

(B): State of California—Certificate That CTFA Is a Non-Filing Corporation

(C): Reimbursement Agreement Between TFR and CTFA, Dated March 30, 1989

EXHIBIT 31: STIPULATED RULE-MAKING RECORD RE: 1988 MATURITY AND SIZE REGULATIONS—PEACHES, PLUMS AND NECTARINES:

(A): Proposed Rule—Size Increases & Maturity Tables (Nectarines), April 18, 1988

(B): Interim Final Rule (Nectarines), Size & Maturity, May 27, 1988

(C): Proposed Rule—Re: Size Increase & Maturity (Plums), April 8, 1988

(D): Recommended & Extension of Time to

Comment on Plum Size Increase, April 25, 1988

(E): Interim Final Rule—Plums. No Plum Size Increase Maturity Tables, May 27, 1988

(F): Proposed Rule—Peaches. Size & Maturity, April 18, 1988

(G): Interim Final Rule—Peaches. Size & Maturity, May 27, 1988

(H): Memo From Kimmel To Scanlon Re: Committee Meeting, May 20, 1987

(I): Memo From Kimmel To Cioffi—NAC Meeting Report & Export Meeting Report, September 24, 1987

(J): Memo From Kimmel to Cioffi Re: Nectarine Size Meeting, October 20, 1987

(K): Memo From Kimmel to Cioffi Re: NAC Meeting, December 15, 1987

(L): Memo From Kimmel to Cioffi Re: NAC Meeting, May 9, 1988

- (M): Memo From Kimmel to Cioffi Re: Plum Meeting, December 11, 1987
- (N): Memo From Kimmel to Cioffi Re: Plum Meeting, May 9, 1988
- (O): Memo From Kimmel to Cioffi Re: Peach Meeting, December 16, 1987
- (P): Memo From Kimmel to Cioffi Re: Peach Meeting, May 13, 1988
- (Q): Minutes NAC Meeting, May 7, 1987
- (R): Minutes NAC Meeting, December 9, 1987
- (S): Minutes NAC Meeting, May 5, 1988
- (T): Minutes—Plum Meeting, May 6, 1987
- (U): Minutes—Plum Meeting, December 9, 1987
- (V): Minutes—Plum Meeting, May 4, 1988
- (W): Minutes—Peach Meeting, May 7, 1987
- (X): Minutes—Peach Meeting, December 8, 1987

- (Y): Minutes—Peach Meeting, May 5, 1988
- (Z): Minutes—Nectarine Sizing Sub-Committee, October 14, 1987
- (AA): Minutes—Nectarine Sizing Sub-Committee, November 16, 1987
- (BB): Minutes—Plum Sizing Sub-Committee, February 10, 1987
- (CC): Minutes—Plum Sizing Sub-Committee, November 4, 1987
- (DD): Minutes—Plum Sizing Sub-Committee, November 12, 1987
- (EE): Minutes—Plum Sizing Sub-Committee, November 17, 1987
- (FF): Minutes—Plum Sizing Sub-Committee, November 30, 1987
- (GG): Comments Submitted on Interim Final Rules, July 6, 1988
- (HH): Comments Submitted Re: Nectarines & Peach Proposed Rules, May 18, 1988

- (II): Comments Submitted
Re: Plums, January
Through May, 1988
- (JJ): Memo From Boyle—
Re: Work Plan For
Size Changes & Ma-
turity, January 29,
1988
- (KK): Memo From Cioffi to
Brader—Re: Proposed
Plum Size Increase &
Maturity, February
18, 1988
- (LL): Memo From Cioffi to
Brader—Re: Proposed
Amendment to Size &
Regulations for Peac-
hes, April 11, 1988
- (MM): Memo From Cioffi to
Brader—Re: Interim
Final Rule (Plums),
May 12, 1988
- (NN): Memo From Cioffi to
Brader—Re: Interim
Rule to Increase Size
& Maturity (Nectar-
ines), May 23, 1988
- (OO): Memo From Cioffi to
Brader—Re: Maturity
& Size (Peaches) In-
terim Final Rule, May
23, 1988

- (PP): Marketing Policy State-
ment (1988) From Tree
Fruit Committees
- (QQ): Additional Comments
To Proposed Rules on
Size Requirements and
Clarification Of Matur-
ity Regulations For
Plums
- (RR): Nectarine—Memoran-
dum from Cioffi to
Brader, Dated: April 11,
1988 and Informal Doc-
ket Review Memoran-
dum of April 13, 1988
- (SS): Peaches—Informal
Docket Review Memo-
randums of April 13,
1988 and May 24, 1988
- (TT): Plums—Informal Doc-
ket Review Memoran-
dums of April 1, 1988 and
May 24, 1988
- (UU): Plums—Documents Re-
garding Extension Of
Time For Comments
 - 1) Letter From Brian
Leighton Dated:
April 6, 1988
 - 2) Memorandum From
Cioffi To Brader,
Dated: April 13, 1988

- 3) Informal Docket Review Memorandum,
Dated: April 18, 1988

(VV): Folder Consisting Of:

- 1) 1987 Plum Minimum Maturity Requirements and Color Standards
- 2) Equivalent Plum Sizes: Maximum Number of Plums In 8-Pound Samples

EXHIBIT 32: STIPULATED RULE-MAKING RECORD RE: 1989 MATURITY AND SIZE REGULATIONS—PEACHES, PLUMS AND NECTARINES

- (A): Minutes—NAC, November 17, 1988
- (B): Minutes—NAC, May 3, 1989
- (C): Minutes—Plum Meeting, November 16, 1988
- (D): Minutes—Plum Committee Meeting, May 3, 1989
- (E): Minutes—Peach Meeting, November 17, 1988
- (F): Minutes—Peach Committee Meeting May 4, 1989

- (G): Letter From Kimmel to Cioffi—Re: NAC Meeting November 17, 1988, with enclosures, November 21, 1988
- (H): Memo From Kimmel to Cioffi—Re: Nectarine Sizing, April 6, 1989
- (I): Memo From Kimmel to Cioffi—Re: NAC Meeting May 10, 1989
- (J): Letter From Kimmel to Cioffi—Re: Plum Committee Meeting of November 16, 1988, November 21, 1988
- (K): Memo From Kimmel to Cioffi—Re: Plum Committee Meeting of May 3, 1989, May 8, 1989
- (L): Agenda Peach Commodity Committee Meeting of November 17, 1988,
- (M): Memo From Kimmel to Cioffi—Re: Peach Committee Meeting of May 4, 1989, May 9, 1989
- (N): Referral of Proposed Rules to F.R.—Re: Maturity, Size, Variances, Containers for 1989 Season

- (O): Interim Final Rule to Relax Size Requirements for Nectarines—M.O. 916 California Nectarines for 1989 Season, April 24, 1989
- (P): Memo from Cioffi to Brader—Re: Size Increases & Maturity, April 11, 1988
- (Q): Letter to Brader From Tracy, Deputy Director—Re: Issues of Concern Re Proposed Rules April 21, 1989
- (R): Letter From Cioffi to Brader—Re: Relax Size Requirements For Certain Varieties Nectarines, April 24, 1989
- (S): Letter From Brader to Byrne—Re: Interim Final Rule For Size Requirements for Certain Varieties of Nectarines, April 25, 1989
- (T): Interim Final Rule—Re: Nectarine Sizing, April 27, 1989
- (U): Memo From Cioffi to Brader Recording Approval of Final Rule for Maturity, Size Variances and Con-

- tainer for 1989, May 15, 1989
- (V): Approval of Final Rule—Re: Maturity, Size, Variance, Container, June 23, 1989
- (W): Letter From Kimmel to Crocker from AMS With Size Regulations, July 7, 1989
- (X): Work Plan to Change Size, Maturity and Container for Nectarines, Plums, Peaches—December 22, 1988
- (Y): Letter From Cioffi to Brader—Re: Approval of Amending Rules Re: Size, Maturity, Variances and Container, March 24, 1989
- (Z): Proposed Rules—Nectarines 1989, April 7, 1989
- (AA): Proposed Rules—Peaches and Plums 1989, April 7, 1989
- (BB): Final Rule—Nectarines, Plums, Peaches for 1989, July 3, 1989
- (CC): Minutes—Nectarine & Plum Sizing Sub-Committee, September 26, 1988

- (DD): Minutes—Plum Sizing Sub-Committee, October 12, 1988
- (EE): Minutes—Nectarine Sizing Sub-Committee, April 6, 1989
- (FF): Various Letters—Re: Modification May Glo Sizing, March 30, 1989
- (GG): Final Report of California Summer Fruits Retailer Research (Thuerk Pro-Con Company Report), California Tree Fruit Agreement May 1988
- (HH): Article, Re: Pest Control - Food Safety, Fall 1988
- (II): Hale Group Study Re: Foodservice Market Research, November 1988
- (JJ): Rules and Regulations (Nectarines), Amendments to the Size Requirements and Revision of the Maturity Regulations, March 27, 1989
- (KK): Rules and Regulations (Plums)—Relaxation of Size Requirements and Revision of Maturity Regulations, March 27, 1989

- (LL): Rules and Regulations (Peaches)—Amendments to the Size Requirements and Revision of the Maturity Regulations, March 27, 1989
- (MM): Additional Comments To Proposed Rules
- (NN): Attachment To Exhibit 32(A)
- (OO): Letter to Johnathan Fields From Grand Union, Dated: October 31, 1988
- (PP): Minutes—Peach Commodity Committee Of November 17, 1988
- (QQ):

EXHIBIT 33:

STIPULATED RULE-MAKING RECORD RE: ADVERTISING ASSESSMENTS FOR PEACHES, PLUMS AND NECTARINES

- (A): Federal Register, Vol. 54, No. 138, Page 30365, Final Rule—Expense and Assessment Rates—Nectarines, Peaches, Plums, July 20, 1989
- (B): Federal Register, Vol. 54, No. 120, Page 26382, Proposed Rule—Expense and Assessment Rates—Re: Nectarines,

Peaches, Plums, June 23, 1989

- (C): Budget NAC—March 1, 1988—February 28, 1989
- (D): NAC Meeting Report of May 5, 1988, May 9, 1988.
- (E): Budget Plum Commodity Committee—March 1, 1988—February 28, 1989
- (F): Memo From Kimmel to Cioffi Re: Plum Commodity Committee Meeting Report of May 4, 1988, May 9, 1988
- (G): Budget Peach Commodity Committee—March 1, 1988—February 28, 1989
- (H): Memo From Kimmel to Cioffi Re: Peach Commodity Committee Meeting Report of May 5, 1988, May 13, 1988
- (I): Memo From Scanlon to Brader Re: Expenses and Assessment Rates For Specified Orders, July 7, 1988
- (J): Informal Docket Review Re: Expenses Assesment Rates for Nectarines, Plums and Peaches, July 13, 1988
- (K): Memo from Scanlon to Brader Re: Expenses and

Assessment Rates for Specified Orders, June 2, 1988

- (L): Federal Register, Vol. 53, No. 119, page 23243, Proposed Rules for Nectarines and Peaches Grown in California, June 21, 1988
- (M): Federal Register, Vol. 53 No. 138, Page 27151, Rules and Regulations for Expenses and Assessment Rates for Specified Marketing Orders, July 19, 1988
- (N): Minutes—Peach Commodity Committee, May 7, 1980
- (O): Minutes—Peach Commodity Committee, November 20, 1980
- (P): Minutes—Peach Commodity Committee, May 6, 1981
- (Q): Minutes—Peach Commodity Committee, November 19, 1981
- (R): Minutes—Peach Commodity Committee, November 18, 1982
- (S): Minutes—Peach Commodity Committee, May 4, 1983
- (T): Minutes—Peach Commodity Committee, December 1, 1983

- (U): Minutes—Peach Commodity Committee, May 3, 1984
- (V): Minutes—Peach Commodity Committee, November 15, 1984
- (W): Minutes—Peach Commodity Committee, May 8, 1985
- (X): Minutes—Peach Commodity Committee, November 14, 1985
- (Y): Minutes—Peach, Plum and Nectarine Commodity Committee, May 8, 1986, May 9, 1986
- (Z): Minutes—Peach Commodity Committee, November 20, 1986
- (AA): Minutes—Peach Commodity Committee, May 7, 1987
- (BB): Minutes—Peach Commodity Committee, December 8, 1987
- (CC):
- (DD):
- (EE): Minutes—Peach Commodity Committee, May 5, 1988
- (FF): Minutes—Peach Commodity Committee, November 17, 1988
- (GG): Minutes—Peach Commodity Committee, May 4, 1989

- (HH): Memo from Blackburn to Doyle Re: Peach Commodity Committee Meeting, May 26, 1982
- (II): Memo From W.B. Blackburn to Doyle Re: Peach Commodity Committee Meeting, December 21, 1982
- (JJ): Memo From Muck to Doyle Re: Peach Commodity Committee Meeting, December 22, 1983
- (KK): Memo From Muck to Doyle Re: Peach Co-mmodity Committee Meeting, June 7, 1984
- (LL): Memo From Muck to Doyle Re: Parity Clarification, Nectarines and Peaches, October 5, 1984
- (MM): Memo from Blackburn to Doyle Re: Peach Commodity Committee Meeting, November 30, 1984
- (NN): Memo From Blackburn to Doyle Re: Peach Commodity Committee Meeting, May 10, 1985
- (OO): Memo From Blackburn to Doyle Re: Peach Commodity Committee Meeting, June 5, 1985

- (PP): Memo From Muck to Doyle
Re: Peach Commodity Com-
mittee Meeting, December 4,
1985
- (QQ): Memo From Kimmel to Cioffi
Re: Peach Commodity Com-
mittee Meeting, May 13, 1986
- (RR): Memo From Kimmel to Cioffi
Re: Peach Commodity Com-
mittee Meeting, December 5,
1986
- (SS): Memo From Kimmel to Cioffi
Re: Peach Commodity Com-
mittee Meeting, December
16, 1987
- (TT): Memo From Kimmel to Cioffi
Re: Peach Commodity Com-
mittee Meeting, May 13, 1988
- (UU): Memo From Kimmel to Cioffi
Re: Peach Commodity Com-
mittee Meeting, November
21, 1988
- (VV): Recommendations Of The
Plum Commodity Committee
For 1989 Season and Sup-
porting Documentation
- (WW): Minutes—Nectarine Admin-
istrative Committee and
Supporting Documentation,
May 3, 1989
- (XX): Memorandum From Kimmel
To Cioffi, Re: Administrative

- Committee Meeting Of May
3, 1989
- (YY): Memorandum From Kimmel
To Cioffi, Re: Plum Com-
modity Committee Meeting
Of May 3, 1989
- (ZZ):
- (AAA): Attachments To Exhibit
33(UU), Pages 5 and 6 Tr.
2632
- (BBB): Index of Exhibits filed in
Wileman I hearing (Ex. 5,6)
[assessment rulemaking rec-
ord with respect to Necta-
rines and Plums]. For clarity
of understanding, Exhibit
33(A) through 33 (AAA) of
Wileman II, contain the
peach assessments from pre-
sent all the way back to the
1980 rule making record, as
well as the plum and necta-
rines from present back to
1987. To get Plums and
Nectarines from 1987 farther
backwards in time, one must
look at Exhibit 33 (BBB),
which is an index of docu-
ments in evidence in the
Wileman/Kash I case, which
index was marked as Exhibit
5C in the Wileman/Kash I
hearing.

- EXHIBIT 34: Waiver of Notice and Consent to Holding of First Meeting of Stip. as being *all* Directors of Tree Fruit Reserve, A California Corporation they had
- EXHIBIT 35: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, November 8, 1957
- EXHIBIT 36: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 11, 1958
- EXHIBIT 37: Minutes—Executive Committee, Tree Fruit Reserve, November 20, 1958
- EXHIBIT 38: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, April 21, 1958
- EXHIBIT 39: Minutes—Board of Directors, Tree Fruit Reserve, 1958-1959, November 21, 1958
- EXHIBIT 40: Minutes—Board of Directors, Tree Fruit Reserve, 1957-1958, April 23, 1958
- EXHIBIT 41: Minutes—Board of Directors, Tree Fruit Reserve, 1958-1959, April 23, 1958
- EXHIBIT 42: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 11, 1959
- EXHIBIT 43: Minutes—Executive Committee, Tree Fruit Reserve, A

- California Corporation, April 20, 1959
- EXHIBIT 44: Minutes—Board of Directors, Tree Fruit Reserve, 1958-1959, April 23, 1959
- EXHIBIT 45: Minutes—Board of Directors, Tree Fruit Reserve, 1959-1960, April 23, 1959
- EXHIBIT 46: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, August 11, 1959
- EXHIBIT 47: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, October 15, 1959
- EXHIBIT 48: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, December 10, 1959
- EXHIBIT 49: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 9, 1960
- EXHIBIT 50: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, April 14, 1960
- EXHIBIT 51: Minutes—Board of Directors, Tree Fruit Reserve, 1959-1960, April 27, 1960

- EXHIBIT 52: Minutes—Board of Directors, Tree Fruit Reserve, 1960-1961, April 27, 1960
- EXHIBIT 53: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, September 9, 1960
- EXHIBIT 54: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, December 2, 1960
- EXHIBIT 55: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 7, 1961
- EXHIBIT 56: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, April 25, 1961
- EXHIBIT 57: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, April 27, 1961
- EXHIBIT 58: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1961-1962, April 27, 1961
- EXHIBIT 59: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, February 13, 1962
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- EXHIBIT 61: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, April 23, 1962

- EXHIBIT 62: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1961-1963, April 27, 1962
- EXHIBIT 63: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1962-1963, April 27, 1962
- EXHIBIT 64: Minutes—Annual Meeting of Member, Tree Fruit Reserve, February 28, 1963
- EXHIBIT 65: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, April 25, 1963
- EXHIBIT 66: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1962-1963, May 1, 1963
- EXHIBIT 67: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1963-1964, May 1, 1963
- EXHIBIT 68: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1963-1964, December 17, 1963
- EXHIBIT 69: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 5, 1964
- EXHIBIT 70: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, April 27, 1964

- EXHIBIT 71: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1963-1964, May 1, 1964
- EXHIBIT 72: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1964-1965, May 1, 1964
- EXHIBIT 73: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1964-1965, November 6, 1964
- EXHIBIT 74: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1964-1965, November 20, 1964
- EXHIBIT 75: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 10, 1965
- EXHIBIT 76: Minutes—Joint Meeting Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, April 26, 1965
- EXHIBIT 77: Minutes—Joint Meeting Control Committee & Board of Directors, Tree Fruit Reserve, April 30, 1965
- EXHIBIT 78: Minutes—Annual Meeting of Member, Tree Fruit Reserve, February 8, 1966
- EXHIBIT 79: Minutes—Joint Meeting Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, April 25, 1966

- EXHIBIT 80: Minutes—Joint Meeting Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, November 16, 1966
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- EXHIBIT 82: Minutes—Joint Meeting Advisory Committee & Executive Committee, Tree Fruit Reserve, April 26, 1967
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- EXHIBIT 85: Minutes—Joint Meeting Control Committee & Board of Directors, Tree Fruit Reserve, 1967-1968, May 2, 1967
- EXHIBIT 86: Minutes—Joint Meeting Advisory Committee & Executive Committee, Tree Fruit Reserve, July 18, 1967
- EXHIBIT 87: Minutes—Joint Meeting Advisory Committee & Executive Committee, Tree Fruit Reserve, November 28, 1967
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- EXHIBIT 93: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 11, 1969
- EXHIBIT 94: Minutes—Management Committee Advisory Committee & Executive Committee, Tree Fruit Reserve, April 24, 1969
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- EXHIBIT 96: Minutes—Joint Meeting Control Committee & Board of Directors, Tree Fruit Reserve—1969-1970, April 30, 1969

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- EXHIBIT 98: Minutes—Management Services Committee, Advisory Committee, CTFA, Executive Committee, Tree Fruit Reserve, April 21, 1970
- EXHIBIT 99: Minutes—Control Committee, CTFA & Board of Directors, Tree Fruit Reserve—1970-1971, April 23, 1970
- EXHIBIT 100: Minutes—Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, November 13, 1970
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- EXHIBIT 102: Minutes—Management Services Committee, Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, February 3, 1971
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- EXHIBIT 104: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1970-1971, April 29, 1971

- EXHIBIT 105: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1971-1972, April 29, 1971
- EXHIBIT 106: Minutes—Management Services Committee, Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, April 19, 1972
- EXHIBIT 107: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1971-1972 May 2, 1972
- EXHIBIT 108: Minutes—Annual Meeting of Members, Tree Fruit Reserve, May 2, 1972
- EXHIBIT 109: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1972-1973, May 2, 1972
- EXHIBIT 110: Minutes—Management Services Committee, Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, October 27, 1972
- EXHIBIT 111: Minutes—Management Services Committee, Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, April 23, 1973
- EXHIBIT 112: Minutes—Annual Meeting of Members, Tree Fruit Reserve, May 1, 1973

- EXHIBIT 113: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1972-1973, May 1, 1973
- EXHIBIT 114: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1973-1974, May 1, 1973
- EXHIBIT 115: Minutes—Management Service Committee, Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, December 6, 1973
- EXHIBIT 116: Minutes—Management Service Committee, Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, May 7, 1974
- EXHIBIT 117: Minutes—Annual Meeting of Members, Tree Fruit Reserve, May 16, 1974
- EXHIBIT 118: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1973-1974, May 16, 1974
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- EXHIBIT 120: Minutes—Management Services Committee, Advisory Committee, CTFA, Executive Committee, Tree Fruit Reserve, November 13, 1974

- EXHIBIT 121: Minutes—Management Services Committee, Advisory Committee, CTFA, Executive Committee, Tree Fruit Reserve, Decemer 11, 1974
- EXHIBIT 122: Minutes—Annual Meeting of Members, Tree Fruit Reserve, May 21, 1975
- EXHIBIT 123: Minutes—Joint Meeting, Control Committee, California Tree Fruit Agreement & Board of Directors, Tree Fruit Reserve, 1975-1976, September 19, 1975
- EXHIBIT 124: Minutes—Annual Meeting of Members, Tree Fruit Reserve, November 10, 1976
- EXHIBIT 125: Minutes—Control Committee, CTFA & Board of Directors, Tree Fruit Reserve for 1975-1976, November 10, 1976
- EXHIBIT 126: Minutes—Control Committee, CTFA & Board of Directors, Tree Fruit Reserve for 1976-1977, November 10, 1976
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- EXHIBIT 130: Minutes—Management Services Committee May 7, 1979
- EXHIBIT 131: Minutes—Annual Meeting of Members, Tree Fruit Reserve, May 8, 1979
- EXHIBIT 132: Minutes—Management Services Committee October 10, 1979
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- EXHIBIT 134: Minutes—Management Services Committee, May 6, 1980
- EXHIBIT 135: Minutes—Management Services Committee, September 17, 1980
- EXHIBIT 136: Minutes—Management Services Committee, October 7, 1980
- EXHIBIT 137: Minutes—Management Services Committee, November 18, 1980
- EXHIBIT 138: Minutes—Management Services Committee, March 3, 1981
- EXHIBIT 139: Minutes—Management Services Committee, May 5, 1981
- EXHIBIT 140: Minutes—Management Services Committee, September 30, 1981
- EXHIBIT 141: Minutes—Management Services Committee, November 17, 1981
- EXHIBIT 142: Minutes—Management Services Committee, May 4, 1982
- EXHIBIT 143: Minutes—Management Services Committee, September 10, 1982

- EXHIBIT 144: Minutes—Management Services Committee, November 16, 1982
- EXHIBIT 145: Minutes—Management Services Committee, May 3, 1983
- EXHIBIT 146: Minutes—Management Services Committee, July 11, 1983
- EXHIBIT 147: Minutes—Management Services Committee, September 19, 1983
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- EXHIBIT 149: Minutes—Management Services and Executive Committee Tree Fruit Reserve, November 29, 1983
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- EXHIBIT 151: Minutes—Management Services Committee, February 10, 1984
- EXHIBIT 152: Minutes—Management Services and Executive Committee Tree Fruit Reserve, May 1, 1984
- EXHIBIT 153: Minutes—Management Services and Executive Committee Tree Fruit Reserve, November 13, 1984
- EXHIBIT 154: Minutes—Management Services and Executive Committee Tree Fruit Reserve, May 6, 1985
- EXHIBIT 155: Minutes—Management Services and Executive Committee Tree Fruit Reserve, October 17, 1985

- EXHIBIT 156: Minutes—Management Services and Executive Committee Tree Fruit Reserve, November 12, 1985
- EXHIBIT 157: Minutes—Management Services and Executive Committee Tree Fruit Reserve, February 21, 1986
- EXHIBIT 158: Minutes—Management Services and Executive Committee Tree Fruit Reserve, May 6, 1986
- EXHIBIT 159: Minutes—Management Services and Executive Committee Tree Fruit Reserve, November 18, 1986
- EXHIBIT 160: Minutes—Management Services and Executive Committee Tree Fruit Reserve, February 25, 1987
- EXHIBIT 161: Minutes—Management Services, March 26, 1987
- EXHIBIT 162: Minutes—Tree Fruit Reserve and Management Services, May 5, 1987
- EXHIBIT 163: Minutes—Tree Fruit Reserve and Management Services, December 7, 1987
- EXHIBIT 164: Minutes—Management Services, May 3, 1988
- (A): Minutes—Tree Fruit Re-serve Executive Committee, Tree Fruit Reserve, August 11, 1988.
- EXHIBIT 165: Minutes—Tree Fruit Reserve, Dup of 29. November 15, 1988
- EXHIBIT 166: Minutes—Management Services, November 15, 1988

- EXHIBIT 167: Minutes—Tree Fruit Reserve, May 2, 1989
- EXHIBIT 168: Minutes—Management Services, May 2, 1989
- EXHIBIT 169: Minutes—Executive Committee, November 28, 1989
- (A): "TFR" Letter From Jon Field To TFR Directors, Setting Forth Request For A January 17, 1990 Full Board Meeting So As To Conduct A Retroactive Ratification of TFR Activities From 1980 Through 1989
- (B): Minutes—Full Board of Directors of Tree Fruit Reserve, January 17, 1990
- EXHIBIT 170: Tree Fruit Reserve November 18, 1957 Financial Statement
- EXHIBIT 171: Tree Fruit Reserve February 28, 1958 Financial Statement
- EXHIBIT 172: Tree Fruit Reserve October 31, 1958 Financial Statement
- EXHIBIT 173: Tree Fruit Reserve February 28, 1959 Financial Statement
- EXHIBIT 174: Tree Fruit Reserve October 31, 1959 Financial Statement
- EXHIBIT 175: Tree Fruit Reserve February 29, 1960 Financial Statement

- EXHIBIT 176: Tree Fruit Reserve, Audit, 1960-1961
- EXHIBIT 177: Tree Fruit Reserve, Audit, 1961-1962
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- EXHIBIT 191: Tree Fruit Reserve, Audit, 1975-1976
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- EXHIBIT 205: California Tree Fruit Agreement, Audit, 1979-1980
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- EXHIBIT 208: California Tree Fruit Agreement, Audit, 1982-1983
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- EXHIBIT 211: California Tree Fruit Agreement, Audit, 1985-1986
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- EXHIBIT 213: California Tree Fruit Agreement, Audit, 1987-1988
- EXHIBIT 214: California Tree Fruit Agreement, Audit, 1988-1989
- EXHIBIT 215: Subpoena Ad Testificandum To Ray Piciotta, Former CTFA Marketing Director
- EXHIBIT 216: Subpoena Ad Testificandum, with Attached Proof of Service To Karen Tully
- EXHIBIT 217: Subpoena Ad Testificandum, with Attached Proof Of Service To Virgil Rasmussen, Past President, Tree Fruit Reserve and

Chairman, Control Committee,
CTFA

- EXHIBIT 218: Subpoena Ad Testificandum, with Attached Proof Of Service To LeRoy Giannini, Past President, Nectarine Administrative Committee
- EXHIBIT 219: Subpoena Ad Testificandum, with Attached Proof Of Service To Byron Hirata, Shipping Point Inspection Area Supervisor
- EXHIBIT 220: Subpoena Ad Testificandum, with Attached Proof Of Service To Jonathan Field, CTFA Manager and Secretary-Treasurer, Tree Fruit Reserve
- EXHIBIT 221: Subpoena Ad Testificandum, with Attached Proof Of Service To David Parker, Assistant Manager, CTFA
- EXHIBIT 222: Subpoena Ad Testificandum, with Attached Proof Of Service To Ann Stolz, CTFA Bookkeeper
- EXHIBIT 223: Subpoena Ad Testificandum, with Attached Proof Of Service To Dawn Rau, Grant Bennett and Associates
- EXHIBIT 224: Subpoena Ad Testificandum, with Attached Proof Of Service To Karen Jackson, CTFA Secretary
- EXHIBIT 225: Subpoena Ad Testificandum, with Attached Proof Of Service To

Albert Peterson, President, Tree Fruit Reserve and Chairman, Peach Committee

- (A): Subpoena Ad Testificandum, with Attached Proof Of Service To Patrick Pinkham, Director Tree Fruit Reserve and Chairman, Plum Committee
- (B): Subpoena Ad Testificandum, with Attached Proof Of Service To Ed Brown, Shipping Point Inspection
- (C): Subpoena Ad Testificandum, with Attached Proof Of Service To Gary Van Sickle, CTFA Supervising Field Agent
- (D): Subpoena Ad Testificandum, with Attached Proof Of Service To Dale Janzen, CTFA Field Agent
- EXHIBIT 226: Subpoena Ad Testificandum, with Attached Proof Of Service To Kirt Kimmel, Agricultural Marketing Service
- EXHIBIT 227: Subpoena Ad Testificandum, with Attached Proof Of Service To Carl Blackstone, Assistant U.S. Attorney

- EXHIBIT 228: Letter From Jonathan Field To Don and Lionel Serimian Dated June 21, 1989
- (A): Field Report of Pete Thiesen Re: D & L Serimian CTFA Violations Dated June 13, 1989
- (B): Field Notes of Sonnie Robinson Re: D & L Serimian CTFA Violations Dated June 13, 1989
- (C): Field Notes of Edward Brown Re: D & L Serimian CTFA Violations Dated June 13, 1989
- (D): Field Notes of Edward Brown Re: D & L Serimian CTFA Violations Dated June 14, 1989
- EXHIBIT 229: Letter to Robert Simmons (OF USDA General Counsel's Office) From Jon Field Re: Kash, Inc., Dated June 22, 1989
- EXHIBIT 230: Letter From James Andrews To Kash, Inc. Dated July 13, 1989
- EXHIBIT 231: Letter From Jonathan Field on TFR Letterhead Seeking Support To Oppose Baker's Ruling Dated July 7, 1989
- EXHIBIT 232: Letter From Charles Brader To Patrick Pinkham Indicating Intent To Publish Color Chips

- For Plums Dated December 4, 1987
- EXHIBIT 233: Letter From Charles Brader To Albert Peterson Re: Intent To Publish Color Chips (Peaches) Dated December 4, 1987
- EXHIBIT 234: Letter From Jonathan Field To Nectarine Handlers Re: Size Elimination, Dated October 20, 1987
- EXHIBIT 235: Letter from Richard Peterson, Manager/President of CTFA To LeRoy Giannini Dated July 23, 1985 Re Maturity (Color Chip) Changes Being Interpreted As Volume Control
- EXHIBIT 236: Letter From Ito Packing To R.V. Pisciotta Dated April 13, 1988 Complaining About Insult To Red Jim Nectarines
- EXHIBIT 237: Letter From CTFA To Jim Ito Dated April 19, 1988 Apologizing Re Red Jim Nectarines
- EXHIBIT 238: Bill and Check For Charter Plane For March 15, 1989 Funeral
- EXHIBIT 239: Lucky Tour Documents For June 21, 1989 to June 22, 1989
- EXHIBIT 240: Corrections To Transcript Submitted By Judge Baker
- EXHIBIT 241: Motion—Court To Take Official Notice of 1988 Hearing

- EXHIBIT 242: Judge Baker Notice Of Intent to Incorporate The 1988 Hearing As Part Of The 1990 Hearing
- EXHIBIT 243: Judge Baker's Request (To The Office of General For USDA To Enforce The Subpoenas Duces Tecums on Tree Fruit Reserve, Albert Peterson, And David Parker, Dated November 7, 1989
- EXHIBIT 244: U.S. Attorney's Application For OSC In Federal Court, and Federal Court Judge Price's Order Compelling Production of Documents Listed In Administrative Subpoena By Tree Fruit Reserve, Albert Peterson, and David Parker
- EXHIBIT 245: TFR Agreeing To Comply With Subpoenas After Receipt of Federal Court OSC Order
- EXHIBIT 246: Expert Witness Dr. Julian Whaley's Analysis of Sun Grand Nectarines, and His Data Summary Re: Color Comparisons of 1987 Color Chips and 1989 Color Chips.
- EXHIBIT 247: 1989 Color Chips (Black Cover Booklet Of Chips), Analyzed By Dr. Julian Whaley
- EXHIBIT 248: List of 1989 Color Chips Matched To Sun Grand Nectarines By Ed Brown, S.P.I. Supervisor, Which Sun Grand Nectarines Were Pre-

- viously Analyzed By Dr. Julian Whaley
- EXHIBIT 249: Domestic Stock Statement of Tree Fruit Reserve, Signed April 30, 1989, Effective April 30, 1989
- (A): Domestic Stock Statement of Tree Fruit Reserve, Signed April 8, 1988, Effective April 30, 1988
- (B): Domestic Stock Statement of Tree Fruit Reserve, Signed April 6, 1987, Effective April 30, 1987
- (C): Domestic Stock Statement of Tree Fruit Reserve, Signed April 16, 1986, Effective April 30, 1986
- (D): Domestic Stock Statement of Tree Fruit Reserve, Effective April 30, 1985
- (E): Domestic Stock Statement of Tree Fruit Reserve, Signed March 7, 1984, Effective April 30, 1984
- (F): Domestic Stock Statement of Tree Fruit Reserve, Signed March 7, 1983, Effective April 30, 1983
- (G): Domestic Stock Statement of Tree Fruit Reserve, Signed February 22, 1982, Effective April 30, 1982

- (H): Domestic Stock Statement of Tree Fruit Reserve, Signed January 26, 1981, Effective April 30, 1981
 - (I): Domestic Stock Statement of Tree Fruit Reserve, Signed April 2, 1980, Effective April 30, 1980
 - (J): Statement of Domestic Corporation for Tree Fruit Reserve, Signed April 17, 1979
 - (K): Statement of Domestic Corporation for Tree Reserve, Signed April 11, 1978
 - (L): Statement of Domestic Corporation for Tree Reserve, Signed June 29, 1977
 - (M): Statement of Domestic Corporation for Tree Reserve, Signed May 10, 1976
 - (N): Statement of domestic Corporation for Tree Reserve, Signed July 12, 1972
- EXHIBIT 250: Al Peterson's Personal Testimony Preparation Notes
- (A): Al Peterson's Personal Testimony Preparation Notes
- EXHIBIT 251: Agreement Between The (Federal) Commodity Committees With The (California) Pear Zone

- EXHIBIT 252: List of Members And Alternates On The "Control Committee", 1989-1990 and 1990-1991
- EXHIBIT 253: List of Committee Members & Alternates for the Nectarine Administrative Committee, 1989-1990 and 1990-1991
- EXHIBIT 254: List of Committee Members & Alternates for the Pear, Plum, and Peach Commodity Committees, 1989-1990 and 1990-1991
- EXHIBIT 255: Budget Peach Commodity Committee, For First Year March 1, 1989 Through February 28, 1990
- (A): Budget Nectarine Association Committee, For First Year March 1, 1989 Through February 28, 1990
 - (B): Budget Plum Commodity Committee, For First Year March 1, 1989 Through February 29, 1990
 - (C): Budget Peach Commodity Committee, For First Year March 1, 1988 Through February 28, 1989
 - (D): Budget Nectarine Administrative Committee, For First Year March 1, 1988 Through February 28, 1989
 - (E): Budget Plum Commodity Committee, For First Year

March 1, 1988 Through February 28, 1989

- (F): Budget Peach Commodity Committee, For First Year March 1, 1987 Through February 28, 1988
- (G): Budget Nectarine Administrative Committee, For First Year March 1, 1987 Through February 28, 1988
- (H): Budget Plum Commodity Committee, For First Year March 1, 1987 Through February 28, 1988
- (I): Budget Peach Commodity Committee, For First Year March 1, 1986 Through February 28, 1987
- (J): Budget Nectarine Administrative Committee, For First Year March 1, 1986 Through February 28, 1987
- (K): Budget Plum Commodity Committee, For First Year March 1, 1986 Through February 28, 1987
- (L): Budget Peach Commodity Committee, For First Year March 1, 1985 Through February 28, 1986
- (M): Budget Nectarine Administrative Committee, For First

Year March 1, 1985 Through February 28, 1986

- (N): Budget Plum Commodity Committee, For First Year March 1, 1985 Through February 28, 1986
- EXHIBIT 256: CTFA Advertising Varietal Chart (Which Includes The Red Jim)
- EXHIBIT 257: VCR Tape
- EXHIBIT 258: Excerpts From Transcripts of Gerawan 15(A) Hearing
- EXHIBIT 259: CTFA's Peach Advertising Hand-out (Which Document Was Also Respondent's Exhibit 57 in The Gerawan Earlier 15(A) Hearing).
- EXHIBIT 260: Prima Stickers
- EXHIBIT 261: Tree Fruit Reserve Bylaws Effective February 1977 (These Same Bylaws Are Also A Part Of The Exhibit 30 Package Hereinabove).
 - A: Bylaws Effective 1975
 - B: Bylaws Effective 1957 At Inception Of Tree Fruit Reserve
- EXHIBIT 262: 1987 Color Chips (Green Cover Booklet Of Chips), Analyzed By Dr. Julian Whaley
- EXHIBIT 263: Photo—Minolta Electronic Light Refraction Testing Device

- EXHIBIT 264: Photo—Minolta Electronic Light Refraction Testing Devis—Light Source
- EXHIBIT 265: Photo of Sun Grand Nectarines Examined By Dr. Whaley
- EXHIBIT 266: Photo of Sun Grand Nectarines Examined By Dr. Whaley
- EXHIBIT 267: Photo of Sun Grand Nectarines Examined By Dr. Whaley
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- EXHIBIT 270: Photo of Sun Grand Nectarines Examined By Dr. Whaley
- EXHIBIT 271: Photo of Pressure Tester Used By Dr. Julian Whaley at USDA's Lab
- EXHIBIT 272: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1988 Through February 28, 1989.
- EXHIBIT 273: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1987 Through February 28, 1988.
- EXHIBIT 274: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1986 Through February 28, 1987.

- EXHIBIT 275: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1985 Through February 28, 1986.
- EXHIBIT 276: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1984 Through February 28, 1985.
- EXHIBIT 277: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1983 Through February 28, 1984.
- EXHIBIT 278: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1978 Through February 28, 1979.
- EXHIBIT 279: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1977 Through February 28, 1978.
- EXHIBIT 280: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1976 Through February 28, 1977.
- EXHIBIT 281: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1975 Through February 28, 1976.
- EXHIBIT 282: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1974 Through February 28, 1975.

- EXHIBIT 283: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1973 Through February 28, 1974.
- EXHIBIT 284: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1972 Through February 28, 1973.
- EXHIBIT 285: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1971 Through February 28, 1972.
- EXHIBIT 286: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1970 Through February 28, 1971.
- EXHIBIT 287: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1969 Through February 28, 1970.
- EXHIBIT 288: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1968 Through February 28, 1969.
- EXHIBIT 289: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1967 Through February 28, 1968.
- EXHIBIT 290: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1966 Through February 28, 1967.

- EXHIBIT 291: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1965 Through February 28, 1966.
- EXHIBIT 292: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1964 Through February 28, 1965.
- EXHIBIT 293: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1963 Through February 28, 1964.
- EXHIBIT 294: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1962 Through February 28, 1963.
- EXHIBIT 295: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1961 Through February 28, 1962.
- EXHIBIT 296: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1960 Through February 28, 1961.
- EXHIBIT 297: Index To The "Budget Approval Record" Which "Budgetary Record" Consists of Sub-Exhibits 297 (A) Through 297 (KK). Said Budget Approval Record [i.e., Exhibits 297 (A) Through 297 (KK)] Was Produced By Respondent in Response To "Orders of Production of Documents Number

26, 27, and 28". Said "Orders of Production" Are Set Forth Within Exhibit 13, and Are Also Identified and Discussed At Those Transcript Paragraphs Which Are Identified As Number 41, 42 and 43 Of The Transcript Of Hearing For The Date Of February 6, 1990, at pages 2642 through 2644. Said "Budget Approval Record" Is The Entire Budget, and All Supporting Documents Thereto, Which The Nectarine, Plum, and Peach Committees Submitted To The Secretary Of Agriculture For His Approval Each Harvest Season From 1980 Through 1989.

- (A): 1988 Report On Research Projects For California Peaches, Plums & Nectarines
- (B): 1987 Report On Research Projects For California Peaches, Plums & Nectarines
- (C): 1986 Report On Research Projects For California Peaches, Plums & Nectarines
- (D): 1985 Report On Research Projects For California Peaches, Plums & Nectarines
- (E): 1984 Report On Research Projects For California Peaches, Plums & Nectarines

(F): Qualitative Research Concerning The California Tree Fruit Agreement (July Through September, 1989)

- (G): 1) Field Representative Reports California Summer Fruits
- 2) California Summer Fruit Promotion Bulletin No. 2 - Period Ending June 13, 1980
- 3) California Summer Fruit Promotion Bulletin No. 3 - Period Ending June 27, 1980
- 4) California Summer Fruit Promotion Bulletin No. 4 - Period Ending July 11, 1980
- 5) California Summer Fruit Promotion Bulletin No. 5 - Period Ending July 25, 1980
- 6) California Summer Fruit Promotion Bulletin No. 6 - Period Ending August 8, 1980
- 7) California Summer Fruit Promotion Bulletin No. 7 - Period Ending August 22, 1980

- 8) California Summer Fruit
Promotion Bulletin No. 8
- Period Ending
September 5, 1980
- 9) California Summer Fruit
Promotion Bulletin No. 9
- Period Ending
September 19, 1980

(H): California Summer Fruits
Promotion Bulletin for 1981

- 1) California Summer Fruit
Promotion Bulletin No. 8
- Period Ending September 19, 1981
- 2) California Summer Fruit
Promotion Bulletin No. 7
- Period Ending September 5, 1981
- 3) California Summer Fruit
Promotion Bulletin No. 6
- Period Ending August 22, 1981
- 4) California Summer Fruit
Promotion Bulletin No. 5
- Period Ending August 8, 1981
- 5) California Summer Fruit
Promotion Bulletin No. 4
- Period Ending July 25, 1981
- 6) California Summer Fruit
Promotion Bulletin No. 3

- Period Ending July 11,
1981

- 7) California Summer Fruit
Promotion Bulletin No. 2
- Period Ending June 27,
1981
- 8) California Summer Fruit
Promotion Bulletin No. 1
- Period Ending June 13,
1981

(I): California Summer Fruits
Promotion Bulletin for 1982

- 1) California Summer Fruit
Promotion Bulletin No. 8
- Period Ending September 10, 1982
- 2) California Summer Fruit
Promotion Bulletin No. 7
- Period Ending August 27, 1982
- 3) California Summer Fruit
Promotion Bulletin No. 6
- Period Ending August 13, 1982
- 4) California Summer Fruit
Promotion Bulletin No. 5
- Period Ending July 30
1982
- 5) California Summer Fruit
Promotion Bulletin No. 4
- Period Ending July 4,
1982

- 6) California Summer Fruit Promotion Bulletin No. 3 - Period Ending July 2, 1982
- 7) California Summer Fruit Promotion Bulletin No. 2 - Period Ending June 18, 1982
- 8) California Summer Fruit Promotion Bulletin No. 1 - Period Ending June 4, 1982
- (J): California Summer Fruits Field Staff Promotion Bulletin for 1983
 - 1) California Summer Fruits Field Staff Bulletin No. 9 - Period Ending September 16, 1983
 - 2) California Summer Fruits Field Staff Bulletin No. 8 - Period Ending September 2, 1983
 - 3) California Summer Fruits Field Staff Bulletin No. 7 - Period Ending August 19, 1983
 - 4) California Summer Fruits Field Staff Bulletin No. 6 - Period Ending August 5, 1983

- 5) California Summer Fruits Field Staff Bulletin No. 5 - Period Ending July 22, 1983
- 6) California Summer Fruits Field Staff Bulletin No. 4 - Period Ending July 8, 1983
- 7) California Summer Fruits Field Staff Bulletin No. 3 - Period Ending June 24, 1983
- 8) California Summer Fruits Field Staff Bulletin No. 2 - Period Ending June 10, 1983
- 9) California Summer Fruits Field Staff Bulletin No. 1 - Period Ending May 27, 1983
- (K): California Summer Fruits Field Staff Bulletin for 1984
 - 1) California Summer Fruits Field Staff Bulletin No. 8 - Period Ending September 7, 1984
 - 2) California Summer Fruits Field Staff Bulletin No. 7 - Period Ending August 24, 1984
 - 3) California Summer Fruits Field Staff Bulletin No. 6 -

Period Ending August 10,
1984

- 4) California Summer Fruits
Field Staff Bulletin No. 5 -
Period Ending July 27,
1984
- 5) California Summer Fruits
Field Staff Bulletin No. 4 -
Period Ending July 13,
1984
- 6) California Summer Fruits
Field Staff Bulletin No. 3 -
Period Ending June 29,
1984
- 7) California Summer Fruits
Field Staff Bulletin No. 2 -
Period Ending June 15,
1984
- 8) California Summer Fruits
Field Staff Bulletin No. 1 -
Period Ending June 1, 1984

(L): California Summer Fruits
Field Staff Bulletin for 1985

- 1) California Summer Fruits
Field Staff Bulletin No. 9 -
Period Ending September
20, 1985
- 2) California Summer Fruits
Field Staff Bulletin No. 8 -
Period Ending September
6, 1985

- 3) California Summer Fruits
Field Staff Bulletin No. 7 -
Period Ending August 23,
1985

- 4) California Summer Fruits
Field Staff Bulletin No. 6 -
Period Ending August 9,
1985

- 5) California Summer Fruits
Field Staff Bulletin No. 5 -
Period Ending July 26,
1985

- 6) California Summer Fruits
Field Staff Bulletin No. 4 -
Period Ending July 12,
1985

- 7) California Summer Fruits
Field Staff Bulletin No. 3 -
Period Ending June 28,
1985

- 8) California Summer Fruits
Field Staff Bulletin No. 2 -
Period Ending June 14,
1985

- 9) California Summer Fruits
Field Staff Bulletin No. 1 -
Period Ending May 31,
1985

(M): California Summer Fruits
Field Staff Bulletin For 1986

- 1) California Summer Fruits
Field Staff Bulletin No. 9 -

Period Ending September
19, 1986

- 2) California Summer Fruits
Field Staff Bulletin No. 8 -
Period Ending September
5, 1986
- 3) California Summer Fruits
Field Staff Bulletin No. 7 -
Period Ending August 22,
1986
- 4) California Summer Fruits
Field Staff Bulletin No. 6 -
Period Ending August 8,
1986
- 5) California Summer Fruits
Field Staff Bulletin No. 5 -
Period Ending July 25,
1986
- 6) California Summer Fruits
Field Staff Bulletin No. 4 -
Period Ending July 11,
1986
- 7) California Summer Fruits
Field Staff Bulletin No. 3 -
Period Ending June 27,
1986
- 8) California Summer Fruits
Field Staff Bulletin No. 2 -
Period Ending June 13,
1986
- 9) California Summer Fruits
Field Staff Bulletin No. 1 -

Period Ending May 30,
1986

- (N): California Summer Fruits
Field Staff Bulletin For
1987
- 1) California Summer Fruits
Field Staff Bulletin No. 1 -
Period Ending May 29,
1987
 - 2) California Summer Fruits
Field Staff Bulletin No. 2 -
Period Ending June 12,
1987
 - 3) California Summer Fruits
Field Staff Bulletin No. 3 -
Period Ending June 26,
1987
 - 4) California Summer Fruits
Field Staff Bulletin No. 4 -
Period Ending July 10,
1987
 - 5) California Summer Fruits
Field Staff Bulletin No. 5 -
Period Ending July 24,
1987
 - 6) California Summer Fruits
Field Staff Bulletin No. 6 -
Period Ending August 7,
1987
 - 7) California Summer Fruits
Field Staff Bulletin No. 7 -

Period Ending August 21,
1987

8) California Summer Fruits
Field Staff Bulletin No. 8 -
Period Ending September
4, 1987

9) California Summer Fruits
Field Staff Bulletin No. 9 -
Period Ending September
18, 1987

10) California Summer Fruits
Field Staff Bulletin No. 10
- Period Ending October 2,
1987

(O): California Summer Fruits
Field Staff Bulletin For 1988

1) California Summer Fruits
Field Staff Bulletin No. 9 -
Period Ending September
23, 1988

2) California Summer Fruits
Field Staff Bulletin No. 8 -
Period Ending September
9, 1988

3) California Summer Fruits
Field Staff Bulletin No. 7 -
Period Ending August 26,
1988

4) California Summer Fruits
Field Staff Bulletin No. 6 -
Period Ending August 12,
1988

5) California Summer Fruits
Field Staff Bulletin No. 5 -
Period Ending July 29,
1988

6) California Summer Fruits
Field Staff Bulletin No. 4 -
Period Ending July 15,
1988

7) California Summer Fruits
Field Staff Bulletin No. 3 -
Period Ending July 1, 1988

8) California Summer Fruits
Field Staff Bulletin No. 2 -
Period Ending June 7, 1988

9) California Summer Fruits
Field Staff Bulletin No. 1 -
Period Ending June 3, 1988

(P): California Summer Fruits
Field Staff Bulletin For 1989

1) California Summer Fruits
Field Staff Bulletin No. 8 -
Period Ending September
1, 1989

2) California Summer Fruits
Field Staff Bulletin No. 7 -
Period Ending August 18,
1989

3) California Summer Fruits
Field Staff Bulletin No. 6 -
Period Ending August 5,
1989

- 4) California Summer Fruits
Field Staff Bulletin No. 5 -
Period Ending July 21,
1989
 - 5) California Summer Fruits
Field Staff Bulletin No. 4 -
Period Ending July 7, 1989
 - 6) California Summer Fruits
Field Staff Bulletin No. 3 -
Period Ending June 23,
1989
 - 7) California Summer Fruits
Field Staff Bulletin No. 2 -
Period Ending June 9, 1989
 - 8) California Summer Fruits
Field Staff Bulletin No.1 -
Period Ending May 26,
1989
 - 9) Letter To all Committee
Members and All Sales
Desks From David S.
Parker, Dated: June 1,
1989
- (Q): California Summer Fruits
Proposed Promotional Bud-
get
- 1) Proposed Promotional
Budget 1986-1987
 - 2) Pear Commodity Commit-
tee Trail Promotional
Budget, 1985-1986

- 3) Pear Commodity Commit-
tee Trail Promotional
Budget, 1984-1985
 - 4) Pear Commodity Commit-
tee Trail Promotional
Budget, 1983-1984
 - 5) Pear Commodity Commit-
tee Trail Promotional
Budget, 1982-1983
 - 6) Pear Commodity Commit-
tee Trail Promotional
Budget, 1981-1982, Sub-
committee On Advertis-
ing And Promotion
 - 7) Pear Commodity Commit-
tee Trail Promotional
Budget, 1980-1981, Sub-
committee On Advertis-
ing And Promotion
- (R): 54th Annual Report of Cali-
fornia Tree Fruit Agreement
(1987)
- (S): 55th Annual Report of Cali-
fornia Tree Fruit Agree-
ment (1988)
- (T): A Communis Measure-
ment of the California Sum-
mer Fruits 1987 Advertising
Campaign
- (U): California Tree Fruit Agree-
ment, Foodservice Market
Research and Strategic

Direction—Executive Summary, By The Hale Group

(V): Executive Summary Consumer Purchasing of Fresh Fruit Within Kansas City—Summer 1987

(W): Minutes - Promotion and Research

- 1) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 7, 1980
- 2) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 29, 1989
- 3) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 2, 1989
- 4) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 16, 1988

- 5) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 16, 1988
- 6) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 4, 1988
- 7) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: December 8, 1987
- 8) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 19, 1986
- 9) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 13, 1985
- 10) Minutes—Nectarine Administrative Committee, Peach Commodity Com-

mittee and Plum Commodity Committee, Dated: May 7, 1985

- 11) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 14, 1984
- 12) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 2, 1984
- 13) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 4, 1983
- 14) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 30, 1983
- 15) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 6 1981

- 16) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 18, 1981
- 17) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 17, 1982
- 18) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 5, 1982
- 19) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 19, 1980
- 20) Minutes—Joint Meeting Plum, Peach and Nectarine Committees, Dated: May 7, 1986
- 21) Minutes— Joint Meeting Plum, Peach and Nectarine Committees, Dated: May 6, 1987

(X): Minutes & Reports - Various Subcommittees

- 1) 1981 - 1982 Ripening Bowl Income Statement
- 2) February 28, 1982, Recap Ripening Bowl Sales
- 3) Minutes—Subcommittee On Promotion, Dated: May 22, 1989
- 4) Minutes—Subcommittee On Advertising & Pro-motion, Dated: May 17, 1988
- 5) Minutes—Subcommittee On Promotion, Dated: December 5, 1984
- 6) Minutes—Subcommittee For Promotion and Research, Dated: March 28, 1984
- 7) Minutes—Stone Fruits Promotion Subcommittee, Dated: November 2, 1988
- 8) Minutes—Stone Fruits Promotion Subcommittee, Dated: March 23, 1988
- 9) Minutes—Stone Fruits Promotion Subcommittee, Dated: September 27, 1989
- 10) Minutes—Stone Fruits Promotion Subcommittee, Dated: March 30, 1989

- 11) Minutes—Stone Fruits Promotion Subcommittee, and Pear Subcommittee For Advertising and Promotion Dated: November 5, 1987
- 12) Minutes—Stone Fruits Promotion Subcommittee, Dated: March 26, 1987
- 13) Minutes—Stone Fruits Promotion Subcommittee, Dated: January 27, 1987
- 14) Minutes—Stone Fruits Subcommittee For Promotion And Research, Dated: March 19, 1986
- 15) Minutes—Stone Fruits Subcommittee For Promotion And Research, Dated: March 3, 1982
- 16) Minutes—Stone Fruits Subcommittee For Promotion And Research, Dated: March 4, 1981
- 17) Minutes—Stone Fruits Subcommittee For Promotion And Research, Dated: February 28, 1980
- 18) Minutes—Subcommittee For Promotion And Research, Dated: March 6, 1985

- 19) Minutes—Subcommittee For Promotion And Research, Dated: April 6, 1983
 - 20) Minutes—Subcommittee For Promotion And Research, Dated: April 14, 1982
 - 21) Minutes—Research Subcommittee, Dated: February 17, 1988
 - 22) Minutes—Research Subcommittee, Dated: November 19, 1987
 - 23) Minutes—Research Subcommittee, Dated: April 16, 1987
 - 24) Minutes—Research Subcommittee, Dated: February 11, 1987
- (Y): 1) Industry Meeting To Discuss Economic Research, October 7, 1980
- 2) Minutes - Industry AD HOC Committee Economic Research, June 5, 1985
 - 3) Minutes - Industry AD HOC Committee Economic Research, October 30, 1985
- (Z): Folder Consisting Of:
- 1) Letter From Jonathan W. Field to Export Market Development Subcommittee

- Members, Dated: March 3, 1989
- 2) Exporting Quality Fruit Article, By Kerry Benson In Fruit Grower, Dated: February 1989
 - 3) Minutes - Export Market Development Subcommittee, Dated: March 16, 1989
 - 4) Minutes - Export Market Development Subcommittee, Dated: November 1, 1988
 - 5) Minutes—Nectarine Export Subcommittee, Dated: September 26, 1988
 - 6) Minutes—Nectarine Export Subcommittee, Dated: March 2, 1988
 - 7) Minutes—Nectarine Export Subcommittee, Dated: January 19, 1988
 - 8) Minutes—Nectarine Export Subcommittee, Dated: December 14, 1987
 - 9) Minutes—Nectarine Export Subcommittee, Dated: September 10, 1987

(AA): Folder Consisting Of:

- 1) U.S. Department of Agriculture Memorandum - From Fruit Branch, To Director,

Fruit and Vegetable Division,
Dated: July 30, 1979

- 2) Memorandum - From Fruit Branch, To Director, Fruit and Vegetable Division, Dated: July 26, 1979
- 3) Memorandum From Malvin E. McGaha, To William B. Blackburn, Dated: August 3, 1979
- 4) Advertising Update, Dated: May 15, 1979
- 5) Letter from Galen Geller To Robert Phillips, Dated: February 22, 1979
- 6) Letter form Robert Phillips To Galen Geller, Dated: February 20, 1979
- 7) Plum Forecast Proposal, 1978
- 8) USDA's Research Proposal To CTFA, Dated: February 22, 1979
- 9) University Of California, Office Of The Vice President, Agriculture & University Services Data Report No. 3158MH

- 10) University Of California, Office Of The Vice President, Agriculture & University Services Data Report No. 3255-H
- 11) Nectarine Administrative Committee - Market Development 1979 - 1980 Budget
- 12) 1979 - 1980 California Pear Budget
- 13) 1979 - 1980 California Stone Fruit Budgets
- 14) California Summer Fruits Ripening Bowl 1979 - 1980 Budget
- 15) Ripening Bowl Income Statement, March 1, 1978 to February 28, 1979
- 16) California Summer Fruits Ripening Bowl 1979 - 1980 Budget
- 17) Ripening Bowl Income Statement, March 1, 1979 to February 29, 1980
- 18) Peach Commodity Committee - 1979 Consumer Education Program
- 19) Plum Commodity Committee - 1979 Consumer Education Program

(BB): Folder Consisting Of:

- 1) Commodity Committee Proposed Market Development Budget 1980 - 1981
- 2) Commodity Committee Proposed Market Development Budget 1980 - 1981
- 3) Pear Commodity Committee Proposed Market Development Budget 1980 - 1981
- 4) Nectarine Commodity Committee Proposed Market Development Budget 1980 - 1981
- 5) USDA Cooperators Report To California Tree Fruit Agreement, Dated: December 31, 1980
- 6) California Tree Fruit Agreement Project On Pre and Post-Harvest Decay
- 7) Table 19
- 8) California Tree Fruit Agreement Annual Report - 1980
- 9) Final Report For 1980 To CTFA - Rootstocks and Tree Density Studies
- 10) 1980 - 1981 California Stone Fruit Budget
- 11) USDA Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: August 8, 1980

- 12) USDA Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: January 5, 1981
- 13) USDA Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: June 22, 1981
- 14) USDA Memorandum - From: G.P. Muck, To: W.J. Doyle, Dated: March 10, 1981
- 15) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. 3154-MH, Project Title: Possible Relation of Nectarine Pox To Plant Hormone, Dated: May 9, 1980
- 16) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. CA-D POM-3365-H, Project Title: Rootstocks and Training Multidensity Orchards Dated: February 25, 1980
- 17) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. 3158-MH, Project Title:

Possible Relation of Nectarine Pox To Plant Hormone Dated: February 25, 1980

- 18) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. CA-D-POM 3365-H, Project Title: Surveying Clauses Of Nectarine Pox, Dated: February 25, 1980
- 19) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. 3158 MH, Project Title: Maturity vs. Quality Attributes Of Shipping Stone Fruits
- 20) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project Title: Peach Limb Sunburn Study
- 21) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. H-2567, Project Title: Stone Fruit Pest Management

- 22) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. 3255-H, Project Title: Pre and Post-Harvest Decay Of Fresh Market Peaches, Plums and Nectarines, Dated: March 19, 1980
 - 23) USDA Science & Education Administration Research Proposal To CTFA - 1980, Dated: February 7, 1980
 - 24) Research - 1980
- (CC): Folder Consisting Of:
- 1) Nectarine Administrative Committee Market Development Proposed 1981-1982 Budget
 - 2) 1981-1982 California Stone Fruit Budget
 - 3) USDA Science & Education Administration Report On Fumigation Of Stone Fruits For Export, Dated: December 9, 1980
 - 4) Final Report For 1981 To CTFA - Nectarine Pox, UC Davis
 - 5) Peach Limb Sunburn Study - December 1980
 - 6) Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: September 29, 1981 - Approval Of

Market Development and
Research 1981-1982 Season

- 7) Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: September 30, 1981 - Approval Of Market Development and Research 1981-1982 Season
- 8) Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: March 15, 1982 - Approval Of Medfly Research Project, 1981-1982 Season
- 9) Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: September 29, 1981 - Approval Of Market Development and Research 1981-1982 Season
- 10) University Of California Office Of The Vice President - Agriculture & University Services, Project No. H-2567, Project Title Stone Fruit Pest Management: Evaluation Of Limb-Banding Techniques For Collection Of San Jose Scale Crawlers, Dated: January 27, 1981
- 11) University Of California Office Of The Vice President - Agriculture & University

Services, Project Title On
Constructing Inherently More
Efficient Peach & Nectarine
Factories

- 12) University Of California Office Of The Vice President - Agriculture & University Services, Project No. 3255-H, Project Title Pre and Post-Harvest Decay of Fresh Market Peaches, Plums and Nectarines, Dated: January 12, 1981
- 13) University Of California Office Of The Vice President - Agriculture & University Services, Project No. USDA-SEAAR Fruit Production Research, Project Title Embryo Culture Of Early-Maturing Hybrids For The Production Of Improved Early-Maturing Peach, Nectarine and Plum Varieties
- 14) USDA Work Unit/ Project No. 5202-20660-003, CTFA - January 19, 1981
- 15) The Japanese Market For Plums and Nectarines - A Research Proposal By Kr. Kirby S. Moulton, Dated: April 20, 1981

(DD): Folder Consisting Of:

- 1) Letter From W.B. Blackburn To GalenGeller, Dated: March 23, 1983
- 2) University Of California Office Of The Vice President - Agriculture & University Services, Project Title On Construction Inherently More Efficient Peach & Nectarine Factories
- 3) University Of California Office Of The Vice President - Agriculture & University Services, Project No. CA-D-POM-3365-H, Project Title Surveying Causes Of Nectarine Pox, Dated:
- 4) University Of California Office Of The Vice President - Agriculture & University Services, Project Title: Evaluation Of The Physiology Efficiency Of Peach, Nectarine and Plum Frees In Different Orchard Systems, Dated: January 29, 1982
- 5) University Of California Office Of The Vice President - Agriculture & University Services, Project No. CAD*-XXX-3346H, Project Title: On Constructing Inherently More

Efficient Peach & Nectarine Factories, Dated: January 29, 1982

- 6) University Of California Office Of The Vice President - Agriculture & University Services, Project Title: Fruit Tolerance To Alternate Insect Quarantine Treatments, Dated: January 29, 1982
- 7) University Of California Office Of The Vice President - Agriculture & University Services, Project No. 3255-H, Project Title: Pre & Post-Harvest Decay Of Fresh Market Peaches, Plums and Nectarines, Dated: December 22, 1981
- 8) University Of California Office Of The Vice President - Agriculture & University Services, Project No. H-3947, Project Title: Stone Fruit Pest Management: Timing Post-Bloom Treatments For Oriental Fruit Moth, Peach Twig Borer and San Jose Scale Using Predictive Phenology Models, Dated: January 29, 1982
- 9) University Of California Office Of The Vice President - Agri-

culture & University Services, Project No. Pending, Project Title: The Marketing OF Selected Fruits In Pacific Rim Countries, Dated: February 24, 1982

- 10) University Of California Office Of The Vice President - Agriculture & University Services, Project No. CAD*-XXX-3346H, Project Title: On Constructing Inherently More Efficient Peach & Nectarine Factories, Dated: January 29, 1982
- 11) University Of California Office Of The Vice President - Agriculture & University Services, Project No. USDA-SEAAR Fruit Production Research, Project Title: Embryo Culture Of Early-Maturing Hybrids For The Development Of Improved Early-Maturing Peach, Nectarine and Plum Varieties, Dated: January 13, 1982
- 12) University Of California Office Of The Vice President - Agriculture & University Services, Project No. Pending, Project Title: The Japanese Market for Plums and Nec-

tarines, Dated: February 24, 1982

- 13) University Of California Office Of The Vice President - Agriculture & University Services, Project No. H-3947, Project Title: Stone Fruit Pest Management: Timing Post-Bloom Treatments For Oriental Fruit Moth, Peach Twig Borer and San Jose Scale Using Predictive Phenology Models, Dated: January 29, 1982
- 14) USDA Market Quality & Transportation Research Laboratory - Work Unit: 5202-20580-004, - Project Leader: Dr. Douglas J. Phillips, Project Title: Influence Of Orchard & Packing-house Practices On Surface Damage Of Stone Fruits
- 15) USDA Market Quality & Transportation Research Laboratory - Work Unit Project Leader: Project Title: Development Of Non-Phytotoxic Quarantine Treatments For Nectarines, Peaches and Plums
- 16) Memorandum - From: G.P. Muck, To: William Doyle, Subject: 1982-1983 Stone Fruit Budgets, Dated: May 24, 1982

- 17) Memorandum - From: G.P. Muck, To: William Doyle, Subject: Joint Meeting, Stone Fruit Committee - Promotion & Research, Dated: May 26, 1982 -
- 18) Memorandum - From: G.P. Muck, To: William Doyle, Subject: Pear Committee Budget, Dated: July 6, 1982
- 19) Memorandum - From: William Doyle, To: Director, Fruit & Vegetable Division, Subject: Approval Of Increase Of Expenditures For Market Development & Research 1982-1983 Season, Dated: March 23, 1983
- 20) Memorandum - From: Fruit Branch, To: Director, Fruit & Vegetable Division, Subject: Approval Of Market Development & Research 1982-1983 Season

(EE): Folder Consisting Of:

- 1) University Of California Office Of The Vice President - Agriculture & University Services, Project No.: CE-7-81-A, Project Title: The Japanese Market For Plums & Nectarine (Extended), Dated: January 15, 1983
- 2) University Of California Office Of The Vice President - Agriculture & University Services,

Project No.: H-3947, Project Title: Stone Fruit Pest Management: Bionomics of Omnivorous Leafroller and San Jose Scale, Dated: January 31, 1983

- 3) University Of California Office Of The Vice President - Agriculture & University Services, Project No.: USDA-ARS Fruit Generics & Breeding Research Unit, Project Title: Embryo Culture Of Early-Maturing Hybrids For The Development Of Improved Early-Maturing Peach, Nectarine and Plum Varieties, Dated: January 31, 1983
- 4) University Of California Office Of The Vice President - Agriculture & University Services, Project No.: 3255-H, Project Title: Pre and Post-Harvest Decay Of Fresh Market Peaches, Plums and Nectarines, Dated: December 22, 1982
- 5) University Of California Office Of The Vice President - Agriculture & University Services, Project No. 3952-H, Project Title: Modified Atmospheres During Preparation, Transport, and Storage Of Stone Fruits, Dated: January 31, 1983

- 6) University Of California Office Of The Vice President - Agriculture & University Services, Project No. CA-D*XXX-3346-H, Project Title: On Constructing Inherently More Efficient Peach and Nectarine Factories, Dated: January 31, 1983
- 7) University Of California Office Of The Vice President - Agriculture & University Services, Project No.: POM-4142-H, Project Title: The Improvement Of Fruit Size and Quality Through Cultural Practices, Dated: January 31, 1983
- 8) Notice To Subcommittee For Promotion and Research - Stone Fruits of Meeting On April 6, 1983, From Galen Geller, Dated: March 16, 1983
- 9) USDA Memorandum - From: William J. Doyle, To: Director, Fruit and Vegetable Division, Subject: Approval Of Market Development & Research, 1983-1984 Season, Dated: August 2, 1983
- 10) USDA - Horticultural Crops Research Laboratory, Work Unit/ Project No. 5202-20660-003, Project Leader: Dr. John M. Harvey, Project Title: Develop-

- ment of Non-Phytotoxic Quarantine Treatments For Nectarines, Peaches and Plums, Dated: January 14, 1983
- 11) UC Davis Memorandum - From J.M Ogawa, To: F.G. Mitchell, Subject: Proposal For The California Tree Fruit Agreement, Dated: December 22, 1982
 - 12) Cooperative Extension University Of California Memorandum - From: F. Gordon Mitchell, To: CTFA Research Subcommittee, Subject: Research Proposal Submission - Postharvest Studies, Dated: January 26, 1983
 - 13) 1983-1984 Ripening Bowl Income Statement
- (FF): USDA Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Subject: Increase in Market Development Budget For Plums, Dated: April 5, 1985
- (GG): Folder Consisting Of:
- 1) USDA Memorandum - From: Acting Chief, Marketing Order Administration Branch, To: Director, Fruit and Vegetable Division, Subject: Approval Of Market Development and Research, 1985-1986 Season

2) USDA Memorandum -
From: W.B. Blackburn, To:
William J. Doyle, Subject:
CTFA Research Meeting,
Dated: February 19, 1985

3) Research Projects - Pears,
1985 Season

(HH): Memorandum - From Deputy
Director Thomas R. Clark, To:
David B. Fitz, Subject: Approval
Of Research & Market Develop-
ment Projects for California
Nectarines, Peaches, Pears and
Plums, Dated: August 27, 1986

(II): Folder Consisting Of:

1) USDA Memorandum - From:
Acting Director, Charles R.
Brader, To: David B. Fitz,
Subject: Approval Of Re-
search, Market Development,
and Promotion Projects For
California Nectarines, Pea-
ches, Pears and Plums, Dated:
June 10, 1987

2) University of California, Div-
ision of Agriculture Science,
Project Plan/ Research Grant
Pro-posal, Project Title: Con-
trol Of Codling Moth By Mat-
ing Disruption, Dated: August
15, 1987

3) Africanized Honey Bee Man-
agement, A Research ~~Pro~~-
posal, 1987-1992

4) Pear Zone Research Proposal,
Use Of Dimilan To Control
Codling Moth

5) California Pear Zone, Re-
search Proposal 1987

6) University of California, Div-
ision Of Agricultural Science,
Project Plan/ Research Grant
Proposal, Project Title: IMP
In Pear Orchards: Optimizing
Chemical Management

7) University of California, Div-
ision Of Agricultural Science,
Project Plan/ Research Grant
Proposal, Project Title: Effect
Of Fungicides and Chemicals
on Pear Fruit Russett

8) USDA Memorandum - From
Acting Deputy Director, Wil-
liam J. Doyle, To: David B.
Fitz, Subject: Approval of Re-
search, Market Development
and Project For California
Pears, Dated: August 28, 1987

(JJ): Folder Consisting Of:

- 1) California Summer Fruits, Description Of Network Schedule, Summer 1988
- 2) California Summer Fruits, Summary Of Proposed Promotional Programs, 1988-1989
- 3) 1988 Media Tour Tentative Invitation List, 12 guests
- 4) Memorandum - From: Robert C. Keeney, Deputy Director, To: William J. Doyle, Subject: Approval of 1988-1989 Fiscal Year Research, Market Development, and Promotion Project for California Nectarines, Peaches and Plums, Dated: August 8, 1988
- 5) Letter dated December 30, 1988, From Kurt J. Kimmel, To: Jon Field

(KK): Folder Consisting Of:

- 1) USDA Memorandum - From: Ronald L. Cioffi, To: William J. Doyle, Subject: Approval Of Research and Marketing Projects For California Nectarines, Plums and Peaches, Dated: August 2, 1989
- 2) USDA Memorandum - From: William J. Doyle, To: Gary Olson, Subject: Approval of 1989-

1990 Fiscal Year Marketing and Research Projects for California Nectarines, Plums and Peaches, Dated: August 3, 1989

- EXHIBIT 298: Early to Mid-Season CTFA 1989 Free Standing Advertising Insert
- EXHIBIT 299: Deciduous Fruit Market Report, AMS (September 5, 1989)
- EXHIBIT 300: Tree Fruit Size Rings
- EXHIBIT 301: Television Advertisements Aired During the 1989 Harvest Season By CTFA
- (A): Page 8 of Exhibit 301
- (B): Page 9 of Exhibit 301
- (C): Page 10 of Exhibit 301
- (D): Page 11 of Exhibit 301
- EXHIBIT 302: Radio Advertisements Aired by CTFA During The 1988 and 1989 Harvest Seasons
- EXHIBIT 303: Radio Advertisements Aired by CTFA During The 1986 and 1987 Harvest Seasons
- EXHIBIT 304: Memo From Jon Field Re: Meeting With Karen Tully - March 21, 1989
- EXHIBIT 305: Memo From Jon Field Re: Phone Conversation With Karen Tully - April 28, 1989
- EXHIBIT 306: Memo From Karen Tully To Gregory Cooper, [In For Limited

Purpose Only - Not For Truth of Matter Contained Therein]

EXHIBIT 307: Maturity Variance Requests Submitted By Handler During The 1988 Harvest season [Nectarines]

- (A): Maturity Change Requested By David Sarabian Of Sarabian Farms, Dated: May 24, 1988
- (B): Nectarines Maturity Change Request Case Summary By Bob Pascoe Of Christen Solverson, Dated: June 10, 1988
- (C): Nectarines Maturity Changes Requested By Eugene Enns of Enns Packing, Dated: June 10, 1988
- (D): Nectarine Maturity Changes Requested By Keith Olsen Of Paul Kazarian, Dated: June 18, 1988
- (E): Nectarine Maturity Changes Requested By Jean Stutz Of Kaprielia Bros. Packing, Dated: June 24, 1988
- (F): Nectarine Maturity Changes Requested By Metae Flora Of Sarabian & Sons, Dated: June 27, 1988
- (G): Nectarine Maturity Changes Requested By Mark Peter-

son, Of Grinnin Boys, Dated: June 27, 1988

- (H): Nectarine Maturity Changes Requested By Vern Peterson, Dated: June 27, 1988
- (I): Nectarine Maturity Changes Requested By John Kaprielian, Of Kaprielian Bros. Packing Co., Dated: June 29, 1988
- (J): Nectarine Maturity Changes Requested By Robert Garcia, Of Garcia Family, Inc., Dated: June 30, 1988
- (K): Nectarine Maturity Changes Requested By Gary Elrich, Dated: July 7, 1988
- (L): Nectarine Maturity Changes Requested By Vince Balasian, Of Fruit Patch, Inc., Dated: July 27, 1988

EXHIBIT 308: Maturity Variances Requests Submitted By Handlers During the 1988 Harvest Season (Plums)

- (A): Plums Maturity Change Requested By Mr. Nelson, Of Superior Farming, Dated: July 13, 1988
- (B): Plums Maturity Change Requested By Warren Tufts, Dated: July 21, 1988

- (C): Plums Maturity Change Requested By Larry Barsamian, Of Kaprielian Bros., Dated: July 28, 1988
- (D): Plums Maturity Change Requested By Ron Nichols, Of Royal Valley, Dated: July 29, 1988
- (E): Plums Maturity Change Requested By Marvin Warkentin, Of WMJ Farm, Dated: August 27, 1988
- (F): Plums Maturity Change Requested By Mike Harriagn, Of Barr Packing, Dated: July 7, 1988

EXHIBIT 309: Peach Maturity Change Request By Ray Goosen, Of Ray Goosen and Son, Dated: August 17, 1988

EXHIBIT 310: Maturity Variance Request (Peaches)

- (A): Maturity Subcommittee - (1988 - Nectarines)
- (B): Maturity Subcommittee Minutes - 1988 (Plums)
- (C): Maturity Subcommittee Minutes - 1988 (Peaches)

EXHIBIT 311: Maturity Variance Requests (Nectarines)

- (A): Minutes - Nectarine Maturity Subcommittee of May 19,

1989 and Maturity Change Request By SPI-Reedley, Dated: May 19, 1989

- (B): Maturity Change Request By Pete Barsamian and Mike Mikaelian of Dinuba, Dated: May 19, 1989
- (C): Maturity Change Request By Dennis Prindeville, Dated: June 7, 1989
- (D): Maturity Change Request By Robert Garcia of Garcia Family, Inc., Dated: June 26, 1989
- (E): Maturity Change Request By John Kaprielian and Vernon Peterson of Kaprielian Bros. Packing Co., Dated: June 27, 1989
- (F): Maturity Change Request By Cliff Sadoian of Sadoian Bros., Dated: June 30, 1989
- (G): Maturity Change Request By Gary Elrich of Elrich Farms, Dated: July 7, 1989
- (H): Maturity Change Request By Craig Rasmussen of Balentine Packing Co., Dated: July 24, 1989
- (I): Maturity Change Request By Joe Garcia of Suma Fruit, Dated: August 11, 1989

- (J): Maturity Change Request By Rodney Chang, Of Kash, Inc., Dated: August 11, 1989
 - (K): Maturity Change Request By Bob Wilcoxon of Nash DeCamp, Dated: August 16, 1989
- EXHIBIT 312: (A): Minutes, Nectarine Maturity Subcommittee Meeting
- (B): Minutes, Plums Maturity Subcommittee Meeting, 1989
- (C): Minutes, Peaches Maturity Subcommittee Meeting, 1989
- EXHIBIT 313: List of Named Individuals On The Maturity Subcommittees For Peaches, Plums, and Nectarines 1988 and 1989 Harvest Seasons
- EXHIBIT 314: List of Named Individuals On The Peaches, Plums, and Nectarines Commodity Committee For 1988 and 1989 Harvest Seasons
- (A): List of Named Individuals On the Nectarine Administrative Committee—To Include Alternates, 1988 Harvest Season
 - (B): List of Named Individuals On the Plum Commodity Committee—To Include Alternates, 1988 Harvest Season

- (C): List of Named Individuals On the Peach Commodity Committee—To Include Alternates, 1988 Harvest Season
 - (D): List of Named Individuals On the Nectarine Administrative Committee—To Include Alternates, 1989 Harvest Season
 - (E): List of Named Individuals On the Plum Commodity Committee—To Include Alternates, 1989 Harvest Season
 - (F): List of Named Individuals On the Peach Commodity Committee—To Include Alternates, 1989 Harvest Season
- EXHIBIT 315: Bound Volume Setting Forth Documents With Respect To "Red Tags" Issued By Shipping Point Inspection For Alleged Failure To Comply With CTFA Maturity Requirements.
- EXHIBIT 316: Kash, Inc. Stickers - Alshir Red Plums
- EXHIBIT 317: Kash, Inc. Stickers - Sweetheart Plums
- EXHIBIT 318: Kash, Inc. Stickers - "Kash, Inc."
- EXHIBIT 319: Photograph, Depicting Kash, Inc. Promotional Display in Singapore

- EXHIBIT 320: Photograph, Depicting A Container Of Nectarines Packed and Sold Under Kash, Inc.'s Chillian Label
- EXHIBIT 321: Poster, "Sweetheart Plums" Advertisement Produced by Kash, Inc.
- EXHIBIT 322: Deciduous Fruit Market Reports, AMS (August 3, 1989)
- EXHIBIT 323: Deciduous Fruit Market Reports, AMS (September 7, 1988)
- EXHIBIT 324: Deciduous Fruit Market Reports, AMS (July 7, 1989)
- EXHIBIT 325: Deciduous Fruit Market Reports, AMS (September 6, 1989)
- EXHIBIT 326: 1989 Produce Availability & Merchandising Guide, *The Packers*, Pages A17-18, B197-201, B262-266, and B385-389
- EXHIBIT 327: Advertisement in *Packer Produce Availability & Merchandising Guide*, *The Packer*
- EXHIBIT 328: CTFA Assessment Billing Invoice Mailed To Kash, Inc. By CTFA For Monies Assessed During The 1989 Harvest Season For Peaches, Plums and Nectarines
- EXHIBIT 329: Maturity Variance Notice, Re: Flamekist (August 18, 1989)

- EXHIBIT 330: Minutes, Annual Meeting Of The Members Of The Tree Fruit Reserve (May 6, 1981)
- EXHIBIT 331: Minutes, Joint Meeting Of The Promotion & Research Subcommittees For The Peach, Plum, and Nectarine Commodity Committee (May 6, 1981) [Also included as part of USDA's Exhibit 297(W)].
- (*) EXHIBIT 332 R/S: Report Of Meeting of Shipping Point Inspection and CTFA Regarding Color Chips and Maturity Review (September 20, 1988)
- (*) EXHIBIT 333 R/S: Report Of Meeting of Shipping Point Inspection and CTFA Regarding Color Chips and Maturity Review (November 1, 1989)
- EXHIBIT 334: California Tree Fruit Agreement Violation Report Regarding Serimian Incident Referred To In Exhibits 228 and 228(A) through (D)
- EXHIBIT 335: California Tree Fruit Agreement Bulletin #1 (Nectarines), 1989
- EXHIBIT 336: California Tree Fruit Agreement Bulletin #1 (Peaches), 1989
- EXHIBIT 337: California Tree Fruit Agreement Bulletin #1 (Plums), 1989
- EXHIBIT 338: California Tree Fruit Agreement Bulletin #1 (Nectarines), 1988

- EXHIBIT 339: California Tree Fruit Agreement Bulletin #1 (Peaches), 1988
- EXHIBIT 340: California Tree Fruit Agreement Bulletin #1 (Plums), 1988
- EXHIBIT 341: Wileman Bros, & Elliott, Inc., Advertising Brochure
- EXHIBIT 342: Application For Membership-Tree Fruit Reserve, Signed By Frank T. Elliott, Jr., Dated: May 15, 1957
- EXHIBIT 343: Release and Transfer Of Funds To the Tree Fruit Reserve, Signed By Bernard Wileman. Dated: May 6, 1959
- EXHIBIT 344: Release and Transfer Of Funds To the Tree Fruit Reserve, Signed By Bernard Wileman. Dated: May 13, 1958
- EXHIBIT 345: Release and Transfer Of Funds To the Tree Fruit Reserve, Signed By Bernard Wileman. Dated: March 31, 1960
- EXHIBIT 346: Letter From CTFA Enclosing Check Returning Excess Assessments, Dated: June 2, 1951. Also, Enclosed Letter From Wileman Bros., & Elliott, Inc. Requesting Refund, Dated: May 21, 1951.
- EXHIBIT 347: Letter from Wileman Bros. and Elliott, Inc. and Kash, Inc. To The Tree Fruit Industry, Dated: May 23, 1989.

- EXHIBIT 348: Market Development Budget, 1989
- EXHIBIT 349: Pie Chart-Re: Spot Market & National Radio & Television, 1989
- EXHIBIT 350: Time Chart & Percentage Of Budget, 1989
- EXHIBIT 351: Market Development Budget, 1988
- EXHIBIT 352: Pie Chart-Re: Spot Markets & National Radio & Television, 1988
- EXHIBIT 353: Time Chart & -Percentage Of Budget, 1988
- EXHIBIT 354: Daily Field Report Of Gary Van Sickle, Dated: January 24, 1989
- EXHIBIT 355: Photo - John Kashiki and His Wife At Kash, Inc. Office In Japan
- EXHIBIT 356: Photo - Japanese Squash (Kabocha)
- EXHIBIT 357: Photo - Supermarket Fruit Display Showing Kash, Inc. Boxes Below Cascading Fruit.
- EXHIBIT 358: Photocopy of John Kashiki's Pocket Calendar For May, 1981
- EXHIBIT 359: Photocopy of John Kashiki's Pocket Calendar For May, 1975
- EXHIBIT 360: List of Candidates For 1988 Election (Peach Commodity Members)
- EXHIBIT 361: Federal Register, Vol. 47, No. 153, p. 3451, Dated: August 9, 1982, Regarding Assessments, Approved By The Secretary of Agri-

- culture, For The Harvest Year 1982
- (*) EXHIBIT 362 R/S: Two Bids, Re: Automobile Purchased By Gary Van Sickie, March 1988
- (*) EXHIBIT 363 R/S: Packout Report, 1988 (Peaches)
- EXHIBIT 364: Packout Report, 1988 (Nectarines)
- EXHIBIT 365: Packout Report, 1988 (Plums)
- EXHIBIT 366: Packout Report, 1989 (Peaches)
- EXHIBIT 367: Packout Report, 1989 (Plums)
- (*) EXHIBIT 368 R/S: Packout Report, 1989 (Nectarines)
- (*) EXHIBIT 369: Memo To David Lewis From Charles Brader Re: Results Of Investigation Conducted Pursuant To Karen Tully's "Whistle-blowing" Statement. Dated: January 28, 1990
- EXHIBIT 370: Photo- Sunny Slope Fruit Display In Corrogated Boxes
- EXHIBIT 371: Daily Report - Al Black, March 16, 1988
- EXHIBIT 372: Daily Report - Al Black, August 11, 1988
- EXHIBIT 373: Daily Report - Al Black, August 9, 1989

- EXHIBIT 374: Daily Report - Al Black, September 22, 1989
- EXHIBIT 375: Daily Report - Al Black, October 4, 1989
- EXHIBIT 376: Publication List Of F. Gordon Mitchell Through July, 1988.
- EXHIBIT 377: Supplemental Publication List Of F. Gordon Mitchell For 1989
- EXHIBIT 378: L.A.B. Scale Produced By F. Gordon Mitchell
- EXHIBIT 379: Bids On Automobile Purchased By Tree Fruit Reserve For Use By Dale Janzen (CTFA Field Agent)
- EXHIBIT 380: California Tree Fruit Agreement Folder For Schools and Food Editors (Nectarines)
- EXHIBIT 381: California Tree Fruit Agreement Folder For Schools and Food Editors (Plums)
- EXHIBIT 382: California Tree Fruit Agreement Folder For Schools and Food Editors (Peaches)
- EXHIBIT 383: California Tree Fruit Agreement Folder For Schools and Food Editors
- EXHIBIT 384: California Tree Fruit Agreement Folder For Schools and Food Editors

- EXHIBIT 385: Benefits Brochure Relating To California Tree Fruit Agreement Employees, November 1989
- EXHIBIT 386: Check, For Purchase By Tree Fruit Reserve From California Tree Fruit Of The Ripening Bowl, September 8, 1988
- EXHIBIT 387: November 1989, Sacramento Leasing Guide
- EXHIBIT 388: Sacramento Map Attached To Sacramento Leasing Guide
- (*) EXHIBIT
389 R/S: Minutes - Grower Nominations, December 15, 1989 (Not Admitted For the Truth Of The Matters Stated Therein)
- EXHIBIT 390: Letter To Jon Field From Kurt Kimmel Re: Nomination Meeting, December 21, 1988; Letter to Kurt Kimmel From Jon Field Re: Nomination Meeting, December 19, 1988 (Not Admitted For The Truth Of The Matter Stated Therein)
- EXHIBIT 391: Wileman Bros. and Elliott, Inc. and Kash, Inc. - Campaign Card
- (*) EXHIBIT
392 R/S: California Tree Fruit Agreement - Shipper Questionnaire Filled Out By Members Of Control Committee

- (*) EXHIBIT
393 R/S: California Tree Fruit Agreement-Shipper Questionnaire Filled Out By Members Of Control Committee
- (*) EXHIBIT
394 R/S: California Tree Fruit Agreement-Questionnaire Filled Out By Growers Members Of Plum Committee
- (*) EXHIBIT
395 R/S: California Tree Fruit Agreement-Questionnaire Filled Out By Growers Members Of Nectarine Committee
- (*) EXHIBIT
396 R/S: Document Signed By Committee Members Upon Acceptance of Position On Commodity Committee
- EXHIBIT 397: Reserved For A Copy Of Contract Between California Tree Fruit Agreement and Its Advertising Agency (Respondent To File Within 5 Working Days - If Not Filed Within 5 Days, Exhibit To Be Vacated) Documents not filed & per Transcript, no such document existed
- EXHIBIT 398: Subpoena Duces Tecum Issued To Jon Field, With Respect To Wileman Bros. & Elliott, Inc. and

Kash, Inc. (AMA Docket Nos. F&V 916-1, 917-3, 916-2, 917-2)

EXHIBIT 399: Minutes - Management Services, Dated: May 6, 1986 (Provided Pursuant To Freedom Of Information Act Request Issued With Respect to AMA Docket Nos. F&V 916-1, 917-3, 916-2, 917-2)

EXHIBIT 400: The List of Those Matters From The Wileman 1 Transcripts and Proceedings (Including Transcripts, Exhibits, Pleadings, Decisions, Etc.) Which Have Been Incorporated Into This Wileman 2 Proceeding

(*) By Transmittal of May 2, 1990, Respondent submitted to the Hearing Clerk new copies of said exhibit because the reproduced copies which it had bore extraneous comments which were not part of the document offered and received into evidence.

ADMINISTRATIVE PROCEEDINGS WITHIN
THE UNITED STATES DEPARTMENT OF
AGRICULTURE BEFORE THE SECRETARY
OF AGRICULTURE

AMA DOCKET NOS. F&V 916-3, 917-3

IN RE: WILEMAN BROS. & ELLIOTT, INC.,
A CALIFORNIA CORPORATION, AND KASH, INC.,
A CALIFORNIA CORPORATION, PETITIONERS

v.

RICHARD LYNG, SECRETARY OF AGRICULTURE,
RESPONDENT

[Rec. June 6, 1988]

PETITION TO MODIFY VARIOUS PROVISIONS
OF THE NECTARINE, PLUM AND PEACH
MARKETING ORDERS;

AND/OR

PETITION TO TERMINATE VARIOUS
PROVISIONS OF THE NECTARINE, PLUM AND
PEACH MARKETING ORDERS;

AND/OR

PETITION TO EXEMPT PETITIONERS FROM
VARIOUS PROVISIONS OF THE NECTARINE,
PLUM AND PEACH MARKETING ORDERS AND
ANY OBLIGATIONS IMPOSED IN CONNECTION
THEREWITH THAT ARE NOT IN
ACCORDANCE WITH LAW

[7 U.S.C. §608c(15)(A); 7 C.F.R. §§916.1, et seq.
and 917.1, et seq.]

I

DESCRIPTION OF PETITIONERSA. WILEMAN BROS. & ELLIOTT, INC.

Pursuant to 7 C.F.R. §900.52(b)(1), Petitioner WILEMAN BROS. & ELLIOTT, INC. (hereinafter "Petitioner Elliott"), states the following:

(a) Petitioner's correct name is WILEMAN BROS. & ELLIOTT, INC.

(b) Petitioner's mailing address is P. O. Box 309, Cutler, California, 93647.

(c) Petitioner's principal place of business is located at 40232 Road 128, Cutler, California.

(d) Petitioner is a corporation, incorporated in the State of California on the date of May 10, 1948.

(e) The names of the officers of Petitioner Wileman Bros. & Elliott, Inc., are as follows:

President: Frank T. Elliott, Jr.

Secretary: Frank T. Elliott, III

Treasurer: Gregg Evangelho

The addresses of all officers are the same as (c) immediately above.

B. KASH, INC.

Pursuant to 7 C.F.R. §900.52(b)(1), Petitioner KASH, INC. (hereinafter "Petitioner Kash"), states the following:

(a) Petitioner's correct name is KASH, INC.

(b) Petitioner's mailing address is P. O. Box 310, Parlier, California, 93648.

(c) Petitioner's principal place of business is located in Parlier, California.

(d) Petitioner is a corporation, incorporated in the State of California on the date of May 28, 1968.

(e) The names of the officers of Petitioner Kash, Inc., are as follows:

President: Rodney Chang

Vice President: Edward Ogawa

Secretary: Carol Ogawa

Chairman of
the Board: John Kashiki

The addresses of all officers are the same as (b) immediately above.

II

PETITIONERS' GENERAL CONTENTIONS RE WHY VARIOUS PROVISIONS OF THE NECTARINE, PLUM AND PEACH MARKETING ORDERS, OR THE INTERPRETATION OR APPLICATION THEREOF,

AS WRITTEN, AND/OR AS APPLIED ARE NOT IN
ACCORDANCE WITH LAW

1. This Petition is made with respect to the Marketing Orders for Nectarine. Plums and Peaches grown in California, 7 C.F.R. §§ 916.1, et seq., and 917.1, et seq., inclusive (hereinafter referred to as the "Nectarine Order", "Plum Order", and "Peach Order"), pursuant to the Agricultural Marketing

Agreement Act of 1937 (hereinafter the "Act"), Title 7, U.S.C. §601, et seq.

2. Petitioners claims that various provisions of the Nectarine, Plum and Peach Orders, in their language and/or in their application, and/or in their obligations imposed in connection therewith, are void and not in accordance with law.

3. Petitioners also claim that the below-described provisions of the Nectarine, Plum and Peach Orders, in their language and/or in their application, and/or in their obligations imposed in connection therewith, are a violation of the First Amendment of the United States Constitution and the due process of the Fifth Amendment of the United States Constitution.

4. Petitioners also claim that various below-mentioned provisions of the Nectarine, Plum and Peach Orders are void as being an improper delegation of authority from the Secretary of Agriculture to the Nectarine, Plum, and Peach Committees, the Control Committee of the California Tree Fruit Agreement, and the Nectarine, Plum and Peach Maturity Subcommittees, and their respective appeal committees.

5. Petitioners also claim that various below-mentioned provisions of the Nectarine, Plum and Peach Orders, as interpreted and as applied, are void as there has been no properly delegated authority to either the Nectarine, Plum and Peach Committees, the Nectarine, Plum and Peach Maturity Subcommittees, the California Tree Fruit Agreement, and the Appeals Committee.

6. Petitioners also claim that various below-mentioned provisions of the Nectarine, Plum and Peach Orders are void since the Administrative Procedures

Act was not followed with respect to implementing the "laws" stated below.

7. Petitioners also claim that the various below-mentioned provisions of the Nectarine, Plum and Peach Orders, and the regulations executed thereafter, are void and not in conformity with the law with respect to assessments assessed against the Petitioners with respect to peaches, plums and nectarines.

8. Petitioners also contend that the below-described provisions of the Nectarine, Plum and Peach Marketing Orders, and the rules and regulations executed thereafter as written, and/or in their application, and/or in their obligation imposed in connection therewith, are a violation of procedural and substantive due process since, in the application of "regulations" which were not promulgated pursuant to law, or in those rules which, although promulgated pursuant to law but applied not in accordance with the law, amount to a complete taking of nectarine, plums and peaches, without just compensation and without furthering any proper Governmental purpose, and without providing a pre-deprivation hearing in accordance with law.

9. Petitioners also contend that the said delegation of authority to committees, made up of competitors of the Petitioners, are contrary to the intent and policy of Congress in enacting the Act, and contrary to the Supreme Court's rulings in *Panama Refining Company v. Amazon Petroleum Corporation*, 293 U.S. 388, 55 S.Ct. 241 (1935); *Wichita Railroad and Light Company v. Public Utilities Commission*, 260 U.S. 48, 59, 43 S.Ct. 41, 55; *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935); *Carter v. Carter Coal Company*, 298 U.S.

238, 56 S.Ct. 855 (1936); *Industrial Union v. American Petroleum*, 448 U.S. 607, 100 S.Ct. 2844 (1980); and *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 101 S.Ct. 2478 (1981).

10. Petitioners also contend that the Nectarine, Plum and Peach order assessments for the 1988 season are invalid, not enacted according to law nor applied according to law, and were not enacted in accordance with the Administrative Procedures Act.

11. Petitioners also contend that the Nectarine, Plum and Peach Order assessments for 1980 through 1988 are invalid, and unconstitutional because at least fifty percent of the assessments compelled to be paid by the Petitioners are violative of the First Amendment to the United States Constitution because it was compulsory subsidization of ideological, economical and commercial activity engaged in by the Nectarine, Plum, and Peach Committees to which Petitioners object, as more completely stated below, and in contravention of the holdings in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782 (1977), and *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 106 S.Ct. 1066 (1986), and cases cited therein.

12. The interim final rules issued by the Secretary, and dated May 24, 1988, regarding the new maturity regulations for nectarine, plums and peaches, were invalid because the Administrative Procedures Act was not followed, and thus are void.

13. The interim final rules issued by the Secretary and dated May 24, 1988, with respect to the new maturity regulations for nectarines, plums and peaches, are violative of the Administrative Procedures Act because they did not sufficiently address comments

submitted, they are arbitrary and capricious, they were not premised on a substantial basis, and alternatives were not considered.

14. The budget and assessments for the Nectarine, Plum and Peach Marketing Orders for the 1988 season are violative of the Administrative Procedures Act since there is no substantial basis and purpose for said assessments and budget, the Secretary failed to review the alternatives and there is "no good cause" exception pursuant to Title 5, U.S.C. §553, for non-compliance with the notice-and-comment procedures in promulgating the budget and the assessments for the 1988 season.

15. The Secretary has violated the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders", by refusing to follow its own rule in §900.70 of Title 7, C.F.R., by continuously determining that interim relief is unavailable with respect to any administrative petition filed pursuant to Title 7, U.S.C. §608c(15)(A).

16. Petitioners also contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" (Title 7, C.F.R. §900.50, et seq.) are invalid because they do not afford any retrospective relief or any monetary damages as a result of being financially injured as a result of an invalid, Nectarine, Plum or Peach Marketing Order provision or its application.

17. Petitioners also contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" (Title 7, C.F.R. §900.50, et seq.) are invalid because they do not afford any timely or effective relief and

"thus are a violation of the due process clause of the United States Constitution.

III

STATEMENT OF FACTS RE PETITIONERS AND THEIR CONTENTIONS

18. Petitioner Wileman Bros. & Elliott, Inc. (hereinafter referred to as "Petitioner Elliott"), and Kash, Inc (hereinafter referred to as "Petitioner Kash") are both growers and handlers of plums and nectarines. Petitioners handle their own varieties of plums and nectarines as well as handle outside growers' varieties of plums and nectarines.

19. Petitioner Kash, Inc., is both a grower and handler of peaches.

20. Petitioner Elliott is the only grower and handle of Tom Grand nectarines. Petitioner Elliott is one of two growers of Ebony plums and one of two handlers of Ebony plums, and grows and handles a significantly greater volume of Ebony plums than the one other grower of Ebony plums.

21. Petitioners market a much greater percentage of their nectarines and plums (and with respect to Kash, Inc., its peaches as well) in the East Coast terminal markets. The fruit being shipped to the East Coast markets takes a considerably greater period of time to reach the store shelves through the terminal markets there than it does reaching the store shelves in national chainstores or in West Coast markets.

22. Nectarines, peaches and plums will continue to ripen after they become mature, and with respect to some varieties of nectarines and plums and peaches handled by the Petitioners, fruit required to be "well-

matured" at the time of picking and packing is over-mature for purposes of marketing said fruit in the East Coast terminal markets.

23. Petitioner Elliott, as a corporation, has been a handler of nectarines and plums since 1948. Petitioner Kash, Inc., as a corporation, has been a handler of nectarines, plums and peaches, since 1968.

24. On or about May 4, 1988, the Nectarine Administrative Committee adopted an 18-cent per carton assessment against each container of nectarines packed by the Petitioners. Of that 18 cents, only approximately 5 cents was for inspection of those cartons of nectarines, and over 10 cents per container was assessed against each container for "market development", which included field staff activities, retail advertising incentives, trade communications, retail projects, point-of-sale materials, publicity, education activities, food service activities, TV and radio production, TV advertising, radio advertising, outdoor advertising, Canadian promotion, promotion research, merchandising research, promotion expense, Hispanic promotion, and miscellaneous. The total budget adopted by the Nectarine Administrative Committee in May, 1988, was approximately \$1,761,886.00. Petitioners object to being assessed for "market development", as described above, because said advertising and market development has not been shown to increase returns to the Petitioners, or their growers, Petitioners object to said assessments being used for advertising and promotional work since said advertising and promotional work do not reach the consumers to whom Petitioners sell their fruit, and it forces the Petitioners to subscribe to ideologies and economical philosophies with which they do not agree. From 1980 to the present, over half of the assess-

ments paid by Petitioners has been used for "market development" with which Petitioners do not agree

25. On or about May 4, 1988, the Plum Administrative committee adopted an 19-cent per carton assessment against each container of plums packed by the Petitioners. Of that 19 cents, only approximately 6 cents was for inspection of those cartons of plums, and approximately 10 cents per container was assessed against each container for "market development", which included field staff activities, retail advertising incentives, trade communications, retail projects, point-of-sales materials, publicity, education activities, food service activities, TV and radio production, TV advertising, radio advertising, outdoor advertising, Canadian promotion, promotion research, merchandising research, promotion expense, Hispanic promotion, and miscellaneous. The total budget adopted by the Plum Administrative Committee in May, 1988, was approximately \$1,831,459.00. Petitioners object to being assessed market development, as described above, because said advertising and market development has not been shown to increase returns to the Petitioners, or their growers, Petitioners object to said assessments being used for advertising and promotional work since said advertising and promotional work do not reach the consumer to whom Petitioners sell their fruit, and it forces the Petitioners to subscribe to ideologies and economic philosophies with which they do not agree. From 1980 to the present, over half of the assessments paid by Petitioners has been used for "market development" with which Petitioners do not agree.

26. On or about May 4, 1988, the Peach Administrative Committee adopted an 18-cent per carton assessment against each container of peaches packed by

Petitioner Kash, Inc. Of that 1 cents, only approximately 6 cents was for inspection of those cartons of peaches, and approximately 9 cents per container was assessed against each container for "market development", which included field staff activities, retail advertising incentives, trade communications, retail projects, point-of-sales materials, publicity, education activities, food service activities, TV and radio production, TV advertising, radio advertising, outdoor advertising, Canadian promotion, promotion research, merchandising research, promotion expense, Hispanic promotion, and miscellaneous. The total budget adopted by the Plum Administrative Committee in May, 1988, was approximately \$1,225,435.00. Petitioner Kash, Inc., objects to being assessed, market development, as described above, because said advertise: and market development has not been shown to increase returns Petitioner Kash, Inc., or its growers, Petitioner Kash, Inc., objects to said assessments being used for advertising and promotional work since said advertising and promotional work do not reach the consumers to whom Petitioner Kash, Inc., sells its fruit, and it forces Petitioner Kash, Inc., to subscribe to ideologies and economic philosophies with which it does not agree. From 1980 to the present, over half of the assessments paid by Petitioner Kash, Inc., has been used for "market development" with which Petitioner Kash, Inc., does not agree.

27. Furthermore, a portion of the assessments assessed against the Petitioners is being utilized by the Committees and the California Tree Fruit Agreement for research projects of which the Petitioners do not subscribe. Said research projects include hiring such individuals to write reports ostensibly

showing that small size fruit is not desired by consumers, to write reports showing that "well-matured" fruit is what is desired by consumers, and to pay individuals and firms for writing reports ostensibly showing that advertising is beneficial to the industry. Petitioners contend that this type of research activity is done for the purpose of supporting more restrictive picking, packing and marketing of peaches, plums and nectarines, is intended by the Committees and CTFA, through volume control, and under the guise of providing consumers with better quality fruit, to restrict the trade of and marketing by the Petitioners, in a form and manner with which the Petitioners do not agree. Petitioners contend that this is done by the Committees and CTFA to promote their own ideological and economic philosophies to which Petitioners do not subscribe.

28. Petitioners also contend that a small portion of their assessments are being used to finance the California Tree Fruit Agreement and their authority has never been published in the Federal Register for notice and comment and is an entity who has never been delegated authority pursuant to the Administrative Procedures Act and thus assessments used to support an entity which, by law, does not legally exist, are null and void.

29. Petitioners also contend that approximately 5-to-6 cents per container is being assessed against the Petitioners to provide for inspection service to inspect the cartons utilizing tests and standards that have never been lawfully promulgated, said tests and standards being utilized by the inspection service have caused the Petitioners substantial losses in picking, culling, and marketing their fruit.

30. Any monies advanced by Petitioners for promotion engaged in by the Petitioners are not credited toward the amount of the assessment assessed against the Petitioners for the Committee and CTFA promotional activities.

31. On April 8, 1988, the Secretary issued proposed rules with respect to plums which proposed to regulate out smaller-size plums, and to change maturity determinations, requests for variances, and to define "well-matured". (53 Federal Register, Pgs. 116669, et seq.)

32. On April 18, 1988, the Secretary issued proposed rules with respect to the eliminating smaller sizes of nectarines and peaches, and also changing the maturity determinations and variances to the maturity determinations, basically identical to the plum maturity changes. (53 Federal Register, Pgs. 12690, et seq. (nectarines); 53 Federal Register, Pgs. 12694, et seq. (peaches).)

33. With respect to the peach, plum and nectarine proposed rules, described in paragraphs 31 and 32 above, only a fifteen-day comment period was provided, and for plums, a seven-day extension was granted at the request of the Petitioners' counsel. These proposed rules with respect to peaches, plums and nectarines, occurred over four months after the respective Peach, Plum and Nectarine Committees met in December, 1987, and proposed to the Secretary the elimination of small sizes of peaches, plums and nectarines. The Peach, Plum and Nectarine Committees also voted to approve the same maturity standards and determinations for the 1988 season that were employed in the 1987 season. There was not good cause shown for providing less than a thirty-day

comment period with respect to each of the proposed rules issued, as described above.

34. Thereafter, on May 27, 1988, the Secretary's designee issued interim final rules, purportedly binding on the Petitioners, which substantially altered the maturity determinations, altered the procedure for changes to the maturity determinations, than what had been proposed in the proposed rule issued approximately five weeks earlier. In said interim final rules, the Secretary rejected the Committee proposal to eliminate small-size plums, but at the same time, the Secretary adopted the Nectarine Committee proposal to eliminate small-size nectarines, and said determination by the Secretary to eliminate small-size nectarines was arbitrary, capricious, not based on a substantial record, and wherein the Secretary refused and failed to address objecting comments. Furthermore, Petitioners contend that the Secretary relied on false information in issuing an interim final rule with respect to elimination of small-size nectarines, which the Secretary knew, or should have known, was false.

35. The Petitioners contend that the Secretary failed to comply with the Administrative Procedures Act notice and comment period, and there was no good cause show, for issuing an interim final rule, which substantially differed from the proposed rule issued by the Secretary approximately five weeks earlier, with respect to maturity determinations and maturity variances. The Secretary's proposed rule with respect to maturity for peaches, plums and nectarines, proposed that the Shipping Point Inspection Service actually set color standards or other maturity tests to determine the "well-matured" standard, and granted only to the SPI the right and

ability to vary or change those color chip standards or other maturity tests, which proposed to eliminate the Maturity Subcommittee of each of the respective Committees, which had existed from 1980 through the 1987 seasons. In said proposed rules, the Secretary published, for the first time, the actual "color standards" or other "maturity tests" which the Secretary claimed the Inspection Service established previously, which the Secretary knew, or should have known, was false, since the Secretary knew, or should have known, that in the past 8 years, it was the Maturity Subcommittees, made up of Petitioners' competitors, which actually set the "color standards" or other maturity tests, and changed the "color standards" or other maturity tests.

36. With respect to the interim final rules issued regarding peaches, plums and nectarines, there were additional false statements made in the interim final rule which the Secretary knew, or should have known, were false, or were conclusions drawn by the Secretary which were arbitrary, capricious, or not based upon substantial evidence—many of which are stated as follows:

(a) Comments to the proposed rule not only discussed, but showed, that the maturity regulations and the size recommendations were done by the Committees for volume control; the Secretary never addressed this comment;

(b) The Secretary, with respect to nectarines, found that consumers wanted larger-sized nectarines, but at the same time, found that the evidence was inconclusive with respect to consumers not desiring smaller-sized plums—despite the fact that the same studies cited by the Secretary with respect to plums were the same authorities cited with respect to nec-

tarines, and the studies do not distinguish between the two; and in fact, only four retailers out of twenty-five retailers interviewed wanted to see the smaller sizes eliminated, and twenty-one out of twenty-five of the retailers interviewed wanted both the smaller sizes and the larger sizes;

(c) The report (by Ervin D. Thuerk) cited by the Secretary was directed to twenty-five "key supermarket chain executives" which represented only 38.7% share of the total industry, and the Secretary failed to point out that the terminal markets were totally unrepresented in the study conducted, which is where many handlers, including the Petitioners, ship their fruit;

(d) The Secretary cites Mr. Thuerk's research that early-season fruit which is small in size does not provide satisfaction to the consumer and does not encourage repeat purchases, but fails to point out that only four out of the twenty-five large supermarket chains interviewed wanted to eliminate small sizes, while the vast majority wanted to keep them; thus the Secretary relied on certain statements made by Mr. Thuerk, and failed to address others that would contradict the conclusions wished to be drawn by the Secretary;

(e) The Secretary addressed the comments that it was too late for growers to modify their cultural practices in order to meet the more restrictive size requirements for nectarines and peaches, but the Secretary rejected this by stating that when the Committee made its recommendations the growers had already begun to undertake cultural practices to obtain "desirable fruit size"; but with respect to plums, the Secretary contradicted this statement by stating: "Finally, it is too late this season for

growers to make any cultural changes on the basis of the proposed size increases if they have not already done so"; and the Secretary fails to explain the difference in the two statements—one with respect to nectarines and peaches, and the other with respect to plums;

(f) In response to the comments that the size proposal would reduce the volume of fruit and was thus volume control, the Secretary stated that that was disputed because "small size nectarines have been a detriment to the trade and as such the industry has directed its efforts toward production and marketing of better quality and larger size fruit", and thus, the Secretary failed to address the issue of whether there would be a reduction of the amount of fruit to reach the market and was indeed volume control;

(g) Furthermore, the size regulations affect certain varieties of fruit, but was not directed at other varieties of fruit which is discriminatory, arbitrary and capricious, since if consumers reject small-size fruit, they would reject them with respect to all varieties, and not just some varieties; the Secretary made a false statement when he states that since May 16, 1980, nectarines, plums and peaches "have been required to be 'well-matured' rather than 'mature'", and further makes the false statement that "this requirement has been implemented by the Federal-State Inspection Service since that time"; since in truth and in fact, which was known by the Secretary, the regulations which went into effect on May 16, 1980, did not state that fruit was required to be "well-matured" but it was merely what the Committees decided thereafter to implement on their own without any rulemaking whatsoever; the Secre-

tary knew, or should have known, that the Federal-State Inspection Service did not set those standards in the past, but were set by the Committee of competitors made up of the Plum, Nectarine and Peach Committees and their respective Maturity Subcommittees, along with CTFA; the Secretary also invalidly states that since 1980 "the Federal-State Inspection Service, based on its expertise, has been primarily responsible for determining which specific test or tests should be used for each variety of nectarines and which test level (e.g., particular color chip) is appropriate for each variety", and the Secretary knew, or should have known, that this statement was false since the Federal-State Inspection Service has merely occupied an advisory role with the respect to the Committees and their respective Maturity Subcommittees which actually set the standards, changing the standards at their whim and actually making "law" regardless of the concerns and opinions of the Federal-State Inspection Service;

(h) The Secretary also states that when the proposed rule was issued in April, 1988, the responsibility for issuing the maturity test, and granting variances during the seasons with respect to those maturity tests, was proposed to be given to the Federal-State Inspection Service to "lessen the burdens on Committee members", and Petitioners contend that the Secretary knew, or should have known, that this was a false statement in that the proposal to provide sole responsibility to the Federal-State Inspection Service, was a direct result of the Petitioners' previously filed and heard administrative petition proceeding which showed the unlawful delegation of authority by the Secretary to the Committees and the Maturity Subcommittees.

(i) The Secretary also invalidly stated that it was proposed to continue the "requirement that not less than ninety-percent of the fruit surface shall meet the color guide established for that variety, and not less than ninety-percent any lot shall meet the color guide established for that variety in that the Secretary knew, or should have known, that that was never a "requirement", but was a determination made by the respective Committees and the respective Maturity Subcommittee and the Secretary had never made that a "requirement" before; was also stated in the proposed rule with respect to maturity nectarines, plums and peaches, issued in April, 1988, that the Inspection Service had intended to use certain "color chips" and other maturity tests for nectarines, plums and peaches in the 1988 season, implying that the Inspection Service had actually set those "maturity tests" or other "color standards", when the Secretary knew, or should have known, that the Inspection Service has never set those standards, but have been set by the respective Committees and their respective Maturity Subcommittees—all made up of Petitioners' competitors;

(j) The Secretary, in adopting the "well-matured" standard, or re-adopting the "well-matured" standard, relies in part upon Mr. Thuerk's report which is attributed by the Secretary to state that the consumers do not want early-season fruit which is picked immature, but the Secretary fails to point out that such study states that consumers do not want "immature" fruit, which is a far cry from "well-matured", and is different than fruit being just "mature";

(k) The Secretary also vacuously states, in response to a comment that the "well-matured"

requirement has become more restrictive than it was when implemented in 1980, that only the number of color chips have increased but the "well-matured" standard has not become more restrictive, and the Secretary knew, or should have known, that his contention was false;

(l) In responding to a claim that the "well-matured" fruit has caused a large increase in harvesting costs, the Secretary merely responds that the commentor "did not document this claim", but the Secretary knew, or should have known, that said claim was documented through the transcripts of the hearing that occurred with respect to the administrative petition filed by the same Petitioners and heard in February and March of 1988, which information was before the Secretary at the time the interim final rule was issued;

(m) The Secretary also buttresses its claim that the "well-matured standard" has been well received by growers since at the last referendum, a majority of those voting favored continuance of the program, which ignores the fact that the referendum was not conducted with respect to eliminating the "well-matured" standard, but was conducted with respect to a continuation or termination of the entire Marketing Agreement, and there was no opportunity for line-item veto of any provision; in responding to a commentors objection to the "well-matured" standard that it is done for the purpose of volume control as indicated by the decrease in packages shipped per acre from 1980 through 1987, even though a higher number of trees were planted per acre, the Secretary stated that this evaluation was inconclusive because the commentor did not consider other factors in addition to the "well-matured" requirement such as age of the

trees, weather, cultural practices, and failure to meet other types of handling requirements such as minimum size requirements, and the Secretary knew, or should have known, that his contention was false and there was a complete failure by the Secretary to document his contention that there were less cartons per acre shipped since the "well-matured" standard came into existence based upon age of the trees, weather, cultural practices, and other handling requirements; the Secretary completely failed to comment about the fact that permitting the Committees, and the Maturity Subcommittees, to make the decisions as to which "color chips" or other "maturity tests" should be utilized for each variety of nectarine, plum and peach, was a violation of due process, and a violation of *Carter v. Carter Coal*;

(n) The Secretary failed to consider the comments with respect to the fact that the color standards or other maturity tests were not uniform, varied from variety to variety causing some fruit to have a shorter shelf life than other fruit, causing some fruit to be left on the trees a much longer time after the fruit otherwise met a U.S. No. 1, than other varieties of fruit, caused fruit that was shipped to the East Coast to arrive in an overripe condition, failed to adequately consider the drastically increased picking costs for having a "well-matured standard" in that said standard has required orchards to be picked five to seven times as opposed to two to three times, failed to address the comments that the said specific color chips or other maturity tests lacked any substantial basis and purpose, lacked any uniformity, lacked any studies and tests to determine the amount of fruit lost, or fruit wherein a decreased sales price was paid as a result of the overripe condition of the fruit, and

the Secretary has wholly failed to consider and comment upon the preliminary and tentative findings made by its own Administrative Law Judge, the Honorable Dorothea Baker, which preliminary findings were made following the conclusion of the administrative petition proceedings occurring in February and March of 1988 in Fresno, California, and the Secretary wholly failed to consider the testimony given under oath and the documents and exhibits presented at the administrative hearing with respect to the precise issues now being stated in the Secretary's interim final rules.

37. The Secretary's statement in the interim final rules (that it is "impracticable, unnecessary, and contrary to the public interest to give prior notice to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until thirty days after publication in the Federal Register", because shipments of the crop have begun and this action should cover as much of the 1988 crop as possible, the maturity requirements are substantially the same as currently implemented and should be made effective as soon as possible, and the interim final rule relaxes maturity requirements for a couple of various varieties) is false, and the Secretary knew, or should have known, that said statement is false since the new maturity requirement procedure and variance procedures are substantially different than what has occurred in the past, and substantially different than what was proposed in the proposed rule, and it is the Secretary's fault that the matter was not first published until April, 1988.

38. Petitioners contend that based upon the new size regulations for nectarines and peaches, and the new maturity procedures with respect to peaches,

plums and nectarines, the Petitioners will lose a substantial amount of fruit that would otherwise be of good consumer quality and of good marketable quality, in this season, and all subsequent seasons wherein the rules remain in effect.

IV

STATEMENT OF GROUNDS ON WHICH THE NECTARINE, PEACH AND PLUM REGULA- TIONS AND/OR THEIR INTERPRETATION AND/OR THEIR APPLICATION ARE NOT IN ACCORDANCE WITH LAW

39. Petitioners contend that permitting the Nectarine, Plum and Peach Committees, and their respective Maturity Subcommittees, to determine the color standards or other maturity tests, and to determine whether or not a change or variance should be made or not made, and also placing authority in the new Appeal Committees is an improper delegation of authority by the Secretary to the private industry, in violation of, among other cases, *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855 (1936); Petitioners also contend that the above-described maturity regulations, maturity-variance regulations, and the appeals regulations are a violation of the due process clause of the Fifth Amendment of the United States Constitution, under the authority of, among other cases, *Carter v. Carter Coal Co.*, *supra*.

40. Petitioners also contend that the above-described maturity regulations, maturity variance or change regulations, and the appeal regulations constitute a taking without just compensation in violation of the due process clause of the United States Constitution, since the standards have resulted, and will result in a taking without just compensation

under the new tests discussed in *Nollan v. California Coastal Commission*, ___ U.S. ___, 107 S.Ct. 3141 (1987); *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552, 92 S.Ct. 1113 (1972); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862; and *Kirby Forest Industries v. United States*, 467 U.S. ___, 104 S.Ct. 2187, 2196 (1984). Petitioners also contend that the implementation of the new maturity standards, and the regulations eliminating smaller-sized nectarines and peaches, is a violation of the Administrative Procedures Act, because:

(1) There was an insufficient notice and comment period with respect to the interim final rules, and no good cause was shown for not providing additional comment period;

(2) There was no "emergency" existing which would permit the Secretary to only provide a fifteen day notice period instead of at least thirty days;

(3) There was no emergency existing, except a self-made emergency by the Secretary, in issuing an interim final rule, as opposed to another proposed rule;

(4) Since the interim final rule, with respect to maturity procedures, was drastically different than the proposed rule issued five weeks earlier, no interim final rule should have been issued before another proposed rule was issued, and the Secretary's reliance on the emergency exceptions to justify the interim final rule is without merit and without validity;

(5) There is no basis and purpose statement with respect to the new size elimination and maturity rules and regulations;

(6) The interim final rules wholly failed to address objecting comments, refused to consider

other alternatives, and relied on false and misleading information that the Secretary knew to be false and/or misleading.

41. The Petitioners also contend that the delegation of authority by the Secretary to Committees, made up of Petitioners' competitors, and the delegation of authority to the Maturity Subcommittees, and to the Appeals Committee, are contrary to the intent and policy of Congress in enacting the Agricultural Marketing Agreement Act of 1937, and contrary to the Supreme Court holding in *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935).

42. Petitioners also contend that the Nectarine, Plum and Peach Order assessments for the 1988 season are invalid, not enacted according to law nor applied according to law, and were not enacted in accordance with the administrative procedures act—all for the following reasons:

(a) The assessments used to fund the 1988 budget are primarily used to advance ideological principles of the Committees but opposed by the Petitioners in violation of the First Amendment of the United States Constitution, and contrary to the express holdings of *Aboud v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782 (1977), *Chicago Teachers Union Local v. Hudson*, ___ U.S. ___, 106 S.Ct. 1066 (1986), *Galda v. Rutgers*, 777 F.2d 1060 (3rd Cir., 1985), and *Century Communications v. FCC*, 835 F.2d 292 (D.C. Cir., 1987);

(b) Since approximately fifty percent of the assessments assessed against the Petitioners are to be used by the Nectarine, Plum and Peach Committees, and the California Tree Fruit Agreement for advancing ideological and economical beliefs to which

the Petitioners do not subscribe and Petitioners are being taxed for the purpose of allowing their competitors to advance such beliefs which are opposed by the Petitioners, is in violation of the First Amendment of the United States Constitution;

(c) There is no substantial basis and purpose for the assessments and no substantial basis and purpose for the budget; and

(d) The Secretary failed to comply with the notice and comment provisions of the Administrative Procedures Act in issuing and setting the assessments and budget for the 1988 season.

43. The assessments assessed by the Secretary against the Petitioners from 1980 through 1987 suffer from the same First Amendment constitutional infirmities as the 1988 assessments with respect to taxing the Petitioners to promote philosophies, ideologies, and economic beliefs with which they do not agree.

44. Since the Petitioners have been previously involved in an administrative petition, the Petitioners contend that the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted from Marketing Orders" do not provide the Petitioners with an adequate and timely relief with respect to assessments, because:

(a) There is no pool of money nor any source of funds available to reimburse the Petitioners for assessments if found to be invalid;

(b) By the time the matter is heard by the Administrative Law Judge, decided by the Administrative Law Judge, and then decided by the Judicial Officer, more assessments are assessed and collected from the Petitioners, or threatened to be collected from the Petitioners, and it has a chilling effect upon the Petitioners with respect to the Petitioners

subsidizing promotional work and research work with which they do not subscribe.

45. The Secretary has violated the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders", with respect to maturity regulations and size regulations, because the Secretary has continuously determined that no interim relief is available with respect to any administrative petition filed pursuant to Title 7, U.S.C. §608c(15)(A), and a substantial amount of the Petitioners' fruit will have to be thrown out, not picked, or not marketed because of said maturity and size regulations, for which there is no fund of money in order to reimburse the Petitioners in the event they later prevail in the administrative proceedings and said rules are invalid because they do not afford any retrospective relief or any monetary damages as a result of being financially injured as a result of the invalid Nectarine, Plum or Peach Marketing Order provisions with respect to maturity and size "regulations".

46. Petitioners also contend that the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid because they do not afford any timely or effective relief and are thus in violation of the due process clause of the United States Constitution; Petitioners also contend that said maturity regulations and said size regulations are in fact volume control and the Secretary has failed to comply with the Agricultural Marketing Agreement Act by failing to apportion the surplus volume in an equitable and fair manner, and has discriminated against various varieties of nectarines, peaches and plums, several of

which are handled by the Petitioners, which amounts to a denial of equal protection of the laws.

V

PETITION FILED IN GOOD FAITH AND NOT FOR DELAY

47. This Petition is filed in good faith and not for the purposes of delay. Furthermore, Petitioners request an expedited hearing in this regard, and also seek interim relief.

PRAYER FOR RELIEF

48. For the reasons set forth above, Petitioners pray for the following specific relief:

A. For a ruling that §§917.460 (Plum Regulation No. 19), 917.459 (Peach Regulation No. 14) and 916.356 (Nectarine Regulation No. 14), and their respective tables showing the specific "maturity tests" or other "color standards", of the Nectarine, Plum and Peach regulations issued in 1988, and the obligations imposed therewith, as written and/or as applied, are not in accordance with law;

B. For a ruling that the specific color standards and/or other maturity tests referenced in paragraph 48(A) above, as written and/or as applied are not in accordance with the law;

C. For a ruling that the various specific color standards and/or maturity tests as referenced in paragraph 48(A) above, as written and/or as applied, are a denial of equal protection of the laws;

D. For a ruling that the specific maturity tests and/or color standards referenced in paragraph 48(A) above, as written and/or as applied, result in a denial of due process of law since it amounts to a taking without due process and without just compensation;

E. For a ruling that the maturity tests and/or "color standards", and the procedure in determining said maturity tests and/or color standards, and the procedure to be utilized in requests for changes or variances to the maturity tests and the appeals, is a denial of due process of law since it constitutes an unlawful delegation of authority to Petitioners' competitors;

F. For a ruling that the specific maturity tests and/or "color standards" referenced in paragraph 48(A) above, as written and/or as applied, are arbitrary, capricious and not based on substantial evidence;

G. For a ruling that the specific maturity tests and/or "color standards" referenced in paragraph 48(A) above were enacted in violation of the Administrative Procedures Act and are thus null and void;

H. For a ruling that the specific new size regulations for nectarines and peaches, as issued as interim final rules by the Secretary in May of 1988, as written and/or as applied, were enacted in violation of the Administrative Procedures Act and are thus void, and/or are in actuality volume control and are contrary to the Agricultural Marketing Agreement Act;

I. For a ruling that the specific maturity tests or specific color standards referenced in paragraph 48(A) above, as written, and/or as applied are in effect volume control, and are violative of the Agricultural Marketing Agreement Act;

J. For a ruling that neither the Nectarine Administrative Committee, the Plum Commodity Committee, the Peach Committee, the Control Committee of the California Tree Fruit Agreement,

the Maturity Subcommittees of any of the above-described Committees nor "Appeals Committee" are empowered, to set and determine, change, vary, deny changing, deny varying, or ruling on the appeal from the denial of specific color standards, or other maturity tests;

K. For a ruling that the assessments issued for 1988 are not in accordance with law, since they were not enacted in accordance with the Administrative Procedures Act;

L. For a ruling that the assessments issued for 1988 are not in accordance with law since they are violative of the Petitioners' First Amendment constitutional rights;

M. For a ruling that the assessments assessed and collected from the Petitioners from 1980 through 1986, and the assessments assessed against the Petitioners in 1987 are not in accordance with law since the majority of the assessments are being used to pay for promotion, other forms of research, and other items reflecting the ideological, economical, and philosophical viewpoints of Petitioners' competitors, to which Petitioners do not subscribe and thus are violative of the First Amendment of the United States Constitution;

N. For a ruling that the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid because they do not afford any retrospective relief or any monetary damages for financial injuries as a result of an invalid Marketing Order or Marketing Agreement regulation;

O. For a ruling that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid

because they do not afford any timely or effective relief and thus are a violation of the due process clause of the United States Constitution;

P. For a ruling that the Secretary has failed to comply with the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" for refusing to grant any form of interim relief, despite the irreparable injury that would occur in the event interim relief is not granted, and thus the Secretary has failed to follow its own rules of procedure;

Q. For a ruling that Petitioners need not exhaust their administrative remedies pursuant to the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" and §608c(15)(A) of the Agricultural Marketing Agreement Act, since the Secretary has already determined that Petitioners' Petition would be futile to exhaust since he has already made up his mind that no violation stated herein will be found to have occurred, no remedy can be afforded, no retrospective relief can be granted, and no relief at all will be granted to the Petitioners;

R. For any other relief deemed necessary and just.

DATED: June 3, 1988.

THE LAW FIRM OF THOMAS E. CAMPAGNE
A Professional Corporation

By /s/ BRIAN C. LEIGHTON
BRIAN C. LEIGHTON

Attorney for Petitioners

[verification and certificate of service omitted in printing]

ADMINISTRATIVE PROCEEDINGS WITHIN
THE UNITED STATES DEPARTMENT OF
AGRICULTURE BEFORE THE SECRETARY
OF AGRICULTURE

—
AMA DOCKET NOS.
F&V 916-3 (NECTARINES)
F&V 917-4 (PLUMS & PEACHES)

IN RE: WILEMAN BROS. & ELLIOTT, INC., A CALIFORNIA
CORPORATION, AND KASH, INC., A CALIFORNIA
CORPORATION, PETITIONERS

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE; AND
RICHARD LYNG, AS FORMER SECRETARY OF
AGRICULTURE, RESPONDENTS

PETITION TO MODIFY VARIOUS PROVISIONS
OF THE NECTARINE, PLUM AND PEACH
MARKETING ORDERS;

AND/OR

PETITION TO TERMINATE VARIOUS
PROVISIONS OF THE NECTARINE, PLUM AND
PEACH MARKETING ORDERS;

AND/OR

PETITION TO EXEMPT PETITIONERS FROM
VARIOUS PROVISIONS OF THE NECTARINE,
PLUM AND PEACH MARKETING ORDERS AND
ANY OBLIGATIONS IMPOSED IN CONNECTION
THEREWITH THAT ARE NOT IN
ACCORDANCE WITH LAW

—
[7 U.S.C. §608c(15)(A); 7 C.F.R. §§916.1, et seq.
and 917.1, Et Seq.]

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[July 27, 1989]

* * *

I

DESCRIPTION OF PETITIONERS

A. WILEMAN BROS. & ELLIOTT, INC.

* * *

B. KASH, INC.

* * *

II

PETITIONERS' GENERAL CONTENTIONS RE WHY
VARIOUS PROVISIONS OF THE NECTARINE,
PLUM AND PEACH MARKETING ORDERS, OR THE
INTERPRETATION OR APPLICATION THEREOF
AS WRITTEN, AND/OR AS APPLIED, ARE NOT IN
ACCORDANCE WITH LAW

* * *

3. Petitioners also claim that the promulgation of the "well-matured" color chip-standard was arbitrarily and capriciously imposed upon the tree fruit industry with no substantial basis or purpose as the "well-matured" color chip standard does not objectively and rationally evaluate the internal maturity of fruit nor determine good consumer quality and/or good marketable quality.

4. Petitioners also claim that the below-described provisions of the Nectarine, Plum and Peach Orders,

in their language and/or in their application, and/or in their obligations imposed in connection therewith, are a violation of the First Amendment of the United States Constitution and the due process clause of the Fifth Amendment of the United States Constitution.

5. Petitioners also claim that various below-mentioned provisions of the Nectarines, Plum and Peach Orders are void as being an improper delegation of authority from the Secretary of Agriculture to the Nectarine, Plum, and Peach Committees, the Control Committee of the California Tree Fruit Agreement, and the Nectarine, Plum and Peach Maturity Subcommittees, and their respective appeal committees.

6. Petitioners also claim that various below-mentioned provisions of the Nectarine, Plum and Peach Orders, as interpreted and as applied, are void as there has been no properly delegated authority to either the Nectarine, Plum and Peach Committees, the Nectarine, Plum and Peach Maturity Subcommittees, the California Tree Fruit Agreement, or the Appeals Committee.

7. Petitioners also claim that various below-mentioned provisions of the Nectarine, Plum and Peach Orders are void since the Administrative Procedure Act was not followed with respect to implementing the "laws" stated below.

8. Petitioners also claim that the various below-mentioned provisions of the Nectarine, Plum and Peach Orders, and the regulations executed thereafter, are void and not in conformity with the law with respect to all assessments levied against Petitioners with respect to peaches, plums and nectarines.

9. Petitioners also contend that the below-described provisions of the Nectarine, Plum and

Peach Marketing Orders, and the rules and regulations executed thereafter as written, and/or in their application, and/or in their obligation imposed in connection therewith, are a violation of procedural and substantive due process since, in the application of "regulations" which were not promulgated pursuant to law, or in those rules which, although promulgated pursuant to law but applied not in accordance with the law, amount to a complete "taking" of Petitioners' nectarines, plums and peaches, without just compensation and without furthering any proper governmental purpose, and without providing a pre-deprivation hearing in accordance with law.

10. Petitioners also contend that said delegation of authority to committees, made up of competitors of Petitioners, are contrary to the intent and policy of Congress in enacting the AMAA, and contrary to the Supreme Court's ruling in *Panama Refining Company v. Amazon Petroleum Corporation*, 293 U.S. 388, 55 S.Ct. 241 (1935); *Wichita Railroad and Light Company v. Public Utilities Commission*, 260 U.S. 48, 59, 43 S.Ct. 41, 55; *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935); *Carter v. Carter Coal Company*, 298 U.S. 238, 56 S.Ct. 855 (1936); *Industrial Union v. American Petroleum*, 448 U.S. 607, 100 S.Ct. 2844 (1980); and *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 101 S.Ct. 2478 (1981).

11. Petitioners contend that the Secretary of Agriculture for each harvest season from 1980 through the present season, failed to engage in reasoned decision-making in establishing regulations authorizing the imposition of forced assessments, all in violation of the Administrative Procedure Act.

Further, in failing to engage in reasoned decision-making, the Secretary failed to engage in notice and comment and made no provision for notice and comment regarding;

(a) Whether the tree fruit industry benefits from a "generic" advertising program;

(b) Whether the tree fruit industry should continue year to year with the "generic" advertising program;

(c) Whether pro rata credits from the forced advertising assessments should be provided to handlers engaging in direct specific brand name advertising programs;

(d) In what manner advertising programs should be conducted;

(e) What, if any, limitations should be placed on the Committees in regards to the monetary level allowed to be expended on a "generic" advertising program;

(f) How advertising money, if any, should be spent;

(g) Which public relations firm, if any, should be retained.

12. Petitioners also contend that the Nectarine, Plum and Peach Order's monetary assessments for the 1988 season and subsequent seasons are invalid, not enacted according to law nor applied according to law, and were not enacted in accordance with the Administrative Procedure Act, and that their adoption and/or collection is not in accordance with the law.

13. Petitioners also contend that the Nectarine, Plum and Peach Order's monetary assessments for the 1980 through 1988 seasons and the 1989 and subsequent seasons are invalid and unconstitutional

because at least fifty percent of said assessments compelled to be paid by Petitioners are violative of the First Amendment to the United States Constitution. The assessments are compulsory subsidization of ideological, economic and commercial activity engaged in by the Nectarine, Plum, and Peach Committees to which Petitioners object (as more completely stated below), and in contravention of the holdings in *Ahood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782 (1977), and *Chicago Teachers Union v. Hudson*, 106 S.Ct. 1066 (1986), and cases cited therein. Further, all assessments for each season were adopted and/or collected in a manner not in accordance with law, and in a manner violative of the Administrative Procedure Act. Additionally, all assessments for each season, are null and void as they were adopted and/or collected for expenditures which are not authorized by the AMAA, and/or for expenditures which are specifically prohibited by the terms of the AMAA and/or by the terms of other laws. Also, all assessments for each season are null and void because the "decisions" to make said expenditures are decisions accomplished in a manner violative of the law (including, but not limited to, public notice and participation and public decision making "in the sunshine" laws); and/or because said "decisions" to make said expenditures and said expenditures themselves were not previously approved, properly authorized in accordance with the law, by the Secretary of Agriculture; and/or because some expenditures from said assessments were for unauthorized and/or legally prohibited purposes.

14. Petitioners also contend that the Nectarine, Plum and Peach Order assessments for 1980 through the 1989 and subsequent seasons are invalid and

unconstitutional as they are violative of equal protection as applied through the Fifth Amendment's deprivation of liberty provision, in that California growers of nectarines, plums and peaches are discriminated against in relation to growers of the same tree in other states, as well as being discriminated against in relation to growers of other commodities within the State of California.

15. The interim final rules issued by the Secretary, dated May 24, 1988, and subsequent final rules, regarding the new maturity regulations, the maturity testing devices, including color chips, the color chip variance procedures, and fruit size elimination, for nectarines, plums and peaches, were invalid because the Administrative Procedure Act was not followed, and/or otherwise are not in accordance with the law as written and/or as applied, and thus are null and void.

16. The interim final rules issued by the Secretary dated May 24, 1988, and subsequent final rules, regarding the new maturity regulations, the maturity testing devices, including color chips, the color chip variance procedures, and fruit size elimination for nectarines, plums and peaches, are violative of the Administrative Procedures Act because they did not sufficiently address comments submitted, they are arbitrary and capricious, they were not premised on a substantial basis, alternatives were not considered, and/or otherwise are not in accordance with the law as written and/or as applied, and thus are null and void.

17. The budget and assessments for the Nectarine, Plum and Peach Marketing Orders for the 1980 through 1989 (and subsequent) seasons are violative of the Administrative Procedure Act since they are

improperly retroactively imposed, there is no substantial basis and purpose for said assessments and budget, the Secretary failed to review the alternatives and there is "no good cause" and/or "no emergency" exception (pursuant to Title 5, U.S.C. §553) for non-compliance with the notice-and-comment procedures in promulgating the budget and assessments for the 1980 through 1989 (and subsequent) seasons.

18. The imposition of advertising assessments by the Secretary of Agriculture pursuant to 7 C.F.R. §§916.45 and 917.39, are unlawfully imposed taxes. As by definition, the advertising assessments imposed on the tree fruit industry shall be done in the "public interest" 7 U.S.C. §608c(6)(I), advertising assessments cannot be deemed "fees", but must be categorized as "taxes", as any benefit inures to the public and not Petitioners. As a tax, the advertising assessments must be declared null and void as the Secretary of Agriculture has not been properly delegated the authority by Congress to impose taxes on the tree fruit industry.

19. The imposition of advertising assessments, pursuant to 7 C.F.R. §§916.45 and 917.39, is an unlawful delegation of the constitutional authority to levy taxes. Insufficient legislative guidelines, restrictions and limitations have been placed upon the Secretary of Agriculture for Congress to have legally delegated its taxing power. Therefore, the collection of assessment "taxes" pursuant to 7 C.F.R. §§916.41 and 917.37 are void as an improper unrestricted delegation of authority.

20. The Secretary has violated the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders", and

thus denied Petitioners due process and equal protection under the law, by refusing to follow its own rule in §900.70 of Title 7, C.F.R., by continuously determining that interim relief is unavailable with respect to any administrative petition filed pursuant to Title 7, U.S.C. §608c(15)(A).

21. Petitioners also contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" (Title 7, C.F.R. §900.50, et seq.) are invalid to the extent that they do *not* provide Petitioners with any timely adequate pre-taking equitable relief and do *not* provide any timely or adequate post-taking monetary relief, particularly to the extent that they do *not* afford any retrospective monetary relief or any prospective monetary damages as a result of being financially injured as a result of invalid provisions of the Nectarine, Plum or Peach Marketing Orders or their invalid application.

22. Petitioners also contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" (Title 7, C.F.R. §900.50, et seq.) are invalid because they do not afford any timely or effective relief and thus are a violation of the due process and equal protection clauses of the United States Constitution.

23. Petitioners also contend the position of the Secretary of Agriculture was not "substantially justified." As a result of the arbitrary and capricious actions undertaken by the Nectarine, Plum and Peach Committees, their maturity subcommittees, CTFA and the United States Department of Agriculture, Petitioners should be awarded fees and expenses, including attorney's fees and the reasonable expenses of expert witnesses, pursuant to the Equal Access to

Justice Act, 5 U.S.C. §504, and/or pursuant to Federal Rules of Civil Procedure §11, and/or as otherwise allowed by law.

III

STATEMENT OF FACTS RE PETITIONERS AND THEIR CONTENTIONS

24. Petitioner Wileman Bros. & Elliott, Inc. (hereinafter referred to as "Petitioner Elliott"), and Kash, Inc. (hereinafter referred to as "Petitioner Kash") are both growers and handlers of plums and nectarines. Petitioners handle their own varieties of plums and nectarines.

25. Petitioner Kash, Inc., is also both a grower and handler of peaches.

26. Petitioner Elliott is the only grower and handler of Tom Grand nectarines. Petitioner Elliott is one of two growers of Ebony plums and one of two handlers of Ebony plums, and grows and handles a significantly greater volume of Ebony plums than one other grower of Ebony plums.

27. Petitioners market a much greater percentage of their nectarines and plums (and with respect to Kash, Inc., peaches) in the East Coast terminal markets. The fruit being shipped to the East Coast markets takes a considerably greater period of time to reach the store shelves through the terminal markets there than it does reaching the store shelves in national chainstores or in West Coast markets.

28. Nectarines, peaches and plums will continue to ripen after they reach U.S. #1 maturity, and with respect to some varieties of nectarines and plums and peaches handled by Petitioners, fruit required to b:

"well-matured" at the time of picking and packing is over-mature for purposes of marketing said fruit in the East Coast terminal markets.

29. Petitioner Elliott, as a corporation, has been a handler of nectarines and plums since 1948. Petitioner Kash, Inc., as a corporation, has been a handler of nectarines, plums and peaches, since 1968.

30. Petitioners Wileman Bros. & Elliott, Inc. and Kash, Inc., subsequent to the granting of a motion to consolidate their separate 15(A) Petitions, had their grievances heard in a hearing conducted during February and March of 1988. Said hearing was presided over by the Honorable Dortha A. Baker, Administrative Law Judge, U.S.D.A. (AMA Docket Nos. 916-1 and 917-3). Said 15(A) Petition hearing encompassed certain issues regarding the 1980 through 1987 harvest seasons for nectarines and plums. Said 15(A) Petition hearing raised a substantial number of issues relating to various provisions of the Nectarine and Plum Marketing Orders. The hearing involved the admission of substantial evidence through oral testimony, the admission of hundreds of exhibits, and other factual evidence which was admitted through judicial and administrative notice being taken by Administrative Law Judge Dortha A. Baker. Petitioners hereby request that the record of the aforementioned 15(A) Petition hearing (AMA Docket Nos. 916-1 and 917-3), to include all evidence received at said 15(A) hearing, be incorporated by reference, as though fully set forth, within this instant Petition. The parties involved in the instant action are identical to the parties involved in the aforementioned 15(A) Petition hearing conducted in 1988 (AMA Docket Nos. 916-1 and 917-3). Incorporation by reference of the record of the prior 15(A) Petition

proceeding would alleviate a substantial duplication of effort, narrow the issues and maximize judicial economy in conducting the instant 15(A) Petition hearing.

31. On or about May 4, 1988, the Nectarine Administrative Committee * * * an 18-cent per carton assessment against each container of nectarines packed by Petitioners. Of that 18 cents, only (approximately) 5 cents was for inspection of those cartons of nectarines, and over 10 cents per container was assessed against each container for "market development", which included: field staff activities; retail advertising incentives; trade communications; retail projects; point-of-sales materials; publicity; education activities; food service activities; TV and radio production; TV advertising; radio advertising; outdoor advertising; Canadian promotion; promotion research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Nectarine Administrative Committee in May, 1988, was approximately \$1,761,886.00. Petitioners object to being assessed for "market development", as described above, because said advertising and "market development" has not been shown to increase returns to Petitioners or their growers. Petitioners object to said assessments being used for advertising and promotional work since said advertising and promotional work do not reach the consumers to whom Petitioners sell their fruit, and it forces Petitioners to subscribe to ideologies and economic philosophies with which they do not agree. From 1980 through the present harvest season, over half of the assessments paid by Petitioners has been used for "market development" * * *.

32. On or about May 4, 1988, the Plum Administrative Committee * * * an 19-cent per carton assessment against each container of plums packed by Petitioners. Of that 19 cents, only (approximately) 6 cents was for inspection of those cartons of plums, and approximately 10 cents per container was assessed against each container for "market development", which included: field staff activities; retail advertising incentives; trade communications; retail projects; point-of-sales materials; publicity; education activities; food service activities; TV and radio production; TV advertising; radio advertising; outdoor advertising; Canadian promotion; promotion research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Plum Administrative Committee in May, 1988, was approximately \$1,831,459.00. Petitioners object to being assessed for "market development", as described above, because said advertising and "market development" has not been shown to increase returns to Petitioners or their growers. Petitioners object to said assessments being used for advertising and promotional work since said advertising and promotional work do not reach the consumers to whom Petitioners sell their fruit, and it forces Petitioners to subscribe to ideologies and economic philosophies with which they do not agree. From 1980 through the present harvest season, over half of the assessments paid by Petitioners has been used for "market development" * * *.

33. On or about May 4, 1988, the Peach Administrative Committee * * * an 18-cent per carton assessment against each container of peaches packed by Petitioner Kash, Inc. Of that 18 cents, only

(approximately) 6 cents was for inspection of those cartons of peaches, and approximately 9 cents per container was assessed against each container for "market development", which included: field staff activities; retail advertising incentives; trade communications; retail projects; point-of-sale materials; publicity; education activities; food service activities; TV and radio production; TV advertising; radio advertising; outdoor advertising; Canadian promotion; promotion research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Plum Administrative Committee in May, 1988, was approximately \$1,225,435.00. Petitioner Kash, Inc., objects to being assessed for "market development", as described above, because said advertising and market development has not been shown to increase returns to Petitioner Kash, Inc. or its growers. Petitioner Kash, Inc. objects to said assessments being used for advertising and promotional work since said advertising and promotional work do not reach the consumers to whom Petitioner Kash, Inc. sells its fruits, and it forces Petitioner Kash, Inc. to subscribe to ideologies and economic philosophies with which it does not agree. From 1980 through the present harvest season, over half of the assessments paid by Petitioner Kash, Inc. have been used for "market development" * * *.

34. A portion of the assessments levied against Petitioners is being utilized by the Commission and the California Tree Fruit Agreement for research projects of which the Petitioners do not subscribe. Said research projects include hiring individuals to write reports ostensibly showing that small size fruit is not desired by consumers, to write reports showing

that "well-matured" fruit is what is desired by consumers, and to pay individuals and firms for writing reports ostensibly by showing that advertising is beneficial to the industry. Petitioners contend that this type of research activity is done for the purpose of supporting more restrictive picking, packing and marketing of peaches, plums and nectarines, as intended by the Committees and CTFA, through prohibited illegal volume (quantity) control, under the guise of providing consumers with better quality fruit, to restrict the trade of and marketing by Petitioners, in a form and manner with which Petitioners do not agree. Petitioners contend that this is done by the Committee and CTFA to promote their own ideological philosophies and their own economic advantage to which Petitioners do not subscribe.

35. Petitioners also contend that a small portion of their assessments are being used to finance the California Tree Fruit Agreement and no authority has even been published in the Federal Register for notice and comment, and CTFA is an entity who has never been delegated authority pursuant to the Administrative Procedure Act. Thus, assessments used to support an entity which, by law, does not legally exist, are null and void.

36. Petitioners also contend that approximately 5-to-6 cents per container is being assessed against Petitioners to provide for inspection service to inspect fruit utilizing tests and standards that have never been lawfully promulgated, said tests and standards being utilized by the inspection service have caused Petitioners substantial losses in picking, culling (forced to discard), and marketing their fruit.

37. Any monies expended by Petitioners for promotion of their own specific brand receive no pro rata credits toward the amount of advertising assessments levied against Petitioners for the Committees' and CTFA's "generic" promotional activities.

38. California's tree fruit * * * subject to Marketing Orders 916 and 917, are the only tree fruit * * * subject to advertising assessments (other states' * * * are not required to advertise. Thus, the forced "generic" advertising program of Marketing Orders 916 and 917, benefits other states' growers and handlers of tree fruit, who are not subject to advertising assessments. For example, a consumer in Minnesota who gets an urge to purchase a California-grown peach, based on an advertisement paid for by Petitioners' assessments, does not necessarily benefit Petitioners or any other California grower or handler. When the consumer enters the grocery store and observes peaches, how does he differentiate a Georgia or Colorado peach (not subject to advertising assessments) from that of a generically advertised California peach? As a result, the marketing orders discriminate against the California handler and grower by providing unassessed advertising to handlers and growers of peaches not subject to California's marketing orders.

39. On April 8, 1988, the Secretary issued proposed rules with respect to plums with the intent to regulate out smaller-size plums, to change maturity determinations, modify requests for variances, and to define "well-matured" (53 Federal Register 11669).

40. On April 18, 1988, the Secretary issued proposed rules with respect to eliminating smaller size nectarines and peaches, and changing the maturity determinations and variances to the maturity

determinations, basically identical to the plum maturity changes. (53 Federal Register 12690 (nectarines); 53 Federal Register 12694 (peaches).)

41. With respect to the peach, plum and nectarine proposed rules, described in paragraphs 39 and 40 above, * * * a fifteen-day comment period was provided except as to plums for which a seven-day extension was granted at the request of Petitioners' counsel. These proposed rules with respect to peaches, plums and nectarines occurred four months after the respective peach, plum and nectarine committees met in December, 1987, and proposed to the Secretary the elimination of small size peaches, plums and nectarines. The peach, plum and nectarine committees also voted to approve the same maturity standards and determinations be applied for the 1988 season that were employed in the 1987 season. There was no "good cause" shown for providing less than a thirty-day comment period with respect to the issuance of each of the above-described proposed rules.

42. On May 27, 1988, the Secretary's designee issued interim final rules, purportedly binding on Petitioners, which substantially altered the maturity determinations and the procedure for changes to the maturity determinations. These interim final rules were substantially different than those proposed in the "proposed" rules issued approximately five weeks earlier. In said interim final rules, the Secretary rejected the committee's proposal to eliminate small-size plums, but at the same time, the Secretary adopted the nectarine committee's proposal to eliminate small-size nectarines. The determination by the Secretary to eliminate small-size nectarines was arbitrary, capricious, not based on a substantial

record, and the Secretary refused and failed to address objecting comments. Furthermore, Petitioners contend that the Secretary relied on false information in issuing an interim final rule with respect to the elimination of small-size nectarines, which the Secretary knew, or should have known, was false.

43. The Petitioners contend that the Secretary failed to comply with the Administrative Procedure Act's notice and comment period, and there was no "good cause" shown, for issuing an interim final rule which substantially differed from the proposed rule issued by the Secretary approximately five weeks earlier with respect to maturity determinations and maturity variances. The Secretary's proposed rule with respect to maturity for peaches, plums and nectarines stated that the Shipping Point Inspection Service was to set the color standards or other maturity tests to determine the "well-matured" standard. Further, the proposed rule granted only SPI the right and ability to vary or change color chip standards or other maturity tests. The proposed rule suggested the elimination of the Maturity Subcommittee for each of the respective committees, which had existed from 1980 through the 1987 seasons. In said proposed rule, the Secretary published, for the first time, the actual "color standards" or other "maturity tests" which the Secretary claimed the Inspection Service had established previously. The Secretary knew, or should have known that statement was false, since the Secretary knew, or should have known, that in the past 8 years, it was the Maturity Subcommittees (made up of Petitioners' competitors), which actually set the "color standards" or other maturity tests, and

changes the "color standards" or other maturity tests.

44. With respect to the interim final rules issued regarding peaches, plums and nectarines, there were additional false statements made in the interim final rules which the Secretary knew, or should have known, were false or were conclusions drawn by the Secretary which were arbitrary, capricious, or not based upon substantial evidence—many of which are stated as follows:

(a) Comments to the proposed rule not only discussed, but showed, that the maturity regulations and the size recommendations were done by the Committees for volume control. The Secretary never addressed this comment;

(b) The Secretary, with respect to nectarines, found that consumers wanted larger-size nectarines, but at the same time, found that the evidence was inconclusive with respect to consumers not desiring smaller-sized plums—despite the fact that the studies cited by the Secretary with respect to plums were the same authorities cited with respect to nectarines, and the studies did not distinguish between the two. However, only four retailers of the twenty-five retailers interviewed wanted to see the smaller sizes eliminated, and twenty-one of the twenty-five retailers interviewed wanted both the smaller and larger sizes;

(c) The report (of Ervin D. Thuerk) cited by the Secretary was directed to twenty-five "key supermarket chain executives" which represented only 38.7% share of the total industry. The Secretary failed to point out that the terminal markets were totally unrepresented in the study conducted, which

is where many handlers, including Petitioners, ship their fruit;

(d) The Secretary cites Mr. Thuerk's research for the proposition that early-season fruit (which is small in size) does not provide satisfaction to the consumer and does not encourage repeat purchases, but fails to point out that only four out of the twenty-five large supermarket chains interviewed wanted to eliminate small sizes, while the vast majority wanted to keep them. Thus, the Secretary relied on certain statements made by Mr. Thuerk, and failed to address others that would contradict the conclusions desired to be drawn by the Secretary;

(e) The Secretary rejected comments that it was too late for growers to modify their cultural practices in order to meet the more restrictive size requirements for nectarines and peaches by stating that when the Committee made its recommendations the growers had already begun to undertake cultural practices to obtain "desirable fruit size". However, with respect to plums, the Secretary contradicted this statement by stating: "Finally, it is too late this season for growers to make any cultural changes on the basis of the proposed size increases if they have not already done so." The Secretary fails to explain the difference in the two statements—one with respect to nectarines and peaches, and the other with respect to plums;

(f) In response to comments that the size proposal would reduce the volume of fruit and was thus volume (quantity) control, the Secretary stated that such a position was questionable as "small size nectarines have been a detriment to the trade and as such the industry has directed its efforts toward production and marketing of better quality and larger

size fruit". Thus, the Secretary failed to address the issue of whether there would be a reduction in the amount of fruit to reach the market and was volume control;

(g) The size regulations affect certain varieties of fruit, but was not directed at other varieties of fruit which is discriminatory, arbitrary and capricious. If consumers reject small-size fruit, they would reject the fruit with respect to all varieties, and not just some varieties. The Secretary made a false statement when he stated that since May 16, 1980, nectarines, plums and peaches "have been required to be 'well-matured' rather than 'mature'", and "this requirement has been implemented by the Federal-State Inspection Service since that time." In truth and in fact (which was known by the Secretary), the regulations which went into effect on May 16, 1980, did not state that fruit was required to be "well-matured". "Well-matured" was what the committees decided thereafter to implement on their own without any rulemaking whatsoever. The Secretary knew, or should have known, that the Federal-State Inspection Service did not set those standards in the past, but those standards were imposed by the committee of competitors made up of the plum, nectarine and peach committees and their respective maturity subcommittees, along with CTFA. The Secretary also falsely states that since 1980 "the Federal-State Inspection Service, based on its expertise, has been primarily responsible for determining which specific test or tests should be used for each variety of nectarines and which test level (e.g., particular color chip) is appropriate for each variety". The Secretary knew, or should have known, that this statement was false since the Federal-State Inspection Service has

merely occupied an advisory role with respect to the committees and their respective maturity subcommittees, who actually set the standards, changed the standards at their whim, and actually made "law", regardless of the concerns and opinions of the Federal-State Inspection Service;

(h) The Secretary also states that when the "proposed rule" was issued in April, 1988, the responsibility for issuing the maturity test, and granting variances during the seasons (with respect to those maturity tests), was proposed to be given to the Federal-State Inspection Service to "lessen the burdens on committee members." Petitioners contend that the Secretary knew, or should have known, that this was a false statement in that the proposal to provide sole responsibility to the Federal-State Inspection Service, was a direct result of the Petitioners' previously having filed and presented evidence at the Administrative Petition Proceeding which showed the unlawful delegation of authority by the Secretary to the committees and the maturity Subcommittees;

(i) The Secretary falsely stated that he proposed to continue the "requirement that not less than ninety-percent of the fruit surface shall meet the color guide established for that variety, and not less than ninety-percent of any lot shall meet the color guide established for that variety." The Secretary knew, or should have known, that this was never a "requirement", but was a determination made by the respective committees and the respective maturity subcommittees, and the Secretary had never made this "requirement" before. It was also stated in the proposed rule, with respect to maturity for nectarines, plums and peaches, issued in April, 1988, that the

Inspection Service had intended to use certain "color chips" and other maturity tests for nectarines, plums and peaches in the 1988 season, implying that the Inspection Service had actually set those "maturity tests" or other "color standards", when the Secretary knew, or should have known, that the Inspection Service has never set those standards, but these standards have been set by the respective committees and their respective maturity subcommittees—made up of Petitioners' competitors.

(j) The Secretary, in adopting the "well-matured" standard, or re-adopting the "well-matured" standard, relies in part upon Mr. Thuerk's report which is attributed by the Secretary to state that the consumers do not want early-season fruit which is picked immature, but the Secretary fails to point out that this study states that consumers do not want "immature" fruit, which is a far cry from "well-matured", and is different than fruit being "mature";

(k) The Secretary also vacuously states, in response to a comment that the "well-matured" requirement has become more restrictive than it was when implemented in 1980, that only the number of color chips have increased but the "well-matured" standard has not become more restrictive. The Secretary knew, or should have known, that his contention was false;

(l) In responding to a claim that "well-matured" fruit has caused a large increase in harvesting costs, the Secretary merely responds that the consumer "did not document this claim." The Secretary knew, or should have known, that said claim was documented through the transcripts of the hearing that occurred with respect to the Administrative Petition filed by these Petitioners and heard in

February and March of 1988. Which information was before the Secretary at the time the interim final rule was issued;

(m) The Secretary also buttresses his claim that the "well-matured standard" has been well received by growers, since, at the last referendum, a majority of those voting favored continuance of the program. He ignores the fact that the referendum was not conducted with respect to eliminating the "well-matured" standard, but was conducted with respect to a continuation or termination of the *entire* Marketing Agreement. There was no opportunity for a line-item veto of any provision. In responding to a commentor's objection to the "well-matured" standard that the standard is for the purpose of volume control as indicated by the decrease in packages shipped per acre from 1980 through 1987, even though a larger number of trees were planted per acre, the Secretary stated that this evaluation was inconclusive because the commentor did not consider other factors in addition to the "well-matured" requirement such as age of the trees, weather, cultural practices, and failure to meet other types of handling requirements such as minimum size requirements. The Secretary knew, or should have known, that his contention was false. There was a complete failure by the Secretary to document his contention that there were less cartons per acre shipped since the "well-matured" standard came into existence based upon the age of the trees, weather, cultural practices, and other handling requirements. The Secretary completely failed to comment about the fact that permitting the committees, and the maturity subcommittees, to make the decisions as to which "color chips" or other "maturity tests" should

be utilized for each variety of nectarine, plum and peach, was a violation of due process, and a violation of *Carter v. Carter Coal*;

(n) The Secretary failed to consider the comments with respect to the fact that the color standards or other maturity tests were not uniform, varied from variety to variety causing some fruit to have a shorter shelf life than other fruit, causing some fruit to be left on the trees after the fruit otherwise met a U.S. No. 1, than other varieties of fruit; caused fruit that was shipped to the East Coast to arrive in an overripe condition; failed to adequately consider the drastically increased picking costs for having a "well-matured standard", said standard has required orchards to be picked five to seven times as opposed to two or three times; failed to address comments that the specific color chips or other maturity tests lacked any substantial basis and purpose, lacked any uniformity, lacked any studies and tests to determine the amount of fruit lost or subject to a decreased sales price as a result of the overripe condition of the fruit. The Secretary has wholly failed to consider and comment upon the preliminary and tentative findings made by his own Administrative Law Judge, the Honorable Dortha Baker. Her preliminary findings were made following the conclusion of the Administrative Petition Proceedings occurring in February and March of 1988 in Fresno, California. The Secretary wholly failed to consider the testimony given under oath and the documents and exhibits presented at the administrative hearing with respect to the precise issues being stated in the Secretary's interim final rules.

45. The Secretary's statement in the interim final rules (that it is "impracticable, unnecessary, and

contrary to the public interest to give prior notice to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until thirty days after publication in the Federal Register", because shipments of the crop have begun and this action should cover as much of the 1988 crop as possible, the maturity requirements are substantially the same as currently implemented and should be made effective as soon as possible, and the interim final rule relaxes maturity requirements for a couple of various varieties) is false. The Secretary knew, or should have known, that said statement is false since the new maturity requirement procedure and variance procedures are substantially different than what has occurred in the past, and substantially different than what was proposed in the proposed rule, and it is the Secretary's fault that the matter was not first published until April, 1988.

46. Petitioners contend that the well-matured standard imposed on the tree fruit industry, commencing with its adoption in 1988, and continuing through the present and subsequent harvest seasons, was implemented arbitrarily and capriciously. The use of the "color chip" does not, with any relevant degree of accuracy, determine the internal maturity of any particular variety of fruit. Further, the specific color standards and maturity requirements discriminates against fruit which genetically have less red color and favors varieties traditionally more redder in skin color.

47. Petitioners contend that the arbitrary and capricious imposition of the "well-matured" standard, through the use of color chips, imposed upon the tree fruit industry by the Secretary's adoption in 1988,

through the present and subsequent harvest seasons, fails to consider other forms of maturity tests that would be either more appropriate or logically used in conjunction with the color chip. Tests such as chemical ratio and/or sugar ratio would provide a more accurate guide to the internal maturity of the fruit, as fruit can be "well-matured" and over ripe and still fail to meet the color chip standard imposed.

48. Petitioners contend that the "well-matured" and the color chip standards fail to recognize, and make allowances for, where the fruit is marketed. Fruit shipped to the east coast must meet the same "well-matured" color chip standard as fruit shipped locally. Thus, the "well-matured" standard discriminates against handlers with markets primarily on the east coast.

49. Petitioners contend that based upon the new size regulations for nectarines and peaches, and the new maturity procedures with respect to peaches, plums and nectarines, Petitioners lost a substantial amount of fruit that would otherwise have been of good consumer quality and of good marketable quality, in the 1988 and 1989 seasons, and all future seasons wherein the rules remain in effect.

STATEMENT OF GROUNDS ON WHICH THE
NECTARINE, PEACH AND PLUM REGULATIONS
AND/OR THEIR INTERPRETATION AND/OR THEIR
APPLICATION ARE NOT IN ACCORDANCE WITH LAW

50. Petitioners contend that permitting the nectarine, plum and peach committees, and their respective maturity subcommittees, to determine the color standards or other maturity tests, and to determine whether or not a change or variance should or should not be made, and also placing authority in the new appeal committees is an improper delegation of authority by the Secretary to private industry, in violation of, among other cases, *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855 (1936). Petitioners also contend that the above-described maturity regulations, maturity-variance regulations, and the appeals regulations are a violation of the due process clause of the Fifth Amendment of the United States Constitution, under the authority of, among other cases, *Carter v. Carter Coal Co.*, *supra*, Petitioners would adopt and incorporate from the record of the prior 15(A) Petition hearing (AMA Docket Nos. 916-1 and 917-3) all oral testimony, exhibits submitted and arguments presented as relevant to the instant matter.

51. Petitioners also contend that the above-described maturity regulations, maturity variance or change regulations, and the appeal regulations constitute a taking without just compensation in violation of the due process clause of the United States Constitution. The standards have resulted, and will continue to result in a taking without just compensation under the new tests discussed in *Nollan v. California Coastal Commission*, 479 U.S.

913, 107 S.Ct. 3141 (1987); *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552, 92 S.Ct. 1113 (1972); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862; and *Kirby Forest Industries v. United States*, 467 U.S. 1, 104 S.Ct. 2187, 2196 (1984). Petitioners also contend that the implementation of the new maturity standards color chip tests, and the regulations eliminating small-size nectarines and peaches, is a violation of the Administrative Procedure Act, because:

(1) There was an insufficient notice and comment period with respect to the interim final rules, and no "good cause" was shown for not providing an appropriate 30-day notice and comment period;

(2) There was no "emergency" existing which would permit the Secretary to only provide a fifteen day notice period instead of at least thirty days;

(3) There was no emergency existing, except a self-made emergency by the Secretary, in issuing an interim final rule, as opposed to another proposed rule;

(4) Since the interim final rule, with respect to maturity procedures, was drastically different than the proposed rule issued five weeks earlier, no interim final rule should have been issued before another proposed rule was issued, and the Secretary's reliance on the emergency exceptions to justify the interim final rule is without merit or validity;

(5) There is no basis and purpose statement with respect to the new size elimination and maturity rules and regulations;

(6) The interim final rules wholly failed to address objecting comments, refused to consider other alternatives, and relied on false and misleading information that the Secretary knew to be false and/or misleading.

52. Petitioners also contend that the delegation of authority by the Secretary to the committees (made up of Petitioners' competitors) and the delegation of authority to the maturity subcommittees and to the appeals committee, are contrary to the intent and policy of Congress in enacting the Agricultural Marketing Agreement of 1937, and contrary to the Supreme Court holding in *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935).

53. Petitioners also contend that the nectarine, plum and peach order monetary assessments for the 1980 through the present harvest season are invalid, not enacted according to law nor applied according to law, and were not enacted in accordance with the Administrative Procedures Act—all for the following reasons:

(a) The assessments used to fund the yearly budgets are primarily used to advance ideological principles of the committees but opposed by Petitioners in violation of the First Amendment of the United States Constitution, and contrary to the express holdings of *Ahood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782 (1977); *Chicago Teachers Union Local v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066 (1986); *Galda v. Rutgers*, 777 F.2d 1060 (3rd Cir., 1985), and *Century Communications v. FCC*, 835 F.2d 292 (D.C. Cir. 1987);

(b) Since approximately fifty percent of the assessments levied against the Petitioners are to be

used by the nectarine, plum and peach committees, and the California Tree Fruit Agreement for advancing ideological and economical beliefs to which the Petitioners do not subscribe and Petitioners are being taxed for the purposes of allowing their competitors to advance beliefs which are opposed by the Petitioners, in violation of the First Amendment of the United States Constitution;

(c) There is no substantial basis and purpose for the assessments and no substantial basis and purpose for the budget;

(d) The Secretary failed to comply with the notice and comment provisions of the Administrative Procedure Act in issuing and setting the assessments and budget for the 1988 and all 1989 harvest seasons;

(e) The authority to impose advertising assessments was improperly and unlawfully delegated to the Secretary of Agriculture by Congress without sufficient guidelines, restrictions or limitations having been established, through legislation, to constitutionally justify the broad discretionary illegal "taxing" authority extended to the Secretary of Agriculture by Congress.

54. The assessments levied by the Secretary against the Petitioners from 1980 through 1987 suffer from the same First Amendment constitutional infirmities as the 1988 and 1989 assessments with respect to illegally taxing Petitioners to promote philosophies, ideologies, economic and commercial beliefs with which they do not agree.

55. Since Petitioners have been previously involved in an administrative petition, Petitioners contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted

From Marketing Orders" do not provide Petitioners with an adequate and timely relief with respect to assessments, because:

(a) There is no pool of money nor any source of funds available to reimburse Petitioners for assessments if found to be invalid;

(b) By the time the matter is heard by the Administrative Law Judge, decided by the Administrative Law Judge, and then decided by the Judicial Officer, more assessments are levied and collected from Petitioners, or threatened to be collected from Petitioners, and it has a chilling effect upon Petitioners with respect to Petitioners subsidizing promotional work and research work with which they do not subscribe.

56. The assessments collected from Petitioners for both advertising and expenses, for every harvest season from 1980 through the present 1989 (and subsequent) seasons, are being expended in a manner violative of the laws of the United States of America and in violation of the provisions of the AMA. 7 U.S.C. §610(b)(2)(ii) authorizes collection of expense assessments for "such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency." Said expense and/or advertising assessments are being expended without the approval of the Secretary, for unlawful, prohibited purposes, and in a manner violative of the provisions of the AMAA.

57. The Secretary has violated the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders", with respect to maturity regulations and size regulations. The Secretary has continuously determined that no interim relief is available with respect to any

administrative petition filed pursuant to Title 7, U.S.C. §608c(15)(A), and a substantial amount of Petitioners' fruit will have to be thrown out, not picked, or not marketed because of said maturity and size regulations, for which there is no fund or money in order to reimburse Petitioners in the event they later prevail in the administrative proceedings. Said rules are invalid because they do not afford any retrospective relief or any monetary damages as a result of being financially injured as a result of the invalid nectarine, plum or peach marketing order provisions with respect to maturity and size "regulations".

58. Petitioners also contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid because they do not afford any timely or effective relief and are in violation of the due process clause of the United States Constitution. Petitioners also contend that said maturity regulations and said size regulations have been established for volume control. The Secretary has failed to comply with the Agricultural Marketing Agreement Act by failing to apportion the surplus volume in an equitable and fair manner, and has discriminated against various varieties of nectarines, peaches and plums, several of which are handled by Petitioners, amounting to a denial of equal protection of the laws.

59. Counsel for U.S.D.A. in the prior 15(A) Petition (AMA Docket Nos. 916-1, 917-3) hearing argued that compensatory monetary damages are unavailable to Petitioners through the 15(A) administrative process. If this position were adopted by the Administrative Law Judge, then the entire administrative process would have no meaning whatsoever. Petitioners herein contend that as a result of the

unlawful promulgation of the illegal collection and expenditure of assessments and as a result of "well-matured" maturity and color chip standard, the smaller-size restrictions and the maturity-variance regulations, in their language and/or in their application, and/or in their obligations imposed in connection there with, that Petitioners have been monetarily damaged. Therefore, Petitioners herein contend that they are entitled to monetary damages, and that such damages may be awarded by the ALJ in the instant matter. However, if the government's position were to be adopted, Petitioners would then alternatively contend that damages must be awarded to them anyway for the untimely, ineffective and inadequate, but mandatory, exhaustion of a sham administrative process in violation of Petitioners' due process, equal protection, and other statutory rights.

60. Petitioners contend that, assuming *arguendo*, the Administrative Law Judge determines that Petitioners have been damaged through the unlawful and/or unconstitutional actions of either the Secretary of Agriculture and/or the nectarine, plum or peach committees, and if the ALF should ever further determine that there is no adequate monetary remedy available through the administrative process, then Petitioners maintain that they have both a common-law and a statutory right to a "set-off" of the levied advertising and expense assessments imposed through the marketing orders. Said above-mentioned statutory rights, include but are not limited to, the provisions of the "Debt Collection Act", 31 U.S.C. § 701, et seq. and implemented within the regulations of the U.S.D.A. at Title 7 of the Department's Code of Federal Regulations.

V

PETITION FILED IN GOOD FAITH AND NOT FOR
DELAY

61. This Petition is filed in good faith and not for the purposes of delay. Furthermore, Petitioners request an expedited hearing in this regard, and also seek interim relief.

PRAYER FOR RELIEF

62. For the reasons set forth above, Petitioners pray for the following specific relief:

A. For a ruling that §§917.460 (Plum Regulation No. 19), 917.459 (Peach Regulation No. 14) and 916.356 (Nectarine Regulation No. 14), and their respective tables showing the specific "maturity tests" or other "color standards", of the nectarine, plum and peach regulations issued in 1988, and the obligations imposed therewith, as written and/or as applied, are not in accordance with law;

B. For a ruling that the specific color standards and/or other maturity tests referenced above, as written and/or as applied are not in accordance with the law;

C. For a ruling that the various specific color standards and/or maturity tests as referenced above, as written and/or as applied, are a denial of equal protection of the laws;

D. For a ruling that the specific maturity tests and/or color standards referenced above, as written and/or as applied, result in a denial of due process of law since they amount to a taking without due process and without just compensation;

E. For a ruling that the maturity tests and/or "color standards", and the procedure in

determining said maturity tests and/or color standards, and the procedure to be utilized in requests for changes or variances to the maturity tests and the appeals, are a denial of due process of law since it constitutes an unlawful delegation of authority to Petitioners' competitors;

(F) For a ruling that the specific maturity tests and/or "color standards" referenced above, as written and/or as applied, are arbitrary, capricious and not based on substantial evidence;

(G) For a ruling that the specific maturity tests and/or "color standards" referenced above were enacted in violation of the Administrative Procedure Act and are null and void;

(H) For a ruling that the specific size regulations for nectarines and peaches, as issued as interim final rules by the Secretary in May, 1988, as written and/or as applied, were enacted in violation of the Administrative Procedure Act and are void, and/or are in actuality volume control and are contrary to the Agricultural Marketing Agreement Act;

(I) For a ruling that the specific maturity tests or specific color standards referenced above, as written and/or as applied are in effect volume control, and violative of the Agricultural Marketing Agreement Act;

(J) For a ruling that neither the Nectarine Administrative Committee, the Plum Commodity Committee, the Peach Committee, the Control Committee of the California Tree Fruit Agreement, the maturity subcommittees of any of the above-described committees nor the "appeals committee" are empowered, to set and determine, change, vary, deny changing, deny varying, or ruling on the appeal

from the denial of specific color standards, or other maturity tests;

(K) For a ruling that the assessments issued for the 1988 and 1989 harvest seasons are not in accordance with law, since they were not enacted in accordance with the Administrative Procedure Act;

(L) For a ruling that the assessments issued for 1988 and 1989 are not in accordance with law since they are violative of Petitioners' First Amendment constitutional rights;

(M) For a ruling that the assessments levied and collected from Petitioners from 1980 through 1986, and the assessments levied against Petitioners in 1987 through 1989 are not in accordance with law since the majority of the assessments are being used to pay for promotion, other forms of research, and other items reflecting the ideological, economic, philosophical, and commercial viewpoints of Petitioners' competitors, to which Petitioners do not subscribe and are violative of the First Amendment of the United States Constitution;

(N) For a ruling that the assessments levied and collected from Petitioners from 1980 through 1986, and the assessments levied against Petitioners for 1987 through 1989 and subsequent seasons are not in accordance with law as the majority of the assessments are used to pay for promotion, other forms of research, which violates the equal protection rights of Petitioners protected by the deprivation of liberty clause within the Fifth Amendment of the United States Constitution.

(O) For a ruling that the advertising and expense assessments collected from Petitioners from 1980 through 1986, and the advertising and expense

assessments levied against Petitioners in 1987 through 1989 and subsequent seasons, are being expended without the approval of the Secretary, pursuant to 7 U.S.C. § 610(b)(2)(ii), and in a manner violative of the laws of the United States of America and in violation of the provisions of the AMAA.

(P) For a ruling that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid because they do not afford any retrospective relief or any monetary damages for financial injuries as a result of an invalid Marketing Order or Marketing Agreement regulation;

(Q) For a ruling that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid because they do not afford any timely or effective relief and thus are a violation of the due process clause of the United States Constitution;

(R) For a ruling that the Secretary has failed to comply with the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" for refusing to grant any form of interim relief, despite the irreparable injury that would occur in the event interim relief is not granted, and thus the Secretary has failed to follow his own rules of procedure;

(S) For a ruling that Petitioners need not exhaust their administrative remedies pursuant to the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" and §608c(15)(A) of the Agricultural Marketing Agreement Act, since the Secretary has already determined that Petitioners' Petition would be futile to exhaust since he had already made up his

mind and that no violation stated herein will be found to have occurred, no remedy can be afforded, no retrospective relief can be granted, and no relief at all will be granted to the Petitioners;

(T) For a ruling that the entire testimony and evidence and record of the 7 U.S.C. §608c(15)(A) Petition hearing (AMA Docket Nos. 916-1 and 917-3) conducted in February and March of 1988, involving the identical parties to the instant 15(A) proceeding, is hereby incorporated by reference into this hearing. The Administrative Law Judge hereby incorporates by reference all testimony received, all exhibits admitted and any and all judicial/administrative notice taken at the hearing conducted in February and March of 1988. The incorporation by references of the aforementioned 15(A) Petition hearing substantially reduces the likelihood of a duplication of the issues presented in the previous 15(A) hearing, will not prejudice either party to the instant action and will benefit judicial economy.

(U) For a ruling that any government claim that Petitioners have an obligation to pay the levied assessments imposed by the Secretary of Agriculture shall be "*set-off*", (pursuant to common-law set-off rights and statutory set-off rights, including 31 U.S.C. §3701, et seq., and as otherwise allowed by law), *against* the monetary damages suffered by Petitioners as a result of the unconstitutional and unlawful enforcement of the marketing orders.

(V) For a ruling that, pursuant to the Equal Access to Justice Act, 5 U.S.C. §504 and/or Federal Rules of Civil Procedure §11, due to the special circumstances herein, Petitioners are entitled to be awarded reimbursement of all their fees

and expenses, including reasonable attorney's fees and expert witnesses fees.

(W) For any and all such other and further relief deemed necessary and just.

DATED: July 27, 1989.

THE LAW FIRM OF THOMAS E. CAMPAGNE
A Professional Corporation

By /s/ THOMAS E. CAMPAGNE
THOMAS E. CAMPAGNE

By /s/ CLIFFORD C. KEMPER
CLIFFORD C. KEMPER

Attorney for Petitioners
WILEMAN BROS. & ELLIOTT, INC.
and KASH, INC.

[Verification and certificate of service omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case No. CV-F-90-473-EDP

WILEMAN BROTHERS & ELLIOTT, INC.,
A CALIFORNIA CORPORATION AND
KASH, INC., A CALIFORNIA CORPORATION, PETITIONERS

v.

EDWARD MADIGAN, SECRETARY OF AGRICULTURE;
RESPONDENT

[Filed October 7, 1991]

FIRST AMENDED COMPLAINT

COMES NOW, Plaintiff Wileman Bros. & Elliott, Inc., a California corporation and Plaintiff Kash, Inc., a California corporation (hereinafter "Plaintiffs"), who jointly and severally for and on behalf of themselves, now complain and allege of the Defendant, Edward Madigan, Secretary of Agriculture of the United States (hereinafter "Secretary"), as follows:

JURISDICTION

1. This is Plaintiffs' First Amended Complaint for review of a final administrative action by the Secretary of Agriculture, pursuant to the Agricultural

Marketing Agreement Act of 1937, as amended, 7 U.S.C. §601 et seq. (hereinafter the "Act"). This Court has original jurisdiction to review administrative action by the Secretary of Agriculture pursuant to §608c(15) (B) of the Act which provides in pertinent part as follows:

"7 U.S.C. §608c(15) (B)—the District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty (20) days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the Court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with direction either (1) to make such ruling as the Court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires . . ."

2. Pursuant to the above provisions of 7 U.S.C. §608c(15) (B), this Court should undertake a *de novo* review of the administrative trial record, as to the facts presented therein as well as to the legal conclusions drawn therefrom.

3. This Court also has jurisdiction under 28 U.S.C. §1331 as this is a civil action involving federal questions arising under the Constitution, laws or treaties of the United States. This Court further has original jurisdiction under 28 U.S.C. §1361 since this First Amended Complaint is in the nature of a complaint in equity for mandamus to compel an officer or employee

of the United States or an agency thereof to perform a duty owed to Plaintiffs.

4. Additionally, this Court has original jurisdiction as this First Amended Complaint is in the nature of a request for a declaratory judgment in equity against the Secretary of Agriculture. An actual controversy exists requiring Plaintiffs to ask this Court to declare their rights and other legal relations pursuant to 28 U.S.C. §2201. Plaintiffs are asking that further necessary or proper relief based on a declaratory judgement or decree against the Secretary of Agriculture be granted in the Plaintiffs' favor after reasonable notice and hearing determining that Plaintiffs' rights have been violated pursuant to 28 U.S.C. §2202. The Secretary's administrative action in this matter is not "in accordance with the law" as required by the Act.

5. This Court also has original jurisdiction as this is a civil action for declaratory relief and judgment, and for preliminary and permanent injunctive relief arising under the First and Fifth Amendments of the United States Constitution; the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.; Title 5, U.S.C. §§701-706); Title 7, C.F.R. §§900.50, et seq.; The Nectarine Marketing Order, Title 7, C.F.R. §§916.1, et seq. and the Plum and Peach Marketing Orders, Title 7, C.F.R. §917.1, et seq. The jurisdiction of this Court is further predicated on Title 28, U.S.C. §§1337a, 1346(a) (2) and Title 7, U.S.C. §608a(6).

VENUE

6. Venue in this Court is founded upon the above-quoted provision of the Act, namely 7 U.S.C. §608c(15) (B). Both Plaintiffs are handlers who are inhabitants,

and have their principal place of business, within the United States District Court for the Eastern District of California. Venue is further founded in this Court upon 28 U.S.C. §§1391(b) and (e) as Plaintiffs' claims against Defendant arose within the Eastern District of California. Intra-District venue is appropriate at the Fresno division of the Eastern District Court, pursuant to Local Rule 120, because Plaintiffs' claims alleged herein arose within the counties of Fresno and Tulare.

PARTIES

7. Plaintiff Wileman Bros. & Elliott, Inc., is a corporation, incorporated in the State of California, on or about May 10, 1948, with its principal place of business located in the City of Cutler, County of Tulare, within the Eastern District of California. Plaintiff Wileman Bros. & Elliott, Inc., is a grower, packer, shipper and handler of plums and nectarines, all grown in the Eastern District of California.

8. Plaintiff Kash, Inc., is a corporation, incorporated in the State of California, on or about May 28, 1968, with its principal place of business located in the City of Parlier, County of Fresno, within the Eastern District of California. Plaintiff, Kash, Inc., is a grower, packer, shipper and handler of plums, nectarines and peaches, all grown in the Eastern District of California.

9. The Secretary of Agriculture, Edward Madigan, is sued in his official capacity as the Secretary of Agriculture, Washington, D.C., and in that capacity exercises authority over and is responsible for the Department Of Agriculture and all its subsidiary organizations and boards established pursuant to the Agricultural Marketing Agreement Act found at,

Title 7, U.S.C. §601, et seq. At all times mentioned herein, the Secretary of Agriculture, Edward Madigan, in his official capacity, was responsible for overseeing and regulating the various Nectarine, Plum and Peach Commodity Committees established pursuant to Title 7 C.F.R. §§916.1, et seq. and 917.1, et seq., and their employees and agents. Defendant maintains his principal place of business at Washington, D.C.

10. Plaintiffs, by and as a result of this instant First Amended Complaint, do *not* seek to modify or be found exempt from any laws of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. §601, et seq.). Nor do Plaintiffs seek to be exempt from or to modify any Marketing Order lawfully promulgated pursuant to the Agricultural Marketing Agreement Act of 1937. By this First Amended Complaint, Plaintiffs contend that the Secretary's claim that his purported regulations constitute the provisions of the Federal Marketing Orders with respect to the handling of nectarines, plums and peaches is without any legal authority. The Commodity Committees' purported regulations prescribed so-called "maturity standards" and "color standards" to be used in determining "well-matured" maturity requirements for various varieties of nectarines, plums and peaches, including those grown by and/or packed and shipped by Plaintiffs. The Nectarine, Plum and Peach Committees' purported "maturity standards" and "color standards" which the Secretary claims to be lawful, are far more stringent and restrictive than what Plaintiffs contend to be the true lawfully authorized regulations which are prescribed under the Nectarine, Plum and Peach Marketing Orders (Title 7, C.F.R. §§916.1, et seq. and 917.1, et seq.)

11. By this First Amended Complaint, Plaintiffs do not seek to modify or become exempt from any law. Rather, Plaintiffs seek a determination as to whether the Secretary's assertions are the law. Plaintiffs herein seek declaratory relief from this Court to the effect that Defendant's asserted "regulations" were *not* in fact lawful regulations.

12. The Secretary of Agriculture is responsible, pursuant to §608c of the Agricultural Marketing Agreement Act (7 U.S.C. §601, et seq.), for the issuance, amendment and administration of Marketing Orders regulating the handling of fresh nectarines, plums and peaches and the promulgation of rules and regulations to effectuate the terms and provisions of such Orders [§§608c(1)]. Pursuant to these provisions, the Secretary has issued the Nectarine Marketing Order at 916 (7 C.F.R. §§916.1-916.356) the Plum and Peach Marketing Order at 917 (7 C.F.R. §§917.1-917.60); and Secretary promulgated and/or failed to promulgate certain regulations thereunder which are herein challenged by Plaintiffs.

13. Within the Secretary's capacity, he appoints individuals engaged in the production and processing of nectarines, plums and peaches to serve on committees known as the Nectarine Administrative Committee, the Plum Commodity Committee and the Peach Commodity Committee, which committees are appointed by the Secretary in order to, inter alia, recommend to the Secretary rules and regulations governing the handling of nectarines, plums and peaches, to include Plaintiffs.

14. Edward Madigan, in his capacity as Secretary of Agriculture, exercises authority over and is responsible for the Department of Agriculture and all its subsidiary organizations and committees

established pursuant to the Agricultural Marketing Agreement Act. The Department of Agriculture has several branches, including the Agricultural Marketing Service which has been delegated the authority by the Secretary of Agriculture to monitor the various commodity committees, to recommend regulations and to regulate nectarine, plum and peach handlers.

15. The Secretary appoints the members of the administrative committees pursuant to his authority under the AMAA [7 U.S.C. §610(b)(1)]. The committees then employ the California Tree Fruit Agreement to handle the ministerial functions of the committees. The composition, duties, and powers of these committees are set forth in Marketing Orders 916 and 917, issued by the Secretary based on Marketing Agreements entered into with handlers. Under these orders, regulations governing the size and grade of fruit may be promulgated *by the Secretary* upon a finding that such regulations will tend to effectuate the policies of the Act.

16. Another subdivision or office of the Department of Agriculture is the position of Judicial Officer, which was established pursuant to the Schwellenbach Act of April 4, 1940 (Codified as 7 U.S.C. §§450c-450g), and Reorganization Plan No. 2 of 1953, (18 F.Reg. 3219 (1953), reprinted in 5 U.S.C. App. at p. 1068 (1982)). The Secretary of Agriculture's present Judicial Officer was appointed in January, 1971 (by the then Secretary of Agriculture), after having been involved with the Department's regulatory program since 1949. Upon information and belief Plaintiffs' allege that within the Department of the Judicial Officer and/or within the Department of Agriculture, Administrative Law Judges are appointed to serve in

the capacity of hearing officers with respect to administrative petitions filed by handlers of agricultural products, including those engaged in the handling of nectarines, plums and peaches. Administrative Law Judges entertain and issue rulings with respect to administrative petition proceedings brought by handlers pursuant to Title 7, U.S.C. §608c(15)(A), which decisions by the Administrative Law Judges are reviewed, upon request, by the Judicial Officer. The Department has formulated the Rules Of Practice Governing Administrative Petition Proceedings Brought Pursuant To Title 7, U.S.C. §608c(15) (A), contained in Title 7, C.F.R. §§900.50, et seq.

17. Plaintiffs directly compete in marketing their nectarines, plums and peaches with the Secretary's appointed members of the Nectarine Administrative Committee and the Plum and Peach Commodity Committees, who all market their nectarines, plums and peaches in California, as well as throughout the United States, and who oftentimes compete for Plaintiffs' buyers, brokers, and growers.

18. All of the acts, conduct and functions undertaken by the Secretary and/or his employees and agents were undertaken under color of federal law, ostensibly as agents and/or employees of the Secretary of Agriculture.

19. Beginning no later than 1979 and continuing through and including the 1991 harvest seasons, the Secretary of Agriculture has failed to oversee his subordinates and allowed the Agricultural Marketing Service and the Secretary's designated commodity committee members and their employees to unlawfully create "law." This has forced Plaintiffs to cull, throw out, and/or not pick good quality, healthful,

nutritious and otherwise marketable nectarines, plums and peaches, based upon regulations unlawfully implemented and enforced by the Nectarine Administrative Committee, the Plum and Peach Commodity Committees and their employees, the California Tree Fruit Agreement, without first providing Plaintiffs with a hearing, as guaranteed by the due process clause of the Fifth Amendment of the United States Constitution.

20. Prior to May of 1980, Nectarine Regulation No. 9, Plum Regulation No. 15 and Peach Regulation No. 14 required nectarines, plums and peaches to meet the requirements of U.S. No. 1 grade. Said regulations stated that when used herein [U.S. No. 1] shall have the same meaning as set forth in United States Standards for Grades of Nectarines, Plums and Peaches. U.S. No. 1 Standard means that point where the fruit has reached that stage in the maturity process that it will continue to ripen after being picked from the tree.

21. In 1980, proposed rules were issued by the Secretary for nectarines, plums and peaches which still required nectarines, plums and peaches to meet the requirement of U.S. No. 1 grade, however, the nectarine, plum and peach provisions went on to add (and it remained the same through 1987): "provided, that maturity shall be determined by the application of color standards by variety or such other tests as *determined to be proper by the Federal or Federal-State Inspection Service.*" The provisions continue to state that U.S. No. 1 means the same as defined in the United States Standards for Grades of Nectarines, Plums and Peaches.

22. The Nectarine Administrative Committee and the Plum and Peach Commodity Committees, desir-

ing a "higher" maturity standard, requested the Federal-State Inspection Service (SPI) [meaning, Shipping Point Inspection] to raise the maturity level. The committees were advised by SPI that they could not change the U.S. Standard because it applied to all states. The committees were further advised that if they desired a "higher" maturity level for the fruit, they should get the Marketing Order amended to require a "well-matured" standard.

23. The members of the Nectarine Administrative Committee and the Plum and Peach Commodity Committees, without authorization from the Secretary, and in direct violation of the Act, took it upon themselves to create a "higher" maturity level. Pursuant to the directions of the Nectarine Administrative Committee and the Plum and Peach Commodity Committees, the California Tree Fruit Agreement (CTFA) (as employees of the Committees) unlawfully issued new "regulations." in what was referred to as Nectarine Bulletin No. 1, the California Tree Fruit Agreement supplied to all growers and handlers of nectarines a bulletin which "sets forth everything you need to know about Nectarine Regulations for the 1980 marketing season. The bulletin states that all varieties of nectarines will be U.S. No. 1 with the following exception:

"Maturity—nectarines shall be 'well-matured' which means that they meet the color standard established for each variety. This maturity requirement is more advanced than the maturity requirement of the U.S. #1 grade."

24. Nectarine Bulletin No. 1 went on to indicate the authority for the new "maturity" standards, and on page 3 stated:

"Your attention is directed to the new and advanced maturity requirements set forth on page 1 of this bulletin. This new maturity regulation was adopted by the *Nectarine Administrative Committee*. The new maturity level is based on color levels that have been developed and established by the Inspection Service and an industry maturity sub-committee. The color standards will be applied on a varietal basis and the maturity sub-committee will be available to deal with any maturity problems that arise."

25. Immediately following the release of Nectarine Bulletin No. 1, the California Tree Fruit Agreement, on May 15, 1980, issued Plum Bulletin No. 1 which "sets forth everything you need to know about Plum Regulations for the 1980 marketing season." This bulletin stated:

"Maturity — plums shall be "well-matured"

which means that they meet the surface color, flesh color or 'spring' requirements applicable to each variety or they meet the ground color standard established on a varietal basis. This maturity requirement will be more advanced than the maturity requirement of the U.S. No. 1 grade."

26. Plum Bulletin No. 1, went on to explain the justification for this new maturity requirement, and stated on page 3:

"Your attention is directed to the new and advanced maturity requirement set forth on page 1 of this bulletin. The new maturity level involves ground color standards which have been developed and established by the Inspection Service and an industry maturity sub-committee. These new standards will be applied when plums fail to meet

surface color, flesh color or 'spring' requirements. 'Equivalent maturity' criteria will no longer be applied. A maturity sub-committee will be available to deal with unusual maturity problems. Set forth on addendum #2 are surface color, flesh and 'spring' requirements for most varieties. For maturity requirements for any variety not listed consult a supervising inspector. It is to be noted that maturity requirements must be met at *time of picking*." [The Peach Bulletin No. 1 read virtually identically].

27. These "well-matured" regulations were, through and including the 1987 harvest season, never adopted by the Secretary of Agriculture, nor did they ever go through the Administrative Procedure Act process, nor were they ever published in the Federal Register.

28. Subsequent to the committees' unlawful creation of 2 the "well-matured" standard, the Nectarine Administrative Committee and the Plum and Peach Commodity Committees established, without authority from the Secretary, "maturity sub-committees." The maturity sub-committees were comprised of members of their respective committees. The purpose of the "sub-committee" was to determine if a variance from a particular color standard should, or should not, be granted to a particular handler during each harvest season.

29. Commencing with the 1980 tree fruit season, CTFA (employees of the Nectarine Administrative Committee, the Plum and Peach Commodity Committees) would *recommend* to the committees particular color standards to be initially applied for each harvest season. The members of the Nectarine

Administrative Committee, the Plum and Peach Commodity Committees would make the final determination. The Federal-State Inspection Service did not, and was not allowed to, determine what the color standard would be for any particular variety. The committees, or their appointed sub-committees (made up of members of the committees), were the only persons allowed to establish, change, or authorize a variance from, the color standard. At no time did the committees or the CTFA personnel permit SPI to ignore a particular color standard or override a particular color standard when the inspectors felt that the fruit was otherwise "well-matured." Even when SPI and the CTFA employee believed that the fruit was "well-matured" if it did not meet the particular color standard for that variety, it could not be shipped unless the sub-committee voted to grant a variance or to change a particular color standard. If the particular committee or sub-committee refused to grant a variance, SPI would not allow the fruit to be shipped.

30. When the color chips, representing the Nectarine Administrative Committee and the Plum and Peach Commodity Committees' color standards for maturity, were first developed and used in 1980 as the "law," SPI felt that the designated—"color standards" for a particular variety represented a "well-matured" piece of fruit. However, of the 79 varieties of nectarines listed having color standards, 45 have since increased in maturity requirements, making it clear that the committees wanted even higher maturity than the "well-matured" standard that was implemented in 1980. Control of the "well-matured" maturity standard and the variance request procedure allowed the Nectarine Administrative Com-

mittee and the Plum and Peach Commodity Committee members to constrict supply during certain parts of the season, capturing for themselves the "marketing windows" in which tree fruit commanded premium prices, thus causing significant losses to Plaintiffs in wasted fruit and reduced revenues.

31. Beginning no later than 1980 and continuing through and including the 1987 harvest season, the members of the Nectarine Administrative Committee and the Plum and Peach Commodity Committees unlawfully imposed increasingly more stringent standards with respect to maturity and size of nectarines, plums and peaches. This has caused Plaintiffs to throw out, or not pick, an ever-increasing amount of nectarines, plums and peaches. For example, during the 1986 harvest season, Plaintiff Wileman Bros. and Elliott was forced to throw out, and was precluded from packing because of regulations unlawfully issued by the commodity committees under color of federal law, in excess of Four Hundred Thousand Dollars (\$400,000.00) worth of nectarines and plums, which would otherwise have been of good consumer quality, healthful, nutritious and which would have returned a good market price.

32. Further, as another example, during this same 1986 harvest season, Plaintiff Kash, Inc. was forced to throw out, and was precluded from packing (because of the regulations unlawfully issued by the commodity committees under color of federal law), in excess of Two Hundred Thousand Dollars (\$200,000.00) worth of nectarines, plums and peaches, which would otherwise have been of good consumer quality, healthful, nutritious and which would have returned a good market price.

33. Following the 1986 harvest season, Petitioner Wileman Bros. and Elliott, Inc., filed an Administrative Petition with the Department of Agriculture pursuant to Title 7, U.S.C. §608c(15) (A). Said Petition contested the validity of the maturity regulations for nectarines. Pursuant to the Rules Of Practice Governing Administrative Petition Proceedings, Plaintiff Wileman Bros. & Elliott, Inc. requested interim relief (Title 7, C.F.R. §900.70), claiming that Plaintiff Wileman Bros. & Elliott, Inc. would again lose a substantial amount of fruit, at considerable expense, if interim relief was not granted pending the outcome of the Administrative Petition proceeding. The Department opposed the Motion and the Secretary, through his Judicial Officer, subsequently denied the Motion claiming that administrative interim relief is never available, pursuant to the provisions of the Act. Plaintiff Wileman Bros. & Elliott, Inc. then filed a Motion For Expedited Hearing before the Secretary, prior to the 1987 harvest season, so that Plaintiff Wileman Bros. & Elliott, Inc. would not again have to throw out good quality nectarines because of the "well-matured" regulations unlawfully imposed by the commodity committees under color of federal law. The Secretary opposed the Motion and the Secretary, through his Judicial Officer, denied the Motion.

34. Subsequently, Plaintiff Kash, Inc. joined Plaintiff Wileman Bros. & Elliott, Inc. and sought declaratory and injunctive relief before the United States District Court for the Eastern District of California (CV-F-87-392 EDP) seeking to preclude the Nectarine Administrative Committee and the Plum Commodity Committee, through their employees, the California Tree Fruit Agreement, from imposing the

unlawful maturity regulations during the 1987 harvest season. The Secretary, defended by the U.S. Attorney's Office for the Eastern District of California, moved to dismiss the Complaint on the grounds that Plaintiffs were compelled to exhaust their administrative remedies before the Department of Agriculture. Plaintiffs argued that the District Court Judge should not dismiss their Complaint seeking declaratory and injunctive relief because the administrative process is not timely or effective and does not allow for monetary relief at the conclusion of the administrative process. Plaintiffs further argued that the administrative process does not provide any interim relief while the matter is being litigated, thus, Plaintiffs were being denied due process and therefore must not be required to "exhaust their administrative remedies." The U.S. District Court Judge dismissed Plaintiffs' Complaint on the basis that jurisdiction did not exist for the District Court to hear the matter and Plaintiffs were required to proceed through the administrative process. As a result, Plaintiffs were unable to secure relief; the District Court determined that it did not have jurisdiction, and the Secretary, through his Judicial Officer, ruled that interim relief is unavailable in the administrative arena.

35. Plaintiffs appealed the District Court Judge's dismissal to the Ninth Circuit Court of Appeals (*Wileman Bros. & Elliott, Inc., et al. v. Richard Lyng, Secretary of Agriculture, et al.*, (9th Cir. CA No. 87-2938). During oral argument before the Ninth Circuit Court of Appeals, the Justices asked whether, pursuant to 5 U.S.C. §706(l), the Court had the jurisdiction to compel the Secretary of Agriculture to promptly complete the U.S.C. §608c(15)(A) Petition

proceeding. Plaintiffs argued that the Court did have that authority, however, unless interim relief was ordered by the 9th Circuit to be provided either by the Agency or the Federal Courts, Plaintiffs would remain without a remedy for losses incurred during each harvest season by being forced to comply with unlawful regulations, since the Secretary, through his Judicial Officer, will never award monetary damages for losses sustained.

36. The Ninth Circuit in *Wileman Bros. and Elliott, Inc., et al. v. Clayton K. Yuetter, et al.* (9th Cir. 1990) 87-2938, reluctantly upheld the Decision of the U.S. District Court, and concluded their opinion:

"Forced as we are to affirm dismissal for failure to exhaust, and despite our efforts to induce settlement, we are appalled by the failure of the Secretary to deal expeditiously with the substantial grievances alleged in this Complaint. We have waited in vain since December 12, 1988 for news of a final appealable order by the Secretary. We wait no longer. We remand to the District Court for determination, under 5 U.S.C. §706(1), whether the Secretary's action has been 'unreasonably delayed,' in which case the District Court shall order the Secretary to expedite final disposition of the administrative proceeding in this case. In addition, the District Court may wish to order the Secretary to advise it promptly of the Secretary's expected final administrative decision date. Any further appeals shall be directed to the attention of this panel."

37. The denial by the U.S. District Court of the declaratory and injunctive relief requested by Plaintiffs, coupled with the Department of Agriculture's

refusal to provide either interim relief or an expedited hearing to Plaintiffs, forced Plaintiffs to throw out, during the 1987 harvest season, a substantial quantity of nectarines, plums and peaches which were otherwise of good consumer quality.

38. Thereafter, Plaintiff Kash, Inc. filed an Administrative Petition, pursuant to Title 7, U.S.C. 20 §608c(15) (A), contesting the unlawful implementation and enforcement of the maturity regulations for nectarines and plums, and contesting the assessments imposed upon Kash, Inc. Thereafter, Plaintiff Wileman Bros. & Elliott, Inc. filed an Amended Petition, pursuant to Title 7, U.S.C. § 608c(15) (A), contesting the unlawful implementation and enforcement of the maturity regulations for nectarines and plums, and contesting the assessments imposed upon them by the Secretary of Agriculture.

39. Plaintiffs then attempted to consolidate the two Petitions as the issues raised in each Petition were identical and in order to reduce the costs and attorney's fees involved. The Department of Agriculture opposed the Motion but later acquiesced to said consolidation. However, a hearing was not set until February, 1988.

40. Subsequent to the filing of the Administrative Petition, Plaintiffs brought an action in State Court under the Cartwright Act, alleging antitrust violations against members of the Nectarine Administrative Committee and the Plum Commodity Committee, as well as the field director of the California Tree Fruit Agreement, pursuant to California Business and Professions Code §16700, et seq. The named Defendants therein removed the action to Federal Court. The District Court for the Eastern District of California granted Defendants' Motion To Dismiss

the action on the basis of: (1) an antitrust exemption in the Act, (7 U.S.C. §608b); and (2) approval of Defendants' activities by the Secretary (CV-F-88-251 REC). Plaintiffs subsequently appealed the District Court Judge's dismissal of the Cartwright antitrust action to the 9th Circuit Court of Appeals (*Wileman Bros. & Elliott, Inc., et al. v. LeRoy Giannini, et al.*, (9th Cir. 1990) 909 P.2d 332. The Ninth Circuit Court of Appeals reversed the District Court ruling, stating that as a matter of law the Defendants were not immune for the actions alleged in the Complaint [See Exhibit "A" to First Amended Complaint, attached hereto].

41. Following the conclusion of the Administrative Petition hearing, conducted in February and March of 1982, and following full briefing on the merits, the trial Judge, Administrative Law Judge Dorothea A. Baker, granted Plaintiffs' Petitions (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3). In this regard, Judge Baker's Decision and Order held that the "maturity standards" and "color standards" imposed upon the industry by the Nectarine Administrative Committee and the Plum Commodity Committee (the "well-matured" standard), were not in accordance with law because those rulemaking actions were never promulgated pursuant to the requirements of the Administrative Procedure Act, Marketing Orders 916 and 917 and/or the Agricultural Marketing Agreement Act [See Exhibits "B" and "C" to Complaint filed herewith for a copy of Administrative Law Judge Baker's Preliminary Findings of Fact and Decision and Order, respectively].

42. Having suffered an adverse ruling before the trial Judge, counsel for the Secretary of Agriculture appealed Administrative Law Judge Baker's Decision

and Order to the Secretary himself. The Secretary of Agriculture designated Donald A. Campbell as the Secretary's designee to hear the appeal brought by the Secretary's counsel. Counsel for the Secretary filed the Secretary's appeal on June 30, 1989.

43. Subsequently, pursuant to Title 28, U.S.C. §§144 and 455, Plaintiffs filed a Motion To Recuse and/or Disqualify Judicial Officer Campbell from handling the Secretary's appeal of Judge Baker's Decision and Order. Plaintiffs alleged that Judicial Officer Campbell was biased, prejudiced and predisposed to rule in favor of his employer, the Secretary of Agriculture. This was based, in part, on the fact that the Judicial Officer *always* rules in favor of the Department. Further, Judicial Officer Campbell, unlawfully and without authority, refused to allow the Administrative Law Judge who heard a subsequent *Wileman Bros. & Elliott, Inc. and Kash, Inc.* Administrative Petition (AMA Docket Nos. F&V 916-3 and 917-4), to write the initial decision in that matter. Instead, Judicial Officer Campbell, unlawfully and unethically, removed the trial Judge, Administrative Law Judge Dorothea A. Baker, and replaced said Administrative Law Judge with himself prior to the issuance of the ALJ's recommended Decision. On April 6, 1990, Judicial Officer Campbell, himself ruling on Plaintiffs' Motion to Recuse, denied Plaintiffs' Motion.

44. The trial Judge, Dorothea A. Baker, in AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3, made a substantial number of findings of fact and conclusions of law based on the testimony received through the witnesses, the exhibits admitted into evidence and the applicable law. She specifically found:

- (a) The members of the Nectarine Administrative Committee and the Plum Commodity Committee are handlers who directly compete with Plaintiffs for buyers and brokers;
- (b) The members of the Nectarine Administrative Committee and the Plum Commodity Committee, themselves, unlawfully established the "well-matured" standard and set the "maturity standards" and "color standards" for nectarines and plums at a much more stringent level than authorized by law;
- (c) The promulgation of the "well-matured" standard, the setting of the "maturity standards" and the specific "color standards," by the members of the Nectarine Administrative Committee and the Plum Commodity Committee had the effect of preventing and restraining Plaintiffs from marketing various varieties of their nectarines and plums at times when Plaintiffs could have otherwise lawfully marketed said nectarines and plums at a much better return to Plaintiffs and their growers;
- (d) The members of the Nectarine Administrative Committee and the Plum Commodity Committee unlawfully promulgated the "well-matured" standard, established the "maturity standards" and the "color standards," at a level much more stringent than the law permitted so to increase Plaintiffs' cost of production and harvest and to limit the quantity of nectarines and plums harvested, packed and marketed by Plaintiffs in order to

- increase the marketing capacity and price paid for the committee members' own tree fruit;
- (e) The members of the Nectarine Administrative Committee and the Plum Commodity Committee, unlawfully formed their own maturity sub-committees for purposes of allowing variances from the "well-matured" standard in an attempt to legitimize their increasing and/or decreasing the "maturity standards" and "color standards" for various varieties of nectarines and plums so as to improve the committee members' own market position;
- (f) The members of the Nectarine Administrative Committee, the Nectarine Maturity Subcommittee, the Plum Commodity Committee, the Plum Maturity Subcommittee, as well as the California Tree Fruit Agreement agents and field director, have unlawfully engaged in favoritism with respect to dealing with handlers and growers to the detriment of Plaintiffs;
- (g) The promulgation of the "well-matured" standard and the enforcement of the "maturity standards" and "color standards" imposed on the tree fruit industry by the Nectarine Administrative Committee and the Plum Commodity Committee were *never* approved by the Secretary of Agriculture, never published in the Federal Register and failed to comply with the requirements of the administrative Procedure Act (Title 5, U.S.C. §551, et seq.);

- (h) The Federal-State Inspection Service (SPI) did not meaningfully determine the "color standards" nor "maturity standards," by variety, for either plums or nectarines;
- (i) Although the Federal-State Inspection Service (SPI) had input on occasion with respect to whether or not maturity standards and specific color standards should be increased or decreased, per variety, their recommendations and input were not final and binding, but, were mere recommendations which could be accepted or rejected by the Nectarine Administrative Committee, the Nectarine Maturity Sub-committee, the Plum Commodity Committee and the Plum Maturity Sub-committee;
- (j) The Nectarine Maturity Sub-committee and the Plum Maturity Sub-committee were unlawfully created by the members of the Nectarine Administrative Committee and the Plum Commodity Committee. The creation of the Sub-committees was never approved by the Secretary of Agriculture, never published in the Federal Register and failed to comply with the requirements of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.);
- (k) The procedure established to grant or deny a variance from the "maturity standard" and "color standard" enforced by the Nectarine Maturity Sub-committee and the Plum Maturity Sub-committee was never approved by the Secretary of Agriculture, never published in the Federal Register and failed

to comply with the requirements of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.);

- (l) When the Nectarine Administrative Committee, the Plum Commodity Committee or their respective Sub-committees changed the specific "maturity standard" and "color standard" from a lower color chip to a higher color chip, the ostensible law changed as well. The changes to the "maturity standard" and "color standard" were never approved by the Secretary of Agriculture, never published in the Federal Register and failed to comply with the requirements of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.);
- (m) The "well-matured" maturity standard and the "color standards" unlawfully promulgated and enforced by the members of the Nectarine Administrative Committee and the Plum Commodity Committee were artificial determinators which did not necessarily reflect whether the fruit was "well-matured" or not;
- (n) The "maturity standards" and "color standards" unlawfully forced on the tree fruit industry by the members of the Nectarine Administrative Committee and the Plum Commodity Committee are arbitrary and capricious and fail to adequately reflect the internal maturity of nectarines and plums;
- (o) The Secretary provided no definition of the terms "higher" maturity and "well-matured" maturity. There are degrees of differences

between a "higher" maturity test and a "well-matured" maturity test. There can be fruit which is well-matured and over-ripe which still does not meet the color chip test for "well-matured" maturity;

- (p) The specific "color standards" and maturity requirements for nectarines discriminates against nectarines which have less red color and favors nectarines, particularly the newer varieties, that are almost red. The later varieties reach and exceed the specific color standard used to designate "well-matured" fruit prior to the fruit ever actually becoming "well-matured;"
- (q) Plaintiffs ship a vast majority of their nectarines and plums out of the State of California, with the majority shipped to the mid-west and east coast. It is unrealistic to conclude that a nectarine or plum packed for overnight delivery and a nectarine or plum packed for delivery thousands of miles away will both arrive with the same shelf life. The same unlawful maturity requirements and "color standards" are applicable regardless of where the fruit may be sold. The timing in which nectarines and plums reach their ultimate market is a factor entering into the economic and monetary return. There is no uniformity between the various varieties of nectarines and plums as to the "shelf life" remaining after a particular variety reaches the "well-matured" maturity standard;

- (r) The Nectarine Administrative Committee, the Plum Commodity Committee and their respective maturity Sub-committees are able to use the "maturity standards" and "color standards" as a form of volume control, allowing the committee members to delay picking, packing and shipping of Plaintiffs' nectarines and plums for purpose other than insuring that good quality fruit reaches the market;
- (s) The members of Nectarine Administrative Committee and the Plum Commodity Committee have unlawfully delegated authority to the California Tree Fruit Agreement personnel. This authority has never been approved by the Secretary of Agriculture, never published in the Federal Register and failed to comply with the requirements of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.);
- (t) The California Tree Fruit Agreement field agents have been unlawfully granted authority by the Nectarine Administrative Committee and the Plum Commodity Committee to preclude handlers and growers' requests for specific "maturity standard" and "color standard" modifications, variances and/or changes. This authority has never been approved by the Secretary of Agriculture, never published in the Federal Register and failed to comply with the requirements of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.);

- (u) The failure of the Secretary of Agriculture to disapprove the rulemaking actions of the members of the Nectarine Administrative Committee and the Plum Commodity Committee does not imply that the Secretary approved the Committees' creation of "law." The creation of "law" must be approved by the Secretary of Agriculture subsequent to publication in the Federal Register and after allowing interested persons an opportunity to provide notice and comment, pursuant to the requirements of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.);
- (v) The administrative process, with respect to the Nectarine and Plum Marketing Orders, does not provide an effective, timely and adequate remedy. Plaintiffs have suffered substantial losses as a direct result of the Nectarine Administrative Committee and Plum Commodity Committee's "maturity regulations" and "color standards." Yet, there are no provisions in either the Nectarine Marketing Order, the Plum Marketing Order or the Agricultural Marketing Agreement Act which would recompense Plaintiffs for their monetary damages.
- (w) Plaintiffs have been denied due process of law because the Rules Of Practice Governing Procedures On Petitions To Modify Or To Be Exempted From Marketing Orders, coupled with the Secretary's summarily denying interim relief, do not afford Plaintiffs timely or effective relief;

- (x) Plaintiffs established through the course of the Administrative Petition proceeding that they have suffered financial injury from the invalid operation of Marketing Orders 916 and 917. The amount of recovery shall be determined in a subsequent hearing for that purpose. [See Exhibits "B" and "C" attached hereto].

45. On July 9, 1990, the Secretary of Agriculture, acting through his designee, Judicial Officer Campbell, issued a Decision and Order reversing Administrative Law Judge Baker's Findings Of Fact and Conclusions of Law and dismissed Plaintiffs' Petitions.

46. The Secretary's Decision and Order (filed herewith as Exhibit "D" to the First Amended Complaint) concluded that, despite Administrative Law Judge Baker's conclusions to the contrary, Plaintiffs could not challenge the "well-matured" maturity standards and "color standards;" the regulatory requirements necessary to be complied with, pursuant to the Administrative Procedure Act, were satisfied; the imposition of the "well-matured" maturity standards and "color standards" were not arbitrary, capricious nor were they applied discriminatorily; notwithstanding the admitted discriminatory treatment afforded Plaintiffs, the Secretary, by not disapproving the Commodity Committees' imposition of the "well-matured" maturity standards and "color standards," tacitly approved the Committees' rulemaking actions.

47. From the 1980 through and including the 1987 harvest seasons, the Secretary of Agriculture never published in the Federal Register, nor issued

pursuant to Marketing Orders 916 and 917, any regulations which affirmatively increased the maturity standard from U.S. No. 1 to the "well-matured" maturity standard.

48. The Ninth Circuit Court of Appeals in reversing the District Court Judge's dismissal of the Cartwright antitrust matter (*Wileman Bros. & Elliott, Inc., et al. v. LeRoy Giannini, et al., supra*), (Exhibit "A" as referred to in Paragraph 40, *supra*), analyzed the history of the unlawful creation and implementation of the "well-matured" maturity standard and its attendant "color standards." The Ninth Circuit's analysis is in conformity with the Decision and Order issued by the trial Judge, Administrative Law Judge Dorothea A. Baker (Exhibit "B"), and is diametrically opposed to the Secretary's findings as set forth by his designee, Judicial Officer Campbell, in his Final Decision and Order (Exhibit "D"). The Ninth Circuit specifically found that:

- (a) The language adopted in 1980 with respect to increasing the "maturity" standards was ambiguous. The language in the regulations did not support departing from the basic maturity standard (U.S. No. 1, 7 C.F.R. §52851.1530, 2851.3153);
- (b) From 1980 through and including the 1987 harvest seasons, the Secretary of Agriculture never published in the Federal Register, nor issued pursuant to Marketing Orders 916 and 917, any regulations which affirmatively increased the maturity standard from U.S. No. 1 to the "well-matured" maturity standard.
- (c) The members of the Nectarine Administrative Committee and the Plum Commodity

Committee were not authorized to promulgate and enforce "higher" maturity standards;

- (d) The Shipping Point Inspection Service was not authorized to establish and/or implement a "higher" maturity standard;
- (e) The regulations promulgated by the Secretary and published in the Federal Register in 1980 did not authorize the creation and/or implementation of a "higher" or "well-matured" maturity standard;
- (f) The promulgation of the "well-matured" maturity standard by the use of "color standards" was unlawfully instituted by the members of the Nectarine Administrative Committee and the Plum Commodity Committee and their employees, the California Tree Fruit Agreement personnel. The Secretary's failure to disapprove the Committee members' actions does not legitimize the "well-matured" maturity standard. Non-disapproval is equally consistent with lack of knowledge or neglect as it is with assent;
- (g) Plaintiffs are not required to exhaust their administrative remedies as the administrative remedies are clearly inadequate.

49. In the interim, following the Tentative Decision and Order issued by Administrative Law Judge Dorothea A. Baker in AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3, the Secretary of Agriculture on April 8, 1988 and April 18, 1988 published, for the first time in the Federal Register, regulations proposing to implement the "well-matured" maturity regula-

tions to be determined by the use of color-chips, size elimination regulations, and proposing to allow the Federal or Federal-State Inspection Service to grant variances from the color chip standards to reflect changes in crop or weather conditions which would make the color determination an inappropriate measure of "well-matured." These proposed regulations were intended to apply to nectarines, plums and peaches.

50. Following the issuance of the 1988 proposed maturity regulations, Plaintiffs, on June 6, 1988 filed their second Administrative Petition with the Department of Agriculture pursuant to Title 7, U.S.C. §608c(15) (A). Thereafter, on July 31 1989, Plaintiffs filed an Amended 7 U.S.C. §608c(15) (A) Petition with the Department of Agriculture contesting the validity of the 1988 proposed "well-matured" maturity regulations on nectarines, plums and peaches. Plaintiffs' Petition also contested: The maturity regulations on peaches for the 1980 through 1987 harvest seasons; the 1988 size elimination regulations issued as interim final rules by the Secretary of Agriculture in May, 1988; and, the assessments levied on Plaintiffs by the Secretary of Agriculture from 1980 through the present.

51. Pursuant to the Rules of Practice Governing Administrative Petition Proceedings, Plaintiffs, in conjunction with filing their second 7 U.S.C. §608c(15) (A) Petition, requested interim relief, pursuant to 7 C.F.R. §900.70, claiming that Plaintiffs would again lose a substantial amount of fruit and money if interim relief was not granted pending the outcome of the administrative petition proceeding. The Department of Agriculture opposed the motion and the Secretary, through his Judicial Officer,

denied the motion claiming that administrative interim relief is never available, within the provisions of the Act.

52. Following the conclusion of the second administrative petition hearing, conducted in October 1988, January and February 1989, and following full briefing on the merits, the trial judge, Administrative Law Judge Dorothea A. Baker based on the testimony received through the witnesses, the exhibits admitted into evidence and the applicable law, granted Plaintiffs' Petition (AMA Docket Nos. F&V 916-3 and 917-4). Therein, Administrative Law Judge Baker specifically found:

- (a) The rulemaking record for the 1988 and 1989 harvest seasons failed to set forth any substantial evidence to reasonably justify the color standards and/or "spring" tests assigned by variety for nectarines, plums and peaches;
- (b) The specific color standards and "spring" requirements assigned to each variety of nectarine, plum and peach, although published in the Federal Register, were not established on any substantial basis and purpose statement by the Secretary of Agriculture;
- (c) The color chips and "spring" tests used to define "well-matured" nectarines, plums and peaches, are arbitrary and capricious in that they bear no rational relationship whatsoever to the internal maturity of the fruit;
- (d) The techniques used in determining the well-matured requirements for nectarines, plums and peaches, through the use of specific color chips and specific "spring" tests, are artifi-

- cial determinators which may not reflect whether the fruit is "well-matured" or not;
- (e) Nectarines, plums and peaches meeting the so-called "well-matured" color chips and/or "spring" standards may in fact be internally immature; and on the other hand, nectarines, plums and peaches failing said color chips and/or "spring" tests may bear the internal meat which is in fact "well-matured;"
 - (f) The procedure established to grant or deny a variance from the maturity standards, and the review process established by the Secretary of Agriculture, fail to provide any meaningful review and fails to provide any neutral impartial review mechanism by which an assigned color chip or "spring" test standard may be appropriately modified;
 - (g) The "well-matured" maturity standards constitute illegal volume control rather than quality control;
 - (h) The internal maturity of nectarines, plums and peaches can be determined accurately and objectively by different types of tests other than through the application of color chips and/or "spring" tests. Accordingly, said color chip application is arbitrary and capricious. The surface color of nectarines, plums and peaches, and the "spring" of plums, does not objectively nor rationally determine whether or not those varieties are of good consumer quality and good marketable quality;
 - (i) The color chips and "spring" tests were implemented and imposed prior to the conducting of any meaningful scientific studies whatsoever. What few studies were con-

- ducted demonstrate that the color chips and "spring" tests imposed by the Secretary are capricious and arbitrary in that they do not bear any rational relationship whatsoever to the internal maturity of nectarines, plums and peaches;
- (j) The color chips being employed for the 1989 harvest season were not even in existence and are different from the color chips which were in existence, and not part of the rule-making record, at the time the Secretary promulgated the color chip assignments for the 1988 and 1989 harvest seasons. Said differences are substantial, effectuating economic loss to Petitioners. There is no rational relationship between the two different sets of color chips presently being employed by the industry;
 - (k) The use of color chips to define "well-matured," without consideration of more objective maturity testing devices, is applied discriminatorily for the purpose of discriminating against nectarines, plums and peaches which have less red color. Said color standards favor nectarines, plums and peaches, particularly the newer varieties, that are almost red, because the latter varieties reach and exceed the specific color standards prior to ever becoming truly "well-matured;"
 - (l) The rule-making record is devoid of any substantial evidence adequately defining the definition of "well-matured;"
 - (m) Whether or not fruit is "well-matured" does not affect its taste. Nectarines, plums and peaches which are "well-matured," may have

less taste and less consumer appeal than fruit which is not "well-matured" but merely U.S. No. 1. The rule-making record with respect to the "well-matured" standard is devoid of any meaningful evidence whatsoever regarding taste tests;

- (n) Nectarines, plums and peaches, although grown in the majority of the states of the United States, are only subject to the "well-matured" maturity standards when grown in the state of California;
- (o) The elimination of smaller-sized nectarines and peaches is arbitrary and capricious and results in volume control. Further, the rule-making record fails to contain any credible substantial evidence to support the Secretary's finding that smaller-sized fruit is rejected by the consumer as lacking quality, taste or nutritional value;
- (p) The enforcement of color chips and "spring" tests as constituting the definition of "well-matured" fruit, as well as the size elimination of nectarines and peaches, are arbitrary and capricious actions and constitute an illegal taking without just compensation for Petitioners' fruit and denies Petitioners equal protection among handlers of the same varieties in other states;
- (q) Although statutorily, the Nectarine, Plum and Peach Committees operate pursuant to appointment and delegation from the Secretary of Agriculture and with his approval, as a practical matter, there seems to be no active supervision or meaningful oversight by the United States Department of Agriculture

over said Committees' decisions with respect to size elimination, maturity standards, color chips, "spring" tests and assessment fund expenditures;

- (r) From the 1980 harvest season, through and including the present, Petitioners have been subjected to California Tree Fruit Agreement assessments. Said assessments are unlawful and have been imposed upon Petitioners in a manner not in accordance with law. For the reasons set forth within the Wileman-I Decision, CTFA is an unlawful organization, with respect to the marketing orders, which does not have the right to assess nor collect any assessments whatsoever. Nor does CTFA have the authority to require SPI inspections;
- (s) The CTFA "generic" advertising program, and other programs associated therewith, lack constitutional adherence. CTFA and the Nectarine, Plum and Peach Committees, for which CTFA purports to collect said assessments, owe Petitioners substantially more in monetary damages for the aforementioned unlawful takings of their fruit, than the assessment monies at issue herein. But the amount of any recovery in this proceeding depends upon evidence to be adduced at a future hearing for that purpose in the event Petitioners prevail throughout this proceeding;
- (t) The Secretary's position with respect to CTFA has been inconsistent. In this proceeding the Secretary contends that CTFA is a lawful entity. However, in Federal District

Court Case No. CV-F-87-392-EDP, Respondent contended that, among other things, the California Tree Fruit Agreement is not a legal entity, which the Honorable District Court Judge Edward Dean Price found after his review of U.S. Attorney Carl Blackstone's Declaration in this regard filed July 21, 1987;

- (u) The forced imposition of "generic" advertising assessments is violative of Petitioners' constitutional rights protected by the First Amendment. The Constitution of the United States and the Amendments thereto protect the rights of free association and the right to speak freely and the right to refrain from speaking at all.
- (v) The evidence is uncontradicted herein, that these Petitioners, as well as others, have been under a compulsion to be forced to participate administratively and financially in the promotion of a cause and a message with which they disagree on ideological, moral, economic and commercial bases. This is incompatible with the principals protected by the First Amendment. The regulations as set out in 7 C.F.R. §916.45 and 917.39 are a violation of Wileman/Kash's First Amendment rights regarding freedom of speech and association to the extent that such regulations force participation in a "generic" advertising program.
- (w) The evidence herein fails to establish any legitimate governmental interest for taxing handlers a per carton fee to support a "generic" advertising program with the goals

of increasing consumer consumption of nectarines, plums and peaches. The government has no legitimate interest in advocating consumers' purchase of nectarines, plums and peaches grown in California as opposed to consumers' purchases of nectarines, plums and peaches grown in any other state, or as opposed to the consumption of any other food products whatsoever;

- (x) Petitioners and other tree fruit handlers are unfairly burdened because the forced "generic" advertising assessments are forced payments, and are a taking only from them and not from all others who participate in and profit from the tree fruit industry;
- (y) Only California nectarine, plum and peach handlers are subject to any federal mandatory assessments for "generic" advertising. Other states' handlers of nectarines, plums and peaches are not subjected to such assessments, nor are any retailers, wholesalers, brokers, jobbers or any other people involved in the economic chain dealing with nectarines, plums and peaches assessed any "generic" advertising tax whatsoever;
- (z) Petitioners, as a condition of their being handlers of California Tree Fruit, are forced to expend their money, not to foster the legitimate purposes of the Agriculture Marketing Agreement Act, nor to improve their own business position, but rather to finance an advertising program which is contrary to their personal, professional, ideologic, philosophic and commercial beliefs;

- (aa) Petitioners derive no benefit from the forced "generic" advertising programs. In fact, Petitioners are damaged by the forced "generic" advertising assessments (or tax) in that the funds taken from them would otherwise have been used to promote their own label over the label of their competitors in California and competitors in other states;
- (bb) The forced generic advertising assessments imposed on Petitioners violates their constitutional right of freedom of speech and association, both as individuals and in the commercial setting in that CTFA's "generic" advertising programs compel Petitioners to provide financial support for the advancement of economic, ideological and/or commercial beliefs and programs to which Petitioners disagree;
- (cc) The forced taking of money from Petitioners for "generic" advertising programs to which they ideologically, philosophically, economically and commercially find unacceptable violates the protections afforded Petitioners by the First and Fifth Amendments;
- (dd) The Agricultural Marketing Agreement Act, the Marketing Orders and various United States Department of Agriculture guidelines strictly regulate how assessment monies mandatorily collected from handlers may be spent by commodity committees and further strictly regulate the subjects upon which such expenditures may be made. In an admitted effort to avoid such proscriptions, CTFA has siphoned off assessment monies and illegally transferred them to a purported

California non-profit corporation known as the Tree Fruit Reserve.

The Tree Fruit Reserve, acting with an identical board that controls CTFA, then has expended and continues to expend those funds in manners and upon projects which the Secretary of Agriculture's guidelines strictly prohibit assessment monies from being expended upon.

... The Tree Fruit Reserve was established and admittedly continues to operate, in a manner to avoid proscriptions, limitations and restrictions placed upon the Secretary of Agriculture, the commodity committees and their agents, by the Agricultural Marketing Agreement Act.

The purpose of the Tree Fruit Reserve is to engage in acts which are illegal for the Secretary of Agriculture to engage in. The collection and expenditure of assets are subject to the jurisdiction, revision and approval of the Secretary of Agriculture. The Tree Fruit Reserve has been, and is being, used to divert assessment monies, resulting in higher handler assessments than would otherwise be required to achieve the legal and legitimate objectives of the Agricultural Marketing Agreement Act and the Order.

Profits generated by the Tree Fruit Reserve from handler assessment monies are used to promote special interests of the various commodity committeemen. The appointment of members to committees of the various commodities by the Secretary of Agriculture is a high calling. It is one of

trust and responsibility, and the duties and responsibilities of committee members and committee chairmen may not be viewed lightly, because the Secretary of Agriculture has entrusted to such persons the lofty position they occupy and he expects their authority to be exercised in a manner reflective of the Secretary's own responsibilities and judgement.

This was not done here, because it was illegal for the members of the Nectarine, Plum and Peach Committees to spend handler assessment monies through the Tree Fruit Reserve for activities which transcend questionable to the illegal. Such "schemes" and "shams," acting under the color of law, should not be tolerated to avoid the Secretary's regulations and Congress' intent in establishing the Agricultural Marketing Agreement Act, nor should uncertainty as to the capacity in which a person acts at any given time become a guessing game. The Chairmen of the respective Nectarine, Plum and Peach Committees and the Chairman of the Control Committee are automatically on the Board of Directors of the Tree Fruit Reserve and are one and the same.

There is an intertwinement between said CTFA and the Tree Fruit Reserve. There is a commonality, a sameness, attached to their meetings, their minutes, as well as their use of the same accounting firm. Discussions relating to the application of the regulations and Order provisions and the operation of each entity are being mutually

discussed within the framework of these common organizations.

When a Chairman of one of the Nectarine, Plum and Peach Committees speaks, how is one to know if he is speaking, and if his actions are reflective of the high position which he holds, by virtue of the Secretary of Agriculture's appointment to the same, or must one wonder whether or not this Committee Chairman's advice and guidance or actions are reflective of being a member of and/or a director of the Tree Fruit Reserve, which later organization can and does engage in activities which admittedly are illegal to the Commodity Committees.

This duality of purpose provides fertile ground for such persons to engage in tactics to restrain their competitors and at the same time, increase production and marketing of their own produce or that of their friends. Little thought has been given to "conflict of interest" and under the present system, any question arising concerning same would be referred to Washington.

The Commodity Committee members including their respective Chairmen, may not directly or by subterfuge in a dual capacity, violate the laws and then claim exemption from such liability. Some growers and handlers, particularly the smaller ones, may not be represented at all or, if represented, very poorly, and their property rights would not be protected when the committee members should, on behalf of the Secretary's trusted position as a committee member, subject to

the Secretary's supervision, delegation and approval, then don the hat of a member of the Board of Directors of the Tree Fruit Reserve, which, in the latter capacity, said member's interests may be, and often are, contrary to the interests of others in the same business;

- (ee) The commodity committee members had no official duty to be part of and/or to condone a little known, if at all, alleged private non-profit corporation, the operations and actions of which were regarded as none of the United States Department of Agriculture's business and which sought to be separated from the Department of Agriculture by achieving a cosmetic facade to create the illusion of separateness. Under such circumstances, the committee members do not have the Secretary's approval because the Secretary cannot and will not approve of illegal acts. Hiding from view within the confines of the Tree Fruit Reserve does not alter the responsibilities and duties of the Secretary of Agriculture, nor his committee members and chairmen, whom he appoints;
- (ff) CTFA acting through its alter-ego, Tree Fruit Reserve, has unlawfully spent assessments on lobbying;
- (gg) CTFA, acting through its alter-ego, Tree Fruit Reserve, has unlawfully spent assessments on retaining attorneys to represent private individuals in direct conflict with the interests of Petitioners;
- (hh) The Secretary of Agriculture's annual imposition of "generic" advertising and expense

assessments from 1980 to the present are rulemaking actions which did not comply with the notice and comment requirements of the Administrative Procedure Act;

- (ii) The Secretary has never provided a "substantial basis and purpose statement" justifying the assessment rates imposed on handlers of nectarines, plums and peaches for the harvest seasons 1980 through the present;
- (jj) The Secretary has consistently failed to comply with the notice and comment provisions of the Administrative Procedure Act in regard to the imposition of expense and advertising assessments for the years 1980 through 1987. Additionally, the imposition of assessments for the 1988 and subsequent harvest seasons were in violation of the notice and comment requirements of the Administrative Procedure Act;
- (kk) The imposition of the "well-maturity" standard for the 1988 and subsequent harvest seasons was in violation of the notice and comment requirements of the Administrative Procedure Act;
- (ll) The Secretary's imposition of size elimination regulations with respect to nectarines and peaches, was in violation of the notice and comment requirements of the Administrative Procedure Act;
- (mm) From 1980 through the present, the Secretary of Agriculture has retroactively applied and retroactively adopted advertising and expense assessments.
- (nn) The commodity committees, CTFA and their alter-ego Tree Fruit Reserve, have intention-

ally failed to comply with the "Sunshine" Act and the Federal Advisory

- (oo) With respect to Nectarine, Plum and Peach Marketing Orders, the administrative process does not provide an effective, timely and adequate remedy. The record fails to reveal the source from which monetary relief would be forthcoming to Petitioners in the event Petitioners were to prevail and be entitled to the same.

Therefore, Judicial Notice and Official Notice is taken of the fact that by Order dated July 6, 1989, in Case No. CV-F-88-568-EDP, the Honorable Federal District Court Judge Edward Dean Price established an attorney/client trust account into which Petitioners herein have placed, and are continuing to place, their contested advertising and expense assessments. I concur and agree with such trust fund establishment and its maintenance by Judge Price, in that such trust fund creates a pool of money which may be awarded to Petitioners in the event they ultimately prevail in this proceeding;

- (pp) Petitioners have suffered economic damages and losses as a direct result of unlawful activities of the Respondent, CTFA, the Commodity Committees and Tree Fruit Reserve;
- (qq) Petitioners are entitled to an award of damages as well as an award of legal fee reimbursement as a result of the denial of their due process rights which Petitioners have sustained as a result of the illegality of the actions taken with respect to Marketing Orders 916 and 10 917. The extent to which

Petitioners may recover in this regard is a matter over which the Judicial Officer apparently has jurisdiction.

Therefore, for all the foregoing reasons and for such further and additional reasons set forth in the final decision, it is found that the Peach, Plum and Nectarine Marketing Orders are not in accordance with law as applied to these Petitioners and that as a result of said illegal enforcement of those Marketing Orders, the Petitioners have been severely damaged.

Therefore, Petitioners are entitled to damages for injuries which they have sustained as a direct result of such illegal activities and Petitioners are entitled to full legal fee reimbursement when they have complied with the procedures set forth in the Equal Access To Justice Act as well as the pertinent provisions of the Administrative Procedure Act. The amount of said damages and legal fee reimbursement is to be determined at a subsequent hearing established for that purpose [See Exhibit "E" to First Amended Complaint, filed herewith].

53. Having again suffered an adverse ruling before the trial judge, counsel for the Secretary of Agriculture appealed Administrative Law Judge Baker's second Decision and Order (AMA Docket Nos. F&V 916-3 and 917-4) to the Secretary. Again, the Secretary of Agriculture designated Donald A. Campbell as the Secretary's designee to hear the appeal brought by the Secretary's counsel. Counsel for the Secretary filed the Secretary's appeal on July 31, 1991.

54. Thereafter, as set forth in Paragraph 43, *supra*, the Judicial Officer at the request of USDA, consolidated both matters (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3 and AMA Docket Nos. F&V 916-3 and 917-4), removed Administrative Law Judge Baker from her duties in writing the Decision regarding Plaintiffs' second Administrative Petition. Concerned that the Judicial Officer's action in removing Administrative Law Judge Baker was a denial of due process, counsel for the Secretary of Agriculture later moved to reinstate Administrative Law Judge Baker as the individual assigned to write the initial Decision. The Judicial Officer granted the Secretary's motion.

55. On or about May 24, 1991, the Trial Judge, Dorothea A. Baker, issued her 369 page Decision and Order, which included the Findings of Fact and Conclusions of Law set forth in paragraph 52, *supra* [See Exhibit "F" to First Amended Complaint filed herewith for a copy of Administrative Law Judge Baker's Decision and Order].

56. As a result of the Ninth Circuit's position in *Wileman Bros. and Elliott, Inc., et al. v. Yuetter, et al.*, *supra*, and the subsequent Order issued by the Honorable Oliver 12 W. Wanger in connection with expediting the instant First Amended Complaint, the Judicial Officer issued his Final Decision and Order on an "expedited" basis, on September 30, 1991. The Secretary's Final Decision and Order reversed Administrative Law Judge Baker's Findings of Fact and Conclusions of Law and dismissed Plaintiffs Petition.

57. The Secretary's Final Decision and Order (filed herewith as Exhibit "G" to the First Amended Complaint) found that, despite Administrative Law Judge Baker's conclusions to the contrary, Plaintiffs

were not entitled- to an award of monetary damages; Plaintiffs were foreclosed from raising a substantial number of issues based on the Judicial Officer's Decision and Order regarding Plaintiffs' first Administrative Petition (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3) contending *res judicata* applied as to those issues; the promotional and advertising programs present no impingement on Plaintiff's First Amendment rights and are thus constitutional; the advertising and promotional programs do not violate 2 Plaintiffs' Fifth Amendment rights and are, thus, constitutional; Congress has not unlawfully delegated its taxing power to the Secretary of Agriculture; no violations of the Sunshine Act, the Brown Act or the Federal Advisory Committee Act exist; the relationship between the Tree Fruit Reserve and the Marketing Order Programs is in accordance with law; the regulatory requirements necessary to be complied with, pursuant to the Administrative Procedure Act, were satisfied; the imposition of the "well-matured" maturity standards and "color standards" were not arbitrary, capricious nor have they been applied discriminatorily; the 1988 size elimination regulations were not arbitrary and capricious and were promulgated in accordance with the APA.

FIRST CAUSE OF ACTION

58. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 57 of this First Amended Complaint.

59. The Secretary's Final Decisions and Orders, issued through his Judicial Officer, Donald A.

Campbell, overturning the Decisions and Orders issued by the trial Judge, Administrative Law Judge Dorothea A. Baker, in AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3 and/or AMA Docket Nos. F&V 916-3 and 917-4, are unsupported by substantial evidence, contrary to the weight of the credible evidence introduced at the hearing, factually unsupported, arbitrary and capricious and contrary to law. Further, the Secretary's Decisions and Orders, as Issued by his Judicial Officer, are inconsistent with the ruling of the 9th Circuit Court of Appeals issued in *Wileman Bros. & Elliott, Inc., et al. v. LeRoy Giannini, et al., supra*.

SECOND CAUSE OF ACTION

60. Plaintiffs' repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 59 of this First Amended Complaint.

61. The course and conduct and the activities of the members of the Nectarine, Plum and Peach Commodity Committees and their agents and employees who unlawfully regulate and inspect said nectarines, plums and peaches on behalf of the Nectarine, Plum and Peach Committees, under color of federal law, have injured Plaintiffs in that they have deprived and continue to deprive Plaintiffs of their constitutional rights to due process of law guaranteed under the Fifth Amendment of the Constitution as the conduct of the Secretary and his agents and employees, including the Federal-State Inspection Service, the members of the Nectarine, Plum and Peach Committees and their agents and employees amounts to a

taking of said nectarines, plums and peaches without due process of law.

62. Plaintiffs have been injured in an amount equal to the fair market value of the fruit unlawfully taken and/or destroyed as a result of being forced to comply with the "well-matured" maturity standards unlawfully established and enforced by the Nectarine, Plum and Peach Committees; an amount in excess of \$5,000,000.00.

THIRD CAUSE OF ACTION

63. Plaintiffs repeat and reallege, and Incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 62 of this First Amended Complaint.

64. The conduct of the Secretary and his agents and employees, including but not limited to the Agricultural Marketing Service personnel, the members of the Nectarine, Plum and Peach Committees, the California Tree Fruit Agreement personnel, the Federal-State Inspectors, whose conduct is undertaken under color of federal law, is violative of the Administrative Procedure Act, Title 5, U.S.C. §551, et seq. The Administrative Procedure Act was not followed with respect to the issuance and enforcement of CTFA "regulations." The Secretary and his agents and employees have unlawfully applied the CTFA "regulations" to Plaintiffs as though said "regulations" have the force and effect of federal law even though the Administrative Procedure Act had not been complied with in establishing said "regulations."

65. Plaintiffs have sustained substantial damages as a result of the unlawful implementation of the

"well-matured" maturity regulations and the unlawful implementation and enforcement of the "color standards" applied to the picking, packing and shipping of Plaintiffs' nectarines, plums and peaches.

66. Plaintiffs have been injured in an amount equal to the fair market value of the fruit unlawfully taken and/or destroyed as a result of being forced to comply with the "well-matured" maturity standard unlawfully established and enforced by the Nectarine, Plum and Peach Committees; an amount in excess of \$5,000,000.00.

FOURTH CAUSE OF ACTION

67. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 66 of this First Amended Complaint.

68. Assessments are levied each harvest season by the California Tree Fruit Agreement pursuant to Marketing Order regulations, 7 C.F.R. §§916.1, et seq. and 917.1, et seq., to cover the expenses which may be incurred during each fiscal year by the Nectarine, Plum and Peach Committees (7 C.F.R. §§916.41 and 917.37). Said assessments would also include the cost of marketing research and development (advertising) as approved by the Secretary (7 C.F.R. §§ 916.45 and 917.39).

69. The assessments levied and collected by the Nectarine, Plum and Peach Commodity Committees, and their employees, the California Tree Fruit Agreement, under color of federal law, constitute an unlawful taking of said assessment monies without due process of law and are a denial of equal protection, in violation of the Fifth Amendment of the United

States Constitution, in that said assessments are used to pay the expenses and operating costs of the Nectarine, Plum and Peach Commodity Committees, as well as the salaries and operating costs of the California Tree Fruit Agreement personnel and the Federal-State Inspection Service personnel who enforce said unlawful regulations.

70. Plaintiffs have been injured in the amount of the assessments paid to the Nectarine, Plum and Peach Commodity Committees, as collected by the California Tree Fruit Agreement, from 1980 through and including the present; an amount in excess of \$1,000,000.00 [Plaintiffs' 1987 through 1991 assessments are currently held in a trust account pursuant to Federal District Court Order (CV-F-88-568 EDP)].

FIFTH CAUSE OF ACTION

71. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 70 of this First Amended Complaint.

72. Each harvest season, from 1980 through and including the 1987 harvest season, the Secretary failed to issue proposed rules, providing notice and comment, regarding the advertising and expense assessments ordered to be paid to the Nectarine, Plum and Peach Commodity Committees. Instead, the Secretary, toward the end of each harvest season, would issue a final rule "rubber-stamping" the advertising and expense assessments requested by the respective Committees. Each year, the harvest season would be essentially over (i.e., all Plaintiffs' nectarines, plums and peaches would have been

picked, packed and shipped) prior to the Secretary issuing, without opportunity for notice and comment, his budget for that particular harvest season. The employees of the California Tree Fruit Agreement would then bill Plaintiffs for their pro rata share of the expenses incurred by the Nectarine, Plum and Peach Commodity Committees, and their employees, the CTFA personnel, to include advertising expenses, after the conclusion of that harvest season.

73. For each harvest season at issue herein, 1980 through and including the present, the fiscal year means the twelve (12) month period beginning on March 1, of one year and ending on the last day of February of the following year (7 C.F.R. §§916.7 and 917.9). The handling of nectarines, plums and peaches begins every year during the month of May. The final rules establishing expense and advertising assessments rates for each harvest season at issue herein were generally issued in the middle of August each season. With the exception that in 1985 the final rule setting forth the assessment rate was July 12; in 1986, the final rule was issued on October 17; in 1988 the final rule was issued July 19; and, in 1990, the final rule was issued on July 20. Neither the AMAA nor Marketing Orders 916 and 917 contain any express provision for retroactive rulemaking. Under the Administrative Procedure Act 23 (Title 5, U.S.C. §551, et seq.), notice of the Secretary's actions occurs at the time of publication in the Federal Register. Plaintiffs were unlawfully required to pay, retroactively, expense and advertising assessments levied and collected by the California Tree Fruit Agreement for nectarines, plums and peaches picked, packed and shipped prior to the promulgation and issuance of the Secretary's assessment regulations.

74. Plaintiffs have been injured in the amount of the assessments paid to the Nectarine, Plum and Peach Commodity Committees, as collected by the California Tree Fruit Agreement, from 1980 through and including the present; an amount in excess of \$1,000,000.00 [Plaintiffs' 1987 through 1991 assessments are currently held in a trust account pursuant to Federal District Court Order (CV-F-88-568 EDP)].

SIXTH CAUSE OF ACTION

75. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 74 of this First Amended Complaint.

76. With respect to the imposition of expense and advertising assessments, for the harvest seasons 1980 through and including the present, the Secretary failed to engage in reasoned decisionmaking, failed to set forth a substantial basis and purpose statement and failed to provide for notice and comment with respect to: (i) whether or not to institute a "generic" advertising program; (ii) the relative costs and benefits of instituting a "generic" advertising program; (iii) in what manner to advertise ("generic" or brand name specific); (iv) whether credits should be allowed, for mandatory "generic" advertising assessments, to growers and handlers for their direct expenditures for their own specific brand name advertising; (v) what format should be adopted for the advertising of various tree fruit commodities; (vi) what monetary limits should be placed on the Nectarine, Plum and Peach Commodity Committees as to the cost of a "generic" advertising program—all

in violation of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.).

77. Plaintiffs have been injured in the amount of the assessments paid to the Nectarine, Plum and Peach Commodity Committees, as collected by the California Tree Fruit Agreement, from 1980 through and including the present; an amount in excess of \$1,000,000.00 [Plaintiffs' 1987 through 1991 assessments are currently held in a trust account pursuant to Federal District Court Order (CV-F-88-568 EDP)].

SEVENTH CAUSE OF ACTION

78. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 77 of this First Amended Complaint.

79. Each harvest season, from 1980 through and including the present, the Secretary has been granted unfettered discretion to set the assessment rates at any level he deems "reasonable." Neither the relevant provisions of the AMAA nor the regulations established by the Secretary pursuant to the Marketing Orders, contain guidelines or restrictions limiting the Secretary's power in establishing and enforcing assessment rates. Without guidelines or restrictions being imposed on the Secretary with respect to Congress' delegation 28 of legislative authority to the Secretary of Agriculture, such 1 delegation is unlawful and any assessments established by the Secretary are likewise unlawful.

80. Plaintiffs have been injured in the amount of the assessments paid to the Nectarine, Plum and Peach Commodity Committees, as collected by the California Tree Fruit Agreement, from 1980 through

and including the present; an amount in excess of \$1,000,000.00 [Plaintiffs' 1987 through 1991 assessments are currently held in a trust account pursuant to Federal District Court Order (CV-F-88-568 EDP)]

EIGHTH CAUSE OF ACTION

83. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 82 of this First Amended Complaint.

84. Assessments are levied each harvest season by the California Tree Fruit Agreement, pursuant to Marketing Order Regulations, 7 C.F.R. §§916.1, et seq. and 917.1, et seq., to pay for promotion, advertising, research and other items reflecting the ideological, economic, philosophical and commercial viewpoints of Plaintiffs' competitors to which Plaintiffs do not subscribe. Plaintiffs are forced to associate with, and speak to, views which are repugnant to Plaintiffs' ideological, philosophical, economic and commercial viewpoints, all in violation of Plaintiffs constitutional rights protected by the First Amendment of the United States Constitution.

85. Plaintiffs have been injured in the amount of the assessments paid to the Nectarine, Peach and Plum Committees, as collected by the California Tree Fruit Agreement, from 1980 through and including the present; an amount in excess of \$1,000,000.00 [Plaintiffs' 1987 through 1991 assessments are currently held in a trust account pursuant to Federal District Court order (CV-F-88-568 EDP)].

NINTH CAUSE OF ACTION

86. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth

herein verbatim, each and every allegation contained in Paragraphs 1 through 85 of this First Amended Complaint.

87. The conduct of the Nectarine, Plum and Peach Committee members, the agents of the Secretary of Agriculture, and the California Tree Fruit Agreement personnel, in establishing and maintaining a "private non-profit corporation, known as the Tree Fruit Reserve to be used to circumvent the proscriptions and restrictions placed on these individuals in their capacities as agents of the Secretary of Agriculture is violative of both federal and state antitrust laws. In their capacities as members of, directors of and/or agents of The Tree Fruit Reserve Corporation, the above-referenced individuals have manipulated Marketing Orders 916 and 917 for their own benefit, in violation of the Agricultural Marketing Agreement Act.

88. Assessments levied and collected from Plaintiffs and others within the tree fruit industry have been diverted to the Tree Fruit Reserve Corporation to be used for purposes not otherwise authorized by the Marketing Orders and/or the Agricultural Marketing Agreement Act.

89. Plaintiffs have been injured in an amount equal to the fair market value of the fruit unlawfully taken and/or destroyed, and the assessments stolen, as a result of the actions and regulations imposed on Plaintiffs by those associated with the Tree Fruit Reserve Corporation; an amount in excess of 5,000,000.00.

PRAYER

WHEREFORE, Plaintiffs respectfully request this Court to review de novo the Secretary's Final

Decision and Order as issued by his designee, Judicial Officer Campbell, pursuant to 15 U.S.C. §608c(15) (B) and 5 U.S.C. §706. Petitioners respectfully request this Court:

(a) To issue an Order that the Secretary's Final 18 Decisions And Orders of July 9, 1990 and September 30, 1991 are not in accordance with law in that they are:

- (1) Unsupported by substantial evidence;
- (2) Arbitrary and capricious;
- (3) Contrary to the weight of the credible evidence introduced at the hearing; and,
- (4) Factually unsupported.

(b) To issue a declaration that:

(1) Those purported Nectarine and Plum Marketing

Order regulations, from 1980 through and including the present, establishing and enforcing the "well-matured" maturity standard and the "color standard" are illegal and of no force and effect;

(2) The assessments levied against Plaintiffs, from 1980 through and including the present are unlawful;

(3) The California Tree Fruit Agreement and its employees are a non-entity with no delegated authority to impose and/or enforce Marketing Order regulations, nor, to assess, levy or collect assessments from Plaintiffs;

(4) With respect to the Nectarine, Plum and Peach Marketing Orders, the administrative process does not provide an effective, timely or adequate remedy. Unless and until the Secretary establishes procedures to provide both pre-taking and post-taking monetary relief, any litigation initiated by and on behalf of these Plaintiffs with respect to the Nectarine and Plum Marketing Orders shall not necessitate their "exhausting their administrative remedies" as said remedies do not exist.

(c) To award Plaintiffs damages in an amount equal to the fair market value of all fruit unlawfully taken and/or destroyed as a result of being forced to comply with the above-mentioned invalidly and unlawfully imposed Nectarine, Plum and Peach Marketing Order regulations. Said damages, exceeding \$5,000,000.00, to be proven at a subsequent hearing conducted for that purpose;

(d) To award Plaintiffs reimbursement of their assessments in an amount equal to all assessments levied and collected against Plaintiffs from 1980 through and including the present; said assessments exceeding \$1,000,000.00, to be proven at a hearing conducted for that purpose. Plaintiffs' assessment reimbursement to be paid through the reserve funds maintained by the Nectarine, Plum and Peach Commodity Committees through the collection of assessments by the Nectarine, Plum and Peach Commodity Committees in future harvest-seasons and through the reserve funds maintained by the Tree Fruit Reserve Corporation.

(e) To remove and recuse the Department of Agriculture's Judicial Officer, Donald A. Campbell,

from any further involvement or review of the instant matter and/or any other Administrative Petitions brought by Plaintiffs, to include AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3 and AMA Docket Nos. F&V 916-3 and 917-4;

(f) To remand these proceedings to the Secretary of Agriculture with instructions to grant the relief sought by Plaintiffs in their Petitions and/or Ordered by this Court;

(g) To award Plaintiffs their attorney's fees and costs incurred herein, pursuant to the Equal Access To Justice Act (28 U.S.C. §2412, et seq. and 5 U.S.C. §504); and,

(h) To award Plaintiffs such other and further relief to which Plaintiffs may be entitled.

DATED: October 7, 1991

THE LAW FIRM OF THOMAS E. CAMPAGNE
A Professional Corporation

By /s/ THOMAS E. CAMPAGNE
THOMAS E. CAMPAGNE

By /s/ CLIFFORD C. KEMPER
CLIFFORD C. KEMPER
Attorneys for Plaintiffs

[verification and proof of service omitted in printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-F-87-392 OWW

WILEMAN BROS. & ELLIOTT, INC., A CALIFORNIA
CORPORATION; FRANK T. ELLIOTT, JR. D/B/A ELLIOTT
FARMS, A SOLE PROPRIETORSHIP, AND KASH, INC., A
CALIFORNIA CORPORATION, PLAINTIFFS

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE;
RICHARD LYNG, FORMER SECRETARY OF
AGRICULTURE; THE UNITED STATES DEPARTMENT OF
AGRICULTURE; THE CONTROL COMMITTEE OF THE
CALIFORNIA TREE FRUIT AGREEMENT; THE NECTARINE
ADMINISTRATION COMMITTEE, DEFENDANTS

No. CV-F-88-568 OWW

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILEMAN BROS. AND ELLIOTT, INC., A CALIFORNIA
CORPORATION; AND, KASH, INC., A CALIFORNIA
CORPORATION, DEFENDANTS

No. CV-F-90-088 OWW

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILEMAN BROS. AND ELLIOTT, INC., A CALIFORNIA
CORPORATION; AND, KASH, INC., A CALIFORNIA
CORPORATION, DEFENDANTS

No. CV-F-90-473 OWW

WILEMAN BROS. & ELLIOTT, INC., A CALIFORNIA
CORPORATION; FRANK T. ELLIOTT, JR. D/B/A ELLIOTT
FARMS, A SOLE PROPRIETORSHIP, AND KASH, INC., A
CALIFORNIA CORPORATION, PLAINTIFFS

v.

CLAYTON YUETTER, SECRETARY OF
AGRICULTURE, DEFENDANT

No. CV-F-91-318 OWW

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILEMAN BROS. & ELLIOTT, INC., DEFENDANT

No. CV-F-91-319 OWW

UNITED STATES OF AMERICA, PLAINTIFF

v.

KASH, INC., DEFENDANT

[Filed: Aug. 2, 1991]

**ORDER CONSOLIDATING ACTIONS AND
ESTABLISHING SCHEDULE FOR HEARING
OF CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Upon stipulation of the parties made in open court August 1, 1991, to serve efficiency and to enable the expedition of these related cases and in the interests

of justice because the issues of fact and law applicable to each of these cases relate to common questions of interpretation, application, validity, and enforcement of certain agricultural marketing orders, specifically, 7 C.F.R. §916.356;

IT IS HEREBY ORDERED that these actions are consolidated for all purposes.

FURTHER ORDERED that pursuant to the Order of this Court Compelling Agency Action in pending administrative appeals that are the subject of Cases Nos. 87-392 and 90-473, and based on representations from the Assistant United States Attorney that final administrative action can be completed by October 2, 1991, the following schedule shall govern further proceedings in these two consolidated cases:

Plaintiffs in said cases, Wileman Bros. & Elliott, Inc., and Kash, Inc., shall file their amended complaint under 7 U.S.C. §608(c)(15)(B) on or before October 7, 1991, and shall serve defendants by express mail or courier to effect service by 5:00 p.m. on October 8, 1991. All material allegations of the amended complaint shall be deemed denied by the Defendants without the necessity of further pleading.

The parties shall have through and including November 8, 1991, to simultaneously file cross-motions for summary judgment and motions for such other relief, if any, as are deemed appropriate. Such motions shall be served by personal delivery the day filed.

Opposition to motions shall be simultaneously filed on or before November 29, 1991. Such opposition shall be served by personal delivery the day filed.

Simultaneous cross-replies shall be filed by December 10, 1991. Such cross-replies shall be served by personal delivery the day filed.

FURTHER ORDERED that any motions so filed in consolidated Cases No. 87-392 and 90-473 shall be heard January 17, 1992, at the hour of 9:00 a.m. in Department 2 of this Court.

FURTHER ORDERED that the parties' attorneys are directed to meet and confer respecting agreement to a form of order to be directed to the appropriate representative of the Secretary of Agriculture to enable preparation and filing of the administrative record with this Court by October 7, 1991. Such order accompanied by a stipulation-of-counsel agreeing to the form of the order shall be lodged with the court by August 15, 1991.

DATED: August 2, 1991.

/s/ OLIVER W. WANG
OLIVER W. WANG
United States District
Judge

wileman.pl

1980-1981 CALIFORNIA STONE FRUIT BUDGETS

Peach Commodity Committee
Plum Commodity Committee
Nectarine Administrative Committee

I hand you herewith the following documents:

1. Proposed Allocation of Joint Expenses Among Programs for 1980-1981 Compared With Prior Year.
2. Stone Fruit Budgets with attachments -
Peach Commodity Committee -
Plum Commodity Committee
Nectarine Administrative Committee
3. Eight Research Proposals.
4. Two Ripening Bowl Financial Reports, one applicable to the fiscal period which ended February 29, 1980, and one recapping sales and expenses during the past five years.

Here are some comments:

JOINT EXPENSES

We have again used current records of key computer counts, mailings and time records in allocating some of the joint expenses. These are of lesser reliability since the public relations programs for all four fresh commodities have been brought in-house since those considerable activities are not well measured by these records. Some adjustments have been made in the

percentage allocations based upon staff estimates. In any event, the total budgeted sum for all joint expenses is \$529,725, up from \$505,972 a year ago. The categories reflect both increases and decreases. Important changes are explained below:

Salaries, Executive: The actual increase in this category involves not only salary increases but also an additional employee, the former Director of Consumer Services who will be terminating in July or August. Salaries paid to the Assistant Manager, the Promotional Director and the new Director of Consumer Affairs, even after adjustments, are below those for people with similar responsibilities in other programs.

Salaries, Clerical: All those in this category have received cost of living and some merit increases as well. Three have been raised substantially because of outstanding service and the addition of responsibility which has come from greatly increased budgets. Last year the total budgeted sum for the five programs managed here was \$6,234,867; this year it will approach \$7,000,000.

Equipment, Supplies, Insurance & Utilities: In fiscal 1979-1980, \$80,667 was spent in this category. This sum included the purchase of a System/32 IBM computer and three IBM Mag Card II typewriters. This equipment was purchased at approxi-

mately 25% of original cost and the elimination of rental payments is reflected in the reduced sum budgeted here.

Sacramento Rent: Rent being charged to plums, peaches and nectarines is being reduced from \$6,000 each to \$3,750. The total for this category is now \$17,250, down from \$24,000.

BUDGETS

Research

The attached statements outline eight of the nine research proposals sponsored by the stone fruit committees. These proposals have received more than their share of attention from the stone fruit chairman who have met four times to review them. They have also been reviewed and approved by the Stone Fruit Subcommittee on Promotion and Research. The Plum Estimation project by Phillips is in the second year of a two-year contract. No formal proposal is included since the endeavor is a simple operation in which Phillips estimates the total crop and seven of the most important varieties.

Research costs of the projects are allocated in accordance with the attention given to each fruit. It will be noted that peaches will stand only 20% of the Insect Quarantine and Decay Control project. Less work will be done on peaches because the prospect of exporting them to Japan is considerably less than that for nectarines and plums, fruits not grown in quantity there.

Inspection costs are estimated by the Service and continue to advance with salary increases.

Ripening bowl: The first of these statements is for the last fiscal period and shows a gain of \$118,729.71 after giving effect to the value of the inventory on March 1. Of this, \$100,000 was distributed in equal parts to each of the four sponsoring fresh fruits. The second statement recapping bowl sales for five years is a truer picture as it shows the losses incurred in prior years. The expenses shown on both statements are out-of-pocket expenses and do not set forth any of the considerable administrative and clerical costs associated with the bowl's development and distribution.

Market development

Expenditures for market development proposed for 1980-1981 are attached to each budget. Total budgets for direct promotional activities may be summarized as follows:

(Pears are included although that commodity has not yet adopted a budget.)

TOTAL BUDGETS

Peaches	635,000
Plums	1,001,500
Nectarines	1,064,500
Pears	<u>325,000</u> (tentative)
	\$ 3,026,000

Costs of Components

TV and Radio

Peaches	400,000
Plums	700,000
Nectarines	750,000
Pears	<u>150,000</u> (inc. \$20,000 grant to stone Fruits)
	\$ 2,000,000

Magazine Tie-ins

Peaches	56,000
Plums	74,000
Nectarines	74,000
Pears	<u>21,000</u>
	\$ 225,000

Field Staff

Peaches	47,000	(peaches regionally promoted)
Plums	63,000	
Nectarines	75,000	(nectarines advertise longer than plums)
Pears	<u>52,500</u>	(CA share)
	\$ 237,500	

Consumer Publicity and other Educational Activities, all in-house

Peaches	37,500
Plums	40,000
Nectarines	40,000
Pears	<u>30,000</u>
	\$ 147,500

P-O-S Materials for 1980

Peaches	15,500
Plums	24,000
Nectarines	24,000
Pears	<u>13,500</u> (CA share)
	\$ 77,000

Foodservice Activities (promotions in August with ARA, Canteen, SAGA, Greyhound, Sheraton)

Peaches	10,000
Plums	15,000
Nectarines	15,000
Pears	<u>10,000</u>
	\$ 50,000

Remaining budget items include retail contests, advance expenses for 1981 as for P-O-S materials, other media activities such as talent, production, trade advertising and special activities.

/s/ GALEN GELLER

GALEN GELLER, Manager
California Tree Fruit Agreement
701 Fulton Avenue
Sacramento, CA 95825

May 20, 1980

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
WASHINGTON, D.C. 20250

Date: AUG 8 1980

To : Director, Fruit and Vegetable Division

From : Fruit Branch

Subject : M.O. 916 (California Nectarines) and
M.O. 917 (California Pears, Plums, and
Peaches) - Approval of Market Development
and Research (1980-81 Season)

We recommend that you sign this document which approves the market development and research for California nectarines, pears, plums, and peaches for the 1980-81 fiscal period. The committees met in May and June and recommended these expenditures. The following shows proposed expenditures for Market Development and Research by the individual committees.

COMMITTEES	MARKET *		TOTAL
	DEVELOPMENT	RESEARCH	
Nectarine			
Administrative	\$ 1,114,500	\$ 35,744	\$ 1,150,244
Pear			
Commodity	430,000	—	430,000
Plum			
Commodity	1,051,500	25,463	1,076,963
Peach			
Commodity	<u>685,000</u>	<u>18,743</u>	<u>703,743</u>
Total	<u>\$ 3,281,000</u>	<u>\$ 79,950</u>	<u>\$ 3,360,950</u>

* Includes \$ 50,000 for Fruit Ripening Bowls for each program.

Market Development

The projected market development activities for 1980-81 are similar in scope to those of last season. The increased proposed expenditures reflect for the most part higher costs of doing business and expanded promotional efforts. The following table shows a comparison of estimated expenditures for each of the programs.

COMMODITY	ESTIMATED (1980)	ACTUAL (1979)*	DIFFERENCE
Nectarines	\$ 1,114,500	\$ 950,432	\$ 164,068
Pears	430,000	324,201	105,799
Plums	1,051,500	900,638	150,862
Peaches	<u>685,000</u>	<u>587,760</u>	<u>97,240</u>
Total	<u>\$ 3,281,000</u>	<u>\$ 2,763,031</u>	<u>\$ 517,969</u>

* Includes fruit ripening bowl

Marketing development activities will continue the joint California Summer Fruit promotional approach developed over the past eight years. The two major objectives are to (1) make consumers aware of the fruits' availability, characteristics, and uses, and (2) encourage in-store promotional activity. This is accomplished through field representatives contacting wholesale and retail trade in major U.S. and Canadian cities, emphasis on food page publicity under educational activities, expanded advertising program, development of point of sale material, and promotional research into effectiveness of TV, radio, and magazine advertising. Magazine tie-ins will be utilized to a greater extent this year. This includes a tie-in with Kraft Salad Days, Karo Syrup, and others. The ads will appear in numerous magazines with a circulation approaching 25 million. Each committee will also support an expanded promotional effort in the food-service area. A consultant has been retained to aid in the development of this area. By far the largest single expenditure is for TV and radio time. These

"spots" will be scheduled to coincide with peak fruit movement in a particular market area. The projected 1980 expenditures by market development category for each of the four fruits are as follows:

MARKET DEVELOPMENT	NECTARINES	PEARS	PLUMS	PEACHES	TOTAL
Field Staff Activities	\$ 75,000	\$ 52,500	\$ 63,000	\$ 47,000	\$ 237,500
Retail Contests	15,000	7,500	15,000	9,000	46,500
Early Season Contest	—	20,000	—	—	20,000
Late Season Activities	—	15,000	—	—	15,000
Consumer Publicity	30,000	20,000	30,000	27,500	107,500
Other Education Activities	10,000	10,000	10,000	10,000	40,000
Point-Of-Sale Materials	50,500	28,500	50,500	34,000	163,500
Promotional Research	10,000	—	10,000	10,000	30,000
Foodservice Activities	15,000	10,000	15,000	10,000	50,000
Magazine Tie-ins	74,000	21,000	74,000	56,000	225,000
Television, Radio Time	750,000	165,000	700,000	400,000	2,015,000
Other Media Activities	27,500	23,000	26,500	24,000	101,000
Special Activities	7,500	7,500	7,500	7,500	30,000
Total	\$ 1,064,500	\$ 380,000	\$1,001,500	\$ 635,000	\$ 3,081,000
Ripening Bowl	50,000	50,000	50,000	50,000	200,000
Total	\$ 1,114,500	\$ 430,000	\$ 1,051,500	\$ 685,000	\$ 3,281,000

The consumer education and publicity activities for plums and peaches, formerly conducted by Steedman, Cooper, and Busse, were taken inhouse for this fiscal period. These programs were taken inhouse for the nectarine and fresh pear programs last season. There will be no television spots specifically for pears; but as they will be shown on television commercials made

for plums, peaches and nectarines, the pear committee will reimburse the respective committees.

Research

The projected research proposals for the 1980-81 include nine proposals, as compared with five last fiscal period. The following table shows a comparison of estimated expenditures for 1980 versus actual expenditures for 1979 for research for each program.

COMMODITY	ESTIMATED (1980)	ACTUAL (1979)	DIFFERENCE
Nectarines	\$ 35,744	\$ 16,449	\$ 19,295
Plums	25,463	18,929	6,534
Peaches	<u>18,743</u>	<u>16,448</u>	<u>2,295</u>
Total	<u>\$ 79,950</u>	<u>\$ 51,826</u>	<u>\$ 28,124</u>

The nine proposals include four ongoing (Insect Quarantine and Decay Control, Control of Decay, Pest Management, and the Plum Estimating Project) plus five new projects. The following shows the proposed allocation of expenditures for research projects to the individual commodities.

RESEARCH PROJECT NECTARINES PLUMS PEACHES TOTAL

Insect Quarantine and				
Decay Control	\$ 12,000	\$ 12,000	\$ 6,000	\$ 30,000
Pre- and Postharvest				
Decay Control	4,560	2,280	4,560	11,400
Pest Management	1,517	1,517	1,516	4,550
Peach Limb Sunburn	—	—	1,000	1,000
Maturity vs Quality	5,000	5,000	5,000	15,000
Nectarine Pox (Beutel)	4,300	—	—	4,300
Nectarine Pox				
(Sommer)	7,700	—	—	7,700
Rootstocks and Density	667	666	667	2,000
Plum Estimating				
Project	—	4,000	—	4,000
Total	<u>\$ 35,744</u>	<u>\$ 25,463</u>	<u>\$ 18,743</u>	<u>\$ 79,950</u>

Detailed material concerning market development and research projects is attached.

Recommended: AUG 8 1980 Approved: AUG 11 1980

/s/ <u>signature illegible</u>	/s/ <u>CHARLES R. BRADER</u>
Chief, Fruit Branch	CHARLES R. BRADER
Fruit and Vegetable	Director
Division	Fruit and Vegetable
Agricultural Marketing	Agricultural Marketing
Service	

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
Fruit and Vegetable Division
PO Box 255507
Sacramento, CA 95825

Date: December 15, 1980

To : Malvin E. McGaha, Chief, Fruit Branch
Fruit and Vegetable Division, AMS, USDA

From : W. B. Blackburn, Field Representative
Sacramento Marketing Field Office

Subject : CTFA Budget Changes

On December 5, 1980, the minutes of the fall Nectarine Administrative Committee meeting were transmitted to you along with our comments and today, under separate cover, the Peach Commodity Committee minutes are being transmitted to you. In both memoranda we noted that the approved budgets had been exceeded. One of the major deviations from the original budget estimate was the cost of inspection. The cost per package clearly exceeded the preseason estimate given by the Inspection Agency and the budget was inflated accordingly. The other major factor in budget overrun was occasioned by

additional costs in market development. Specifically, the item "Other Media Activities" includes such items as trade promotion and television and radio production costs, including talent costs. These items are difficult to estimate, according to Charlie Sanderson, and tend to vary substantially from anticipated expenditures.

The table below sets forth the items that need to be acted on by the Department in amending the Nectarine and Peach budgets. We recommend that appropriate action be taken in accordance with the Committee actions.

	<u>Nectarines</u>	<u>Peaches</u>
<u>Market Development</u>		
Budgeted	\$1,064,500	\$ 635,000
Estimated		
Expense	1,074,500	640,000
Recommended	1,075,000	642,000
 Total Budget		
Budgeted	1,824,434	1,370,348
Estimated		
Expense	1,867,964	1,436,739
Recommended	1,870,000	1,440,000

Attached to both the Peach and Nectarine minutes is a table entitled "1980-81 Estimated Expenses, Income and Carryover—All Programs" This table shows that the Pear Committee anticipates expenses of \$529,170 against an approved budget of \$501,170. In discussing the Pear budget with Manager Geller he advises that they anticipate a \$30,000 payment from

the Pear Bureau, which will reduce expenses accordingly. At this time he says there is a 50-50 chance that the Pear budget will not be exceeded. There will be no Committee recommendation to change the Pear budget. The Plum Committee expenses were within the budgeted amount.

/s/ signature illegible

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
WASHINGTON, D.C. 20250

Date: 1-5-81

To : Director, Fruit and Vegetable Division

From : Fruit Branch

Subject : M.O. 916 (California Nectarines) and
M.O. 917 (California Pears, Plums, and
Peaches) - Approval of an Increase in
Expenditures for Market Development
for 1980-81

We recommend that you sign this document which approves an increase in market development expenditures of \$10,500 for California nectarines, and \$7,000 for California peaches for the 1980-81 fiscal year. The Nectarine Administrative Committee and the Peach Commodity Committee met in November 1980, and unanimously recommended increases in their individual market development projects as outlined in the table below. These committees report that greater than anticipated expenses were incurred for the merchandising kit, trade promotion and television and radio production costs. These expense items are included in other media activities under the market development project.

<u>Committee</u>	<u>Amount Approved</u>	<u>Increase</u>	<u>Total</u>
Nectarine			
Administrative	\$1,114,500	\$10,500	\$1,125,000
Peach Commodity	\$ 685,000	\$ 7,00	\$ 692,000

Recommended:

Approved: JAN 05 1981

/s/ signature illegible/s/ signature illegible

Chief, Fruit Branch
Fruit and Vegetable Division
Agricultural Marketing
Service

Deputy Director
Fruit and Vegetable Division
Agricultural Marketing
Service

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
WASHINGTON, D.C. 20250

Date:

To : Director, Fruit and Vegetable Division

From : Fruit Branch

Subject : M.O. 917 - Approval of an Increase in
Market Development for 1980-81 for
California Pears - Impact and Recom-
mendation

We recommend that you sign this document which approves an increase in market development expenditures of \$29,000 for California pears for the 1980-81 fiscal year which ended February 28, 1981. This increase would bring the total spending authorization for 1980-81 to \$459,000. The Pear Commodity Committee in a mail ballot unanimously recommended this increase. The committee reported that shared expenses with the Northwest Fresh Pear Marketing Committee were more than originally estimated. Also, ripening bowl expenses exceeded the estimate and this was not known until February. This action would not involve an increase in the rate of assessment as assessment income received during the period is sufficient to cover this increase.

Recommended: JUN 22 1981 Approved: JUN 26 1981

/s/ WILLIAM J. DOYLE
Acting Chief, Fruit Branch
Fruit and Vegetable Division
Agricultural Marketing
Service

/s/ signature illegible
Director
Fruit and Vegetable Division
Agricultural Marketing
Division

FORM AMS-400 (2-79)

Federal Register
Vol. 45, No. 157
Tuesday, August 12, 1980
[p. 53,450]

Agricultural Marketing Service

7 CFR Parts 916 and 917

**Nectarines and Fresh Pears, Plums, and Peaches
Grown in California; Expenses and Rates of Assess-
ment**

AGENCY: Agricultural Marketing Service, USDA

ACTION: Final rule.

SUMMARY: These actions authorize expenses and rates of assessment for [p. 53,451] the 1980-81 fiscal period, to be collected from handlers to support activities of the committees which locally administer the Federal marketing orders covering nectarines and fresh pears, plums, and peaches grown in California.

DATES: Effective March 1, 1980, through February 28, 1981.

* * * * *

SUPPLEMENTARY INFORMATION: These final actions have been reviewed under USDA procedures established in Secretary's Memorandum 1955 to implement Executive Order 12044, and have been classified "not significant." This final rule is issued

under Marketing Order Nos. 916 and 917 (7 CFR Parts 916 and 917 respectively), regulating the handling of nectarines grown in California (M.O. 916), and fresh pears, plums, and peaches grown in California (M.O. 917). These programs are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). This action is based upon the recommendation and information submitted by the respective committees, established under these marketing orders, and upon other information. It is found that the respective expenses and rates of assessment, as hereafter provided, will tend to effectuate the declared policy of the act.

These actions were recommended at public meetings at which all present could state their views. There is insufficient time between the date when information became available upon which this final rule is based and when the action must be taken to warrant a 60-day comment period as recommended in E.O. 12044, and it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the Federal Register (5 U.S.C. 553). These orders require that the rates of assessment for a particular fiscal year shall apply to all assessable fruit handled from the beginning of such year which began March 1, 1980. To enable the committees to meet fiscal obligations which are now accruing, approval of the expenses and assessment rates is necessary without delay. It is necessary to effectuate the declared purposes of the act to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

Therefore, new §§ 916.219 (M.O. 916) and 917.226; 917.227; 917.228 (M.O. 917) are added to read as follows (§§ 916.219, 917.226, 917.227, and 917.228 expire February 28, 1981, and will not be published in the annual Code of Federal Regulations):

PART 916—NECTARINES GROWN IN CALIFORNIA

Marketing Order 916

§ 916.219 Expenses, rate of assessment, and carry-over of unexpended funds.

(a) Expenses that are reasonable and likely to be incurred by the Nectarine Administrative Committee during fiscal year March 1, 1980, through February 28, 1981, will amount to \$1,824,434.

(b) The rate of assessment for said year payable by each handler in accordance with § 916.41 is fixed at \$0.11 per No. 22D standard lug box of nectarines, or its equivalent in other containers or in bulk.

(c) Unexpended funds in excess of expenses incurred during fiscal year ended February 29, 1980, shall be carried over as a reserve in accordance with § 916.42.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

Marketing Order 917

* * * * *

§ 917.227 Expenses and rate of assessment.

(a) Expenses that are reasonable and likely to be incurred by the Plum Commodity Committee during fiscal year March 1, 1980, through February 28, 1981, will amount to \$1,773,718.

(b) The rate of assessment for said year payable by each handler in accordance with § 917.37 is fixed at \$0.13 per No. 22D standard lug box of plums, or its equivalent in other containers or in bulk.

§ 917.228 Expenses, rate of assessment, and carry-over of unexpended funds.

(a) Expenses that are reasonable and likely to be incurred by the Peach Commodity Committee during fiscal year March 1, 1980, through February 28, 1981, will amount to \$1,370,348.

(b) The rate of assessment for said year payable by each handler in accordance with § 917.37 is fixed at \$0.10 per No. 22D standard lug box of peaches, or its equivalent in other containers or in bulk.

(c) Unexpended funds in excess of expenses incurred during fiscal year ended February 29, 1980, shall be carried over as a reserve in accordance with § 917.38.

* * * *, *

Dated: August 7, 1980.

* * * * *

1981-1982 CALIFORNIA STONE FRUIT
BUDGETS

Peach Commodity Committee
Plum Commodity Committee
Nectarine Administrative Committee

In connection with the 1981-1982 stone fruit budgets the following documents are presented:

1. Proposed Allocation of Joint Expenses Among Programs for 1981-1982 Compared With Prior Year.
2. The Stone Fruit Budgets with attachments.
3. Eight Research Proposals.
4. A Recap reporting Ripening Bowl Sales for the past six years.

JOINT EXPENSES

As usual, current records of keyed computer counts, mailings and time records for field staff have been used in allocating some of the joint expenses. These have become less reliable as we have brought more promotional activities in-house because these enormous activities are not accurately measured by such records. We must therefore rely heavily on judgment.

The total budgeted for joint expenses is \$594,236 compared with actual expenses a year ago of \$531,140 with the principal increase in the first category now entitled "Salaries Administrative-Promotion." These are the salaries of five people including a new employee who will understudy the assistant manager until his retirement on October 1. All other proposed

expenses are in line with prior costs except postage, paper and envelopes which is up more than one-third for obvious reasons.

All salaries have been advanced a basic 10% with several key employees receiving 12%.

STONE FRUIT BUDGETS

Research

Expenditures of \$80,320 are proposed for research activities and proposals submitted by the researchers for eight of these projects are attached. These projects are listed in each budget together with the allocations among the three stone fruits and pears. All have been screened by the Stone Fruit Chairmen and the Stone Fruit Advertising and Research Committee. One project entitled "Survey of Marketing Opportunities in Pacific Rim Countries (Moulton)" has been changed considerably since it was presented as a result of conversations between the researcher and the manager, these pursuant to suggestions of the Research Committee. The project is now entitled "The Japanese Market for Plums and Nectarines." This proposal contemplates important work particularly in Japan in researching the market potential there and its results will aid in making decisions on whether to continue the expensive codling moth fumigation work underway for the past three years. This project has been suspended pending a response from the Japanese Ministry of Agriculture, Forests and Fisheries to the researchers' report of work done to date. Two of the projects which relate to nectarine

pox were approved a year ago and half of the money expended.

Three expenditures are listed for which there is no proposals. One is to reimburse Tree Fruit Reserve for travelling expenses of two industry people who together with two scientists visited Hawaii to confer with University and USDA representatives in regard to fumigation for Medfly. Their trip has resulted in the beginning of work at Hilo look toward eliminating the necessity for cold treatments following fumigation as now required by the Quarantine Manual. A second involves preparation for the possibility that all of California will be quarantined and a prototype fumigation chamber is now being completed at Reedley. The purchase of fruit for the Hilo work is the third expenditure. The Giannini Foundation study has not been put together and no funds have been assigned.

Inspection

These costs are estimated by the Inspection Service and are higher for nectarines and peaches but lower for plums. Plum inspection costs were inflated a year ago by the heat damage occurring in Casselman and late variety plums.

Market Development

Proposed expenditures for market development are attached to each budget. These are increased from 26% to 28% with major increases proposed for television and radio including the production of television ads for 1982. Management continues to respond to industry desires for promotional expenditures to keep

pace with rapidly expanding production. This year's media program is an enormous endeavor. Network radio begins on May 25 and during opening week, for example, 30,000 spots will be aired; for the season 71% of all U.S. persons 18 or older will hear Summer Fruits commercials more than 13 times. In TV markets 87% of all adults will view these messages more than 10 times. Magazine ads will reach 63.5% of all U.S. adult women 2.4 times. This does not include expanded food page publicity releases which last year appeared in magazines and newspapers with combined circulation exceeding 200 million.

Ripening Bowl

The attached statement shows the entire history of the bowl. Last year it was re-designed, eliminating the wooden knob which permits close nesting and thus decreases shipping costs about one-third. A self-merchandise is fastened to the top of the bowl and thus will always be at the point of sale, something that was never accomplished with separate pieces. With the new bowl, sales increases are anticipated and to date this fiscal period sales are much ahead of last year. In fact, March and April sales totalled 34% of last year's sales.

/s/ GALEN GELLER
GALEN GELLER, Manager
California Tree Fruit
Agreement
701 Fulton Avenue
Sacramento, CA 95825

May 18, 1981

U.S. DEPARTMENT OF AGRICULTURE
[USDA Seal Omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
WASHINGTON, D.C. 20250

Date: SEP 29 1981

To: Director, Fruit and Vegetable Division

From: Fruit Branch

Subject: M.O. 916 (California Nectarines) and M.O. 917 (California Pears, Plums, and Peaches) - Approval of Market Development and Research (1981-82 Season)

We recommend that you sign this document which approves the market development and research for California nectarines, pears, plums, and peaches for the 1981-82 fiscal period. The committees met in May and June and recommended these expenditures. The following show proposed expenditures for Market Development and Research for the individual committees:

	MARKET*		
<u>COMMITTEES</u>	<u>DEVELOPMENT</u>	<u>RESEARCH</u>	<u>TOTAL</u>
Nectarine			
Administrative	\$1,410,000	\$19,863	\$1,429,863
Pear Commodity	620,000	1,650	621,650
Plum Commodity	1,263,000	24,154	1,287,154
Peach Commodity	<u>890,000</u>	<u>34,653</u>	<u>924,653</u>
Total	<u>\$4,183,000</u>	<u>\$80,320</u>	<u>\$4,263,320</u>

*Includes \$100,000 for fruit ripening bowls for each program.

Market Development

The projected market development activities for 1981-82 are similar in scope to those of last season. The increased proposed expenditures reflect for the most part higher costs of doing business and expanded promotional efforts. The following table shows a comparison of estimated expenditures for each of the programs:

<u>Commodity</u>	<u>Estimated (1981)</u>	<u>Actual (1980)*</u>	<u>Difference</u>
Nectarines	\$1,410,000	\$1,091,000	\$318,489
Pears	620,000	456,503	163,497
Plums	1,263,000	959,437	303,563
Peaches	<u>890,000</u>	<u>676,073</u>	<u>213,927</u>
Total	<u>\$4,183,000</u>	<u>\$3,183,524</u>	<u>\$999,476</u>

*Includes fruit ripening bowl

Marketing development activities will continue the joint California Summer Fruit promotional approach developed over the past nine years. The two major objectives are to (1) make consumers aware of the fruits' availability, characteristics, and uses, and (2) encourage in-store promotional activity. This is accomplished through field representatives contacting wholesale and retail trade in major U.S. and Canadian cities, emphasis on food page publicity under educational activities, expanded advertising program, development of point of sale material, and promotional research into effectiveness of TV, radio, and magazine advertising. Magazine tie-ins will be utilized to a greater extent this year. This includes the use of Summer Fruits with Knox Gelatin, Kraft Cracker Barrel Cheese, Kraft Salad Days, Karo

Syrup, California Iceberg lettuce, and others. Food page publicity releases appeared in magazines and newspapers with a combined circulation exceeding 200 million. By far the largest single expenditure is for TV and radio time. These "spots" will be scheduled to coincide with peak fruit movement in a particular market area. The projected 1981 expenditures by market development category for each of the four fruits are as follows:

<u>Market Development</u>	<u>Nectarines</u>	<u>Pears</u>	<u>Plums</u>	<u>Peaches</u>	<u>TOTAL</u>
Field Staff Activities	\$75,000	\$55,000	\$63,000	\$47,000	\$240,000
Retail Contests	25,000	7,500	15,000	12,000	59,000
Early Season Contest	—	20,000	—	—	20,000
Late Season Activities	—	20,000	—	—	20,000
Publicity, Education					
Activities	40,000	40,000	40,000	40,000	160,000
P-O-S Materials for 1980	—	—	—	—	—
P-O-S Materials for					
1981	27,000	15,000	27,000	—	86,500
Foodservice Activities	22,500	15,000	22,500	—	75,000
Magazine Tie-ins	106,000	48,000	106,000	—	335,000
TV, Radio Production					
for 1981	27,000	8,000	27,000	17,500	87,000
Television, Radio					
Time	900,000	240,000	775,000	15,000	2,390,000
Other Media Activities	—	—	—	—	—
Trade Communications	25,000	14,000	25,000	—	85,000
Promotional Research	—	—	—	—	—
Retail Projects	15,000	15,000	15,000	15,000	60,000
Television Production					
for 1982	40,000	15,000	40,000	25,000	135,000
Miscellaneous					
Activities	<u>7,500</u>	<u>7,500</u>	<u>7,500</u>	—	<u>30,000</u>
Total	<u>\$1,310,000</u>	<u>\$520,000</u>	<u>\$1,163,000</u>	—	<u>\$3,783,000</u>
Ripening Bowl	<u>100,000</u>	<u>100,000</u>	<u>100,000</u>	<u>100,000</u>	<u>400,000</u>
Total	<u>\$1,410,000</u>	<u>\$620,000</u>	<u>\$1,263,000</u>	<u>\$ 890,000</u>	<u>\$4,183,000</u>

The consumer education and publicity activities, formerly conducted by Steedman, Cooper, and Busse, have been taken inhouse. There will be no television spots specifically for pears; but as they will be shown on television commercials made for plums, peaches and nectarines, the pear committee will reimburse the respective committees.

Research

Expenditures of \$80,320 are proposed for research activities and proposals submitted by the researchers for eight of these projects are attached. These projects are listed in each budget together with the allocations among the three stone fruits and pears. The following table shows a comparison of estimated expenditures for 1981 versus actual expenditures for 1980 for research for each program:

<u>Commodity</u>	<u>Estimated (1981)</u>	<u>Actual (1980)</u>	<u>Difference</u>
Nectarines	\$34,653	\$35,744	\$ - 1,091
Plums	24,154	25,463	- 1,309
Peaches	19,863	18,743	1,120
Pears	<u>1,650</u>	<u>----</u>	<u>1,650</u>
Total	\$80,320	\$79,950	\$370

Three expenditures are listed for which there are no proposals. One is to reimburse Tree Fruit Reserve for travelling expenses of two industry people who together with two scientists visited Hawaii to confer with University and USDA representatives in regard to fumigation for Medfly. Their trip has resulted in the beginning of work at Hilo looking toward eliminating the necessity for cold treatments following

fumigation as now required by the Quarantine Manual. A second involves preparation for the possibility that all of California will be quarantined and a prototype fumigation chamber is now being completed at Reedley. The purchase of fruit for the Hilo work is the third expenditure. The Giannini Foundation study has not been put together and no funds have been assigned.

The following shows the proposed allocation of expenditures for research projects to the individual commodities:

<u>Research Project</u>	<u>Plums</u>	<u>Peaches</u>	<u>Nectarines</u>	<u>Pears</u>	<u>Total</u>
Insect Quarantine and Decay Control	5,080	2,540	5,080		12,700
Embryo Culture	2,056	2,057	2,057		6,170
Pre- and Post harvestDecay Control	4,334	4,333	4,333		13,000
Pest Management	667	667	666		2,000
Construction of More Efficient Peach & Nectarine Factories		4,500	4,500		9,000
Nectarine Pox (Sommer)		3,850			3,850
Nectarine Pox (Beutel)	2,150				2,150
The Japanese Market for Plums and Nectarines	6,250	6,250			12,500
Expenses of Dele- gation to Hawaii	667	666	667		2,000

Construction of Pro-					
tototype fumiga-					
tion Chamber	4,500	4,500	4,500	1,500	15,000
Giannini Foundation					
Study	-	-	-	-	-
Purchase of Fruits					
for Fumigation					
Testing in					
Hawaii	<u>600</u>	<u>600</u>	<u>600</u>	<u>150</u>	<u>1,950</u>
Total	\$24,154	\$19,863	\$34,653	\$1,650	\$80,320

Detailed material concerning market development and research projects is attached.

Recommended: SEP 29 1981 Approved: SEP 30 1981

/s/ signature illegible /s/ D. S. KURYLOSKI

Acting Chief, Fruit Branch	D. S. KURYLOSKI
Fruit and Vegetable Division	Deputy Director
Agricultural Marketing	Fruit and Vegetable
Service	Division
	Agricultural
	Marketing Service

Attachments

AMS:F&V:VFWolverton:vfw:8/6/81

Federal Register
Vol. 46, No. 153
Monday, August 10, 1981
[p. 40,503]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916, 917, 919, 921, 922, 923, 924, 930, 945, 946, 947, 948, 953, 958, 967, 985 and 993

Expenses and Rates of Assessment for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation authorizes expenses of the committees functioning under Marketing Orders 916, 917, 919, 921, 922, 923, 924, 930, 945, 946, 947, 948, 953, 958, 967, 985 and 993. Funds to administer these programs are derived from assessments on handlers of the fruits, vegetables and specialty crops regulated under the orders.

* * * * *

SUPPLEMENTARY INFORMATION: This rule has been reviewed under USDA procedures and Executive Order 12291 and has been classified "not significant" and not a major rule.

William T. Manley, Deputy Administrator, Agricultural Marketing Service, has determined that this action will not have a significant economic impact on

a substantial number of small entities because it would not measurably affect costs for the directly regulated handlers.

These marketing orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). These actions are based upon the recommendations and information submitted by each committee, established under the respective marketing order, and upon other information. It is found that the expenses and rates of assessment, as hereinafter provided, will tend to effectuate the declared policy of the act.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice and engage in public rulemaking, and good cause exists for not postponing the effective date until 30 days after publication in the Federal Register (5 U.S.C. 553). Each order requires that the rate of assessment for a particular fiscal period shall apply to all assessable fruits, vegetables, and specialty crops handled from the beginning of such period. To enable the committee to meet current fiscal obligations, approval of the expenses is necessary without delay. It is necessary to effectuate the declared policy of the act to make these provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

Information collection requirements (reporting and recordkeeping) under these parts are subject to clearance by the Office of Management and Budget and are in the process of review. These information requirements shall not become effective until such time as clearance by the OMB has been obtained.

* * * * *

PART 916—NECTARINES GROWN IN CALIFORNIA

§ 916.220 Expenses and assessment rate.

Expenses of \$2,231,368 by the Nectarine Administrative Committee are authorized, and an assessment rate of \$0.125 per No. 22D standard lug box of nectarines is established for the fiscal year ending February 28, 1982; and unexpended funds from the fiscal year ended February 28, 1981, shall be carried over as a reserve.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

§ 917.229 Expenses and assessment rate.

Expenses of \$2,097,685 by the Plum Commodity Committee are authorized, and an assessment rate of \$0.16 per No. 22D standard lug box is established for the fiscal year ending February 28, 1982.

§ 917.230 Expenses and assessment rate.

Expenses of \$1,710,714 by the Peach Commodity Committee are authorized, and an assessment rate of \$0.125 per No. 22D standard lug box is established for the fiscal year ending February 28, 1982.

PART 921—FRESH PEACHES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

§ 921.220 Expenses and assessment rate.

Expenses of \$15,080 by the Washington Fresh Peach Marketing Committee are authorized, and an assessment rate of \$3.00 per ton of peaches is established for the fiscal year ending March 31, 1982.

* * * * *

19
No. 95-1184

Supreme Court, U.S.
FILED

AUG 23 1995

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX
Volume II

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EDITOR'S NOTE

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NOTATION RE ITEMS PREVIOUSLY SUBMITTED

The following opinions, decisions, orders and other parts of the record have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari and within the appendix to the brief in opposition to the petition for a writ of certiorari.

I.

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II.

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1982-1983 CALIFORNIA STONE FRUIT BUDGETS

Peach Commodity Committee
Plum Commodity Committee
Nectarine Administrative Committee

I hand you herewith these documents, all having to do with the 1982-1983 budgets for peaches, plums and nectarines:

1. Proposed Allocation of Joint Expenses Among Programs for 1982-1983 Compared With Prior Year.
2. The Budgets with attachments.
3. Nine Research Proposals.
4. Recap of Ripening Bowl Sales to April 30, 1982.

JOINT EXPENSES

No changes have been made in the indicators used to determine the allocation of expenses although more weight is being given to judgment than empirical data because of the increased promotional activities performed in-house. These are not accurately measured by such records as computer counts and the time records available. (Field staff only.) Only one change in percentage allocations has been made. Clerical expenses for plums have been lowered from 22% to 20% because of the much reduced volume. The indicators here would have justified to increase of 26% had the crop been normal. Aside from a reduction in Clerical

expense, the lesser volume does not affect other categories.

The total budget for joint expenditures is \$587,677, slightly down from the \$592,161 spent in fiscal 1981-1982. The larger decrease is to be seen in salaries of the administrative and promotional people as this staff returns to a normal complement of four following the retirement of Dudley Bidstrup. Other items reflect salary increases of about 8% for all employees except the manager whose salary remains the same.

STONE FRUIT BUDGETS

Research

Of the nine research projects approved, six are continuations of work begun in earlier years. The three new ones are these:

1. Evaluation of the physiology efficiency of peach, nectarine and plum trees in different orchard systems (De Jong).
2. Fruit tolerance to alternate insert quarantine treatments (Mitchell).
3. Influence of orchard and packinghouse practices on surface damage of stone fruits (Phillips).

The Mitchell proposal is not yet specific and the work may not be performed. If the project is to proceed, Mr. Mitchell will submit a detailed proposal. Presently he is considering heat treatments and gamma ray exposure. The Moulton project concerning marketing op-

portunities in Pacific rim countries was started a year ago but only Japan was surveyed. Dr. Moulton will now look at Taiwan, Hong Kong and Singapore in that order. The Japan report was excellent.

Research expenditures total \$82,310 to be apportioned as shown on the back of each budget.

INSPECTION

These costs are estimated by the Inspection Service and are considerably higher because of the damaged crops. The per-package estimates are shown in each budget and may be compared to 1981 actual per-package costs shown below:

	<u>1981-1982</u>	<u>1982-1983</u>
Plums	.04888	.091
Peaches	.04885	.062
Nectarines	.03902	.053

These estimated costs are affected not only by low volume but also reduced quality of deliveries. Hail damaged fruit moves slowly through packinghouses.

MARKET DEVELOPMENT

As the attachments show, direct market development expenditures in behalf of the stone fruits are budgeted at \$2,378,866. A proposed budget of some \$437,000 will shortly be considered by the Pear Committee.

The California Summer Fruits media campaign now calls for 15 weeks of nationwide network radio ad-

vertising; up to 14 weeks of spot television in up to 19 markets, as well as 13 weeks of advertising on one syndicated and one cable television program; and three full-page tie-in advertisements, each supported by in-store recipe distributions, in the June, July and August issues of 16 consumer magazines.

Radio levels will range from 40 to 80 network advertisements per week. Estimated reach and frequency is 70% of all U. S. adults an average of 13 times. The magazine schedule for June includes *Family Circle*, *Good Housekeeping*, *Parents*, *Seventeen*, *Southern Living*, *Sunset* and *Working Mother*; for July, *Family Circle*, *Life*, *McCall's* and *People*; for August, *Better Homes and Gardens*, *Good Housekeeping*, *Southern Living*, *Sunset* and *Woman's Day*. Estimated reach and frequency is 63% of all U. S. women an average of 3 times. The respective tie-in partners are Knox gelatine, Kraft salad dressing and Karo syrup. Newly created commercials will be employed for both radio and television. Television reach and frequency in the 19 markets is preliminary estimated at 80% of all adults an average 9 times.

The 13-man Oregon-Washington-California Pear Bureau field staff has again been retained to disseminate crop and handling information, merchandise the advertising campaign, distribute point-of-sale materials and promote the California Summer Fruits ripening bowl. On the consumer publicity and education front, 65 different recipe-photo releases will be furnished to 750 newspapers. Efforts to secure increased editorial exposure in consumer magazines will also continue, as will efforts to encourage increased food-service use.

RIPENING BOWL

The ripening bowl statement shows the number of bowls sold to date, the income, expenses and the overall excess of income over expenses as well as the value of the current inventory. Bowl sales lag those of a year ago and it is not anticipated that last year's volume will be reached. Recently we have terminated our relationship with the Jareen Company and henceforth we will furnish bowls to non-grocery outlets. For instance, we have agreed to furnish bowls to the Joan Cook Company who will include it in their catalog which has a mailing list of 18 million.

ASSESSMENT RATES

These per-lug assessment rates have been recommended: Plums, 16¢; Peaches, 15¢; Nectarines, 15¢. The Plum Committee has elected not to increase its rate despite or perhaps because of the much reduced crop. This will require cutting market development costs by more than 50%, considered appropriate with supplies at 40% of last year. Peaches and nectarines, looking at respectable volume and remembering low 1981 prices, have increased their rates by 2 1/2¢. The Peach Market Development budget is actually increased over last year's and nectarine expenditures lag 1981 by only 12%.

All three fruits entered the fiscal period with good carryins (shown at the top of each budget.) The rates chosen at the volumes shown under Inspection will reduce the 1983 plum carryin from \$384,806 on 3/1/82 to \$98,166 on 3/1/83; peaches from \$273,320 to \$211,188;

nectarines from \$297,759 to \$149,237. These sums should be sufficient to launch the 1983 programs.

ORIGINAL SIGNED BY

/s/ GALEN GELLER
GALEN GELLER, MANAGER
California Tree Fruit
Agreement
701 Fulton Avenue
Sacramento, CA 95825

May 18, 1982

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal Omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE

Date: May 24, 1982

To: William Doyle, Acting Chief, Fruit
Branch Fruit and Vegetable Division,
AMS, USDA

From: G. P. Muck, Field Representative
Sacramento Marketing Field Office

Subject: 1982-83 Stone Fruit Budgets

Enclosed is a copy of the 1982-83 budget for peaches, plums and nectarines, as well as documents relating thereto. The budgets were approved by the three commodity committees in Fresno earlier this month. A three-page budget statement dated May 18, 1982, prepared by CTFA Manager Galen Geller, is also enclosed.

The CTFA budget process is a lengthy one. Prior to final adoption, a number of preliminary meetings are held. This year these included meetings of the Stone Fruit Subcommittee on Promotion and Research March 3 and April 14, Management Services May 4, a Joint Meeting for Promotion and Research May 5 and finally the Peach, Nectarine and Plum Committee meetings held May 5-6. Minutes of all the May meetings are being sent under separate cover. You

already have in hand minutes of the Stone Fruit Subcommittee meetings of March and April.

Management Services, at its May 4 meeting, recommended rehiring Manager Geller and allocated joint expenses among all programs managed at 701 Fulton Avenue, Sacramento. These programs include peaches, plums, nectarines and pears, as well as a State Marketing Order for Canning Pears. The allocations recommended by Management Services are shown on the enclosed sheet entitled "Proposed Allocation of Joint Expenses Among Programs for 1982-82 Compared with Prior Years".

A total of nine research projects are to be funded by CTFA during the 1982-83 fiscal year. Total cost of the nine projects is \$82,310. Project proposals are enclosed. Please note some of the proposals show greater dollar amounts than the amount approved by each committee. The Subcommittee for Promotion and Research considered project proposals on March 3, and some projects were not given all the funds requested. See the reverse side of each commodity committee budget for the dollars allocated to each research project. In Manager Geller's transmittal, he indicates that before Gordon Mitchell's project proposal for work on Fruit Tolerance to Alternate Insect Quarantine Treatments is undertaken, Mitchell will submit a proposal in greater detail. This should not be cause to defer approval of the project at this time, as all three committees are vitally concerned about alternative methods of insect eradication (Medfly) to the use of Methyl Bromide and EDB. It is also to be noted that the project of Dr. Kirby Moulton, UC Cooperative Extension, Berkeley, for a survey

of marketing prospects in Pacific Rim Countries started last year (FY 81-82) will be completed this year. As Manager Geller indicates, Moulton surveyed Japan in 1981 and this year will look at Taiwan, Hong Kong and Singapore. The total project cost is \$12,500, half expended last year with the balance of \$6,250 to be spent this year shared equally by plums and nectarines. The proposal enclosed is the original 1981 proposal with an amended Memorandum of Agreement showing the work which will be conducted this season.

Inspection costs are a significant element of stone fruit budgets. Costs are expected to show marked increases this season, due in part to weather damage and smaller than normal crops. Management has budgeted 9.1 cents per lug for plum inspection, almost double the 4.88 cents expended last season. The sharp increase in the cost of plum inspection is based on prospects of an extremely small and heavily damaged crop. 5.9 million packages are expected to be shipped this season, as compared to 1981 shipments of 13.8 million. Peach and nectarine inspection costs will also be increased, but not as dramatically.

Market development budgets for each of the stone fruits are enclosed. Direct market development expenditures for all three fruits total \$2,378,866, a decrease of almost \$900,000 from last year. Management does not show Ripening Bowl as part of committee market development budgets but as a separate budget item. Although plums and nectarines will spend less on market development, peaches increased their market development budget slightly. Plums will cut way back on their program, particularly in

television and radio advertisements where savings can be made by reducing schedule. On the other hand, peach and nectarine committees decided that additional expenditures for radio and TV time were essential to help sell their respective crops. Consequently, each decided to increase their assessment rates by 2 /12 cents to support such activities. See Manager Geller's comments on the overall market development program in his transmittal. Minutes of the Joint Meeting for Promotion and Research carry more detail concerning the 1982 market development budgets, as do minutes of the respective commodity committees.

The Peach Committee approved a budget totalling \$1,772,132 and a 15-cent per lug assessment rate. This includes \$908,000 for market development (\$60,000 for Ripening Bowl included) and \$27,687 for research. The peach budget is based on shipments of 11 million lugs. The committee will utilize a portion of the \$273,320 March 1, 1982, carryin to operate during the year and estimates that on March 1, 1983, they will carry out \$211,188.

The Nectarine Committee adopted a budget of \$1,859,672 and an assessment rate of 15 cents per lug. The budget includes \$1,094,000 for market development (includes \$60,000 for Ripening Bowl) and \$30,812 for research. Nectarines carried into the fiscal year \$297,759. Based on estimated shipments of 11 million lugs, the committee expects its March 1, 1983, carry-out to be \$149,237.

Plums adopted a budget totaling \$1,226,640 and an assessment rate of 16 cents per lug. The total

includes a market development budget of \$556,000 (\$60,000 for Ripening Bowl included) and \$23,811 for research based on shipments of 5.5 million lugs (figure used for budget purposes). The committee plans on utilizing a good portion of the \$384,806 it had on March 1, 1982. It estimates that the March 1, 1983, carryout will total \$98,166.

We concur with each committee's action on budgets, assessment rates, market development and research project proposals and recommend they be acted upon favorably.

/s/ signature illegible

Enclosures

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal Omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE

Date: July 6, 1982

To: William Doyle, Acting Chief, Fruit
Branch Fruit and Vegetable Division,
AMS, USDA

From: G. P. Muck, Field Representative
Sacramento Marketing Field Office

Subject: Pear Committee budget

At its June 29, 1982, meeting, the Pear Commodity Committee unanimously approved a budget totaling \$555,850. To finance this budget, the Committee recommended an assessment rate of 16 cents per carton. The committee anticipates shipments of 3236 cars of pears. Using 900 cartons per car and based on the proposed assessment rate, income of \$465,984 is anticipated. The Committee carried into the current fiscal year \$143,613 and expects to utilize some of these funds this year. On the surface, it would appear the drawdown of funds would be quite sizable; however since \$60,000 of the \$555,850 is budgeted for Ripening Bowl and will be offset by income from bowl sales plus miscellaneous income, the amount of carryout funds on March 1, 1983, is expected to be around \$120,000.

Enclosed is a copy of the 1982-83 Pear Commodity Committee budget as well as a market development

with attached market development report which describes proposed 1982-83 activities. Direct market development expenditures total \$417,166, which excludes the \$60,000 for Ripening Bowl noted in the first paragraph. Adding in this amount brings a total market development budget up to \$477,166.

We recommend approval of the budget and assessment rate as proposed. If you have any questions, please let me know.

/s/ signature illegible

Enclosures

FORM AMS-401 (4-3-72)

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal Omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
WASHINGTON, D.C. 20250

Date:

To: Director, Fruit and Vegetable Division

From: William J. Doyle
Chief, Fruit Branch

Subject: M.O. 916 (California Nectarines) and
M.O. 917 (California Pears, Plums, and
Peaches) - Approval of Increase in
Expenditures for Market Development
and Research (1982-83 Season)

We recommend that you sign this memo which approves increased expenditures for market development and research for California nectarines, pears, plums, and peaches for the 1982-83 fiscal period. The administrative committees met in November and December of 1982 and unanimously recommended these increased expenditures. The increase was necessitated by underestimation of the expected crop by the committees for all four commodities (as illustrated).

<u>Commodity</u>	<u>Estimated*</u>	<u>Actual*</u>	<u>Percent Increase</u>
Nectarines	11.6 m.p.	14.3 m.p.	23
Pears	3,206 cars	4,765 cars	49
Plums	5.9 m.p.	8.6 m.p.	46
Peaches	11.3 m.p.	11.9 m.p.	5

* m.p. = million packages cars = railcars

Market development expenditures exceeded approved amounts in most categories, principally in trade communications, T.V. and radio production, and T.V. and radio time. In addition, the Pear Commodity Committee recommended a \$3,026 increase in its research budget to cover its share of a fumigation project sponsored jointly with the stone fruit committees. The following shows the approval amounts and the recommended increases.

<u>Committee</u>	<u>Approved Market Development</u>	<u>Recommended Increase</u>
Nectarine		
Administrative	\$1,094,000	\$ 66,000
Pear Commodity	477,166	162,834
Plum Commodity	703,600	38,400
Peach Commodity	<u>908,766</u>	<u>11,234</u>
Total	\$3,183,532	\$278,468

^{1/} Includes \$60,000 for fruit ripening bowls for *each* program.

<u>Committee</u>	<u>New Market Development</u>	<u>Total Market Development and Research</u>
Nectarine		
Administrative	\$1,160,000	\$1,190,812
Pear Commodity	640,000	643,026 ^{2/}
Plum Commodity	742,000	765,811
Peach Commodity	<u>920,000</u>	<u>947,687</u>
Total	\$3,462,000	\$3,547,336

^{2/} Includes \$3,026 in pear research budget.

With respect to peaches and plums, the total expenditures were within the previously approved budgets, thus, no additional action is required. With respect to pears and nectarines, the additional expenditures necessitated an increase in the previously approved budget (though no change in assessment rates was necessary). Appropriate action to increase the pear and nectarine budgets was published in the Federal Register on February 28, 1983.

Further information concerning the marketing development and research efforts are detailed in the attached committee minutes and correspondence.

Recommended: MAR __ 1983 Approved: MAR 09 1983

/s/ WILLIAM J. DOYLE
Chief, Fruit Branch
Fruit and Vegetable
Division
Agricultural Marketing
Service

/s/ D. S. KURYLOSKI
D. S. KURYLOSKI
Deputy Director
Fruit and Vegetable
Division
Agricultural Marketing
Service

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal Omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
WASHINGTON, D.C. 20250

Date:

To: Director, Fruit and Vegetable Division

From: Fruit Branch

Subject: M.O. 916 (California Nectarines) and M.O. 917 (California Pears, Plums, and Peaches) - Approval of Market Development and Research (1982-83 Season)

We recommend that you sign this memo which approves market development and research for California nectarines, pears, plums, and peaches for the 1982-83 fiscal period. The administrative committees met in May, June, and July and recommended these expenditures. The following shows proposed 1982-83 season expenditures for market development and research for the individual committees:

<u>Committees</u>	<u>Market *</u> <u>Development</u>	<u>Research</u>	<u>Total</u>
Nectarine Administrative	\$1,094,000	\$30,812	\$1,124,812
Pear Commodity	477,166		477,166
Plum Commodity	703,600	23,811	727,411
Peach Commodity	<u>908,766</u>	<u>27,687</u>	<u>936,453</u>
Total	\$3,183,532	\$82,310	\$3,265,842

*Includes \$60,000 for fruit ripening bowls for each program.

Market Development

Total market development expenditures for 1982-83 are reduced from those last season. Much of this decrease reflects a scaling back of market development efforts, due to estimated reduced fruit crops this season. A comparison of estimated expenditures for this season compared with actual expenditures last season are shown on the following table.

<u>Commodity</u>	<u>Actual</u> <u>(1981-82)*</u>	<u>Estimated</u> <u>(1981-82)*</u>	<u>Difference</u>
Nectarines	\$1,222,971	\$1,094,000	-\$128,971
Pears	556,311	477,166	- 79,145
Plums	1,223,839	703,600	- 520,239
Peaches	<u>801,137</u>	<u>908,766</u>	<u>107,629</u>
Total	\$3,804,258	\$3,183,532	-\$620,735

*Includes fruit ripening bowl.

Marketing development activities will continue the joint California Summer Fruit promotional approach

developed over the past 10 years. The two major objectives are to (1) make consumers aware of the fruits' availability, characteristics, and uses, and (2) encourage in-store promotional activity.

The California Summer Fruits media campaign now calls for 15 weeks of nationwide network radio advertising; up to 14 weeks of spot television in up to 19 markets, as well as 13 weeks of advertising on one syndicated and one cable television program; and three full-page tie-in advertisements, each supported by in-store recipe distributions, in the June, July and August issues of 16 consumer magazines.

The 13-man Oregon-Washington-California Pear Bureau field staff has again been retained to disseminate crop and handling information, merchandise the advertising campaign, distribute point-of-sale materials and promote the California Summer Fruits ripening bowl. On the consumer publicity and education front, 65 different recipe-photo releases will be furnished to 750 newspapers. Efforts to secure increased editorial exposure in consumer magazines will also continue, as will efforts to encourage increased food-service use.

Further information concerning the marketing development efforts are shown on the following table, and detailed in the attached related material, including committee minutes and correspondence.

<u>Market Development</u>	<u>Nectarines</u>	<u>Pears</u>	<u>Plums</u>	<u>Peaches</u>	<u>Total</u>
Field Staff Activities	81,000	60,000	68,000	53,000	262,000
Retail Contests	15,000	17,500	15,000	7,500	55,000
Trade					
Communications	12,500	12,500	12,500	10,500	48,000
Other Retail Projects	7,500	7,500	7,500	7,500	30,000
POS Materials for 1981					
POS Materials for 1982	33,000	18,000	33,000	20,000	104,000
Publicity, Education Activities	40,000	40,000	40,000	40,000	160,000
Foodservice Activities	13,000	8,666	13,000	8,666	43,332
Magazine Tie-ins	114,000	22,000	114,000	80,000	330,000
TV, Radio Production for 1982	16,000	13,500	16,000	16,000	61,500
TV, Radio Time	694,500	210,000	317,100	598,100	1,819,700
Miscellaneous Activities	7,500	7,500	7,500	7,500	30,000
Total	1,034,000	417,166	643,600	848,766	2,943,532
Ripening Bowl	60,000	60,000	60,000	60,000	240,000
Grand Total	1,094,000	477,166	703,600	908,766	3,183,532

Research

Expenditures of \$82,310 are allocated for research activities for 9 research projects for plums, peaches and nectarines, which are attached. The following table compares 1982-83 estimated research expenditures, with actual 1981-82 expenditures. Attached is a table which lists the research projects and cost allocation among commodities, as well as total costs for

all projects. The attached project outlines contain further details relating project activities.

<u>Commodity</u>	<u>Actual (1981-82)</u>	<u>Estimated (1982-83)</u>	<u>Difference</u>
Nectarines	25,952	30,812	4,860
Plums 18,095	23,811	5,716	
Peaches	<u>17,409</u>	<u>27,687</u>	<u>10,278</u>
	61,456	82,310	20,854

Recommended: OCT 12 1982 Approved: 12 OCT 1982

/s/ WILLIAM J. DOYLE
Acting, Chief, Fruit
Branch
Fruit and Vegetable
Division
Agricultural Marketing
Service

/s/ D. S. KURYLOSKI
D. S. KURYLOSKI
Deputy Director
Fruit and Vegetable
Division
Agricultural Marketing
Service

Federal Register
Vol. 47, No. 153
Monday, August 9, 1982

[p. 34,351]

DEPARTMENT OF AGRICULTURE

* * * * *

7 CFR Parts 911, 915, 916, 917, 918, 919, 921, 922, 923, 924, 930, 945, 946, 947, 948, 953, 958, 967, 985, and 993

Expenses and Rates of Assessment for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

[p. 34,352]

SUMMARY: This regulation authorizes expenses of the committees functioning under Marketing Orders 911, 915, 916, 917, 918, 919, 921, 922, 923, 924, 930, 945, 946, 947, 948, 953, 958, 967, 985, and 993. Funds to administer these programs are derived from assessments on handlers of the fruits, vegetables and specialty crops regulated under the orders.

* * * * *

SUPPLEMENTARY INFORMATION: This rule has been reviewed under Secretary's Memorandum 1512-1 and Executive Order 12291 and has been designated a "nonmajor" rule. William T. Manley, Deputy

Administrator, Agricultural Marketing Service, has determined that this action will not have a significant economic impact on a substantial number of small entities because it would not significantly affect costs for the directly regulated handlers.

These marketing orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). These actions are based upon the recommendations and information submitted by each committee, established under the respective marketing order, and upon other information. It is found that the expenses and rates of assessment, as hereinafter provided, will tend to effectuate the declared policy of the act.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice and engage in public rulemaking and good cause exists for not postponing the effective date until 30 days after publication in the Federal Register (5 U.S.C. 553). Each order requires that the rate of assessment for a particular fiscal period shall apply to all assessable fruits, vegetables, and specialty crops handled from the beginning of such period. To enable the committees to meet current fiscal obligations, approval of the expenses is necessary without delay. It is necessary to effectuate the declared policy of the act to make these provisions effective as specified, and handlers have been apprised of such provisions, and the effective time.

* * * * *

PART 916—NECTARINES GROWN IN CALIFORNIA

§ 916.221 Expenses and assessment rate.

Expenses of \$1,859,672 by the Nectarine Administrative Committee are authorized, and an assessment rate of \$0.15 per No. 22D standard lug box of nectarines is established for the fiscal year ending February 28, 1983; and unexpended funds may be carried over from the fiscal year ending February 28, 1982.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

* * * * *

§ 917.233 Expenses and assessment rate.

Expenses of \$1,646,640 by the Plum Commodity Committee are authorized, and an assessment rate of \$0.16 per No. 22D standard lug box of plums is established for the fiscal year ending February 28, 1983; and unexpended funds may be carried over from the fiscal year ending February 28, 1982.

§ 917.234 Expenses and assessment rate.

Expenses of \$1,772,132 by the Peach Commodity Committee are authorized, and an assessment rate of \$0.15 per No. 22D standard lug box of peaches is established for the fiscal year ending February 28, 1983; and unexpended funds may be carried over from the fiscal year ending February 28, 1982.

PART 918—FRESH PEACHES GROWN IN GEORGIA

§ 918.219 Expenses and assessment rate.

Expenses of \$18,600 by the Industry Committee are authorized, and an assessment rate of \$0.01 per bushel of peaches is established for the fiscal period ending February 28, 1983.

PART 919—PEACHES GROWN IN MESA COUNTY, COLORADO

§ 919.221 Expenses and assessment rate.

Expenses of \$1,000 by the Administrative Committee are authorized, and an assessment rate of \$0.01 per bushel of peaches is established for the fiscal year ending June 30, 1983.

PART 921—FRESH PEACHES GROWN IN DESIGNATED COUNTRIES IN WASHINGTON

§ 921.221 Expenses and assessment rate.

Expenses of \$17,078.50 by the Washington Fresh Peach Marketing Committee are authorized, and an assessment rate of \$2.00 per ton of peaches is established for the fiscal year ending March 31, 1983; and unexpended funds from the fiscal year ended March 31, 1982, shall be carried over as a reserve.

* * * * *

Federal Register
Vol. 48, No. 40
Monday, February 28, 1983

[p. 8255]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 904, 916, and 917

Expenses and Rates of Assessment for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation authorizes expenses of the California Grapefruit Administrative Committee functioning under Marketing Order 904 and increases expenses of the Nectarine Administrative and Pear Commodity Committees functioning under Marketing Orders 916 and 917, respectively. Funds to administer these programs are derived from assessments on handlers regulated under the orders.

* * * * *

SUPPLEMENTARY INFORMATION: This rule has been reviewed under Secretary's Memorandum 1512-1 and Executive Order 12291 and has been classified a "non-major" rule. William T. Manley, Deputy Administrator, Agricultural Marketing Serv-

ice, has certified that this action will not have a significant economic impact on a substantial number of small entities because it would not measurably affect costs for the directly regulated handlers.

These marketing orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). These actions are based upon the recommendations and information submitted by the Committees established under their respective marketing orders, and upon other information. It is found that the expenses and rates of assessment, as hereinafter provided, will tend to effectuate the declared policy of the Act.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice and engage in public rulemaking and good cause exists for not postponing the effective date until 30 days after publication in the Federal Register (5 U.S.C. 553). The orders require that the rates of assessment for a particular fiscal period shall apply to all assessable fruit handled from the beginning of such period. To enable the committees to meet current fiscal obligations, approval of the expenses is necessary without delay. It is necessary to effectuate the declared policy of the Act to make these provisions effective as specified, and handlers have been apprised of such provisions, and the effective time.

* * * * *

PART 916—NECTARINES GROWN IN CALIFORNIA

§ 916.221 Expenses and assessment rate.

Expenses of \$2,000,000 by the Nectarine Administrative Committee are authorized, and an assessment rate of \$0.15 per No. 22D standard lug box of nectarines is established for the fiscal year ending February 28, 1983; and unexpended funds may be carried over from the fiscal year ended February 28, 1982.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

§ 917.232 Expenses and assessment rate.

Expenses of \$718,684 by the Pear Commodity Committee are authorized, and an assessment rate of \$0.16 per No. 29B special lug box of pears is established for the fiscal year ending February 28, 1983.

* * * * *

Dated: February 22, 1983.

* * * * *

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal Omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE

To: Director, Fruit and Vegetable Division

From: William J. Doyle
Chief, Fruit Branch

Subject: M.O. 916 (CA Nectarines) and M.O. 917
(CA Pears, Plums, and Peaches)
Approval of Market Development and
Research - 1983-84 Season

We recommend that you sign this memo which approves market development and research for California nectarines, pears, plums and peaches for the 1983-84 fiscal period. The administrative committees met in May and July and recommended these expenditures. The following table shows proposed 1983-84 season budgeted expenditures for market development and research for the individual committees:

<u>Committee</u>	<u>Market Development*</u>	<u>Research</u>	<u>TOTAL</u>
Nectarine			
Administrative	\$1,711,500	\$35,012	\$1,746,512
Pear Commodity	712,500	11,000	723,500
Plum Commodity	1,388,500	31,263	1,419,763
Peach Commodity	1,052,500	31,217	1,083,717
TOTAL	\$4,865,000	\$108,492	\$4,973,492

*Includes \$60,000 for fruit ripening bowl for each program.

Total budgeted market development expenditures for 1983-84 are increased from last season due to estimated increased fruit crops this season. The following table compares this year's budgeted expenditures with last year's actual expenditures:

<u>Commodity</u>	<u>Actual Expenditures 1982-83*</u>	<u>Budgeted Expenditures 1983-84*</u>	<u>Difference</u>
Nectarines	\$1,161,546	\$1,711,500	\$ 549,954
Pears	641,087	712,500	71,413
Plums	752,372	1,388,500	636,128
Peaches	914,641	1,052,500	137,859
TOTAL	\$3,469,646	\$4,865,000	\$1,395,354

*Includes \$60,000 for fruit ripening bowl for each program.

The California Summer Fruits media campaign presently calls for six weeks of national cable and syndicated television; 14 weeks of spot television in New York, Los Angeles, and Chicago; six weeks of national network radio; and up to eight weeks of spot radio in 10 U.S. markets and Montreal and Toronto. California Bartletts will appear in tie-in advertisements in the July issues of four consumer magazines.

The Oregon-Washington-California Pear Bureau field staff has again been retained to disseminate crop and handling information, merchandise the advertising campaign, distribute point-of-sale materials, and promote the California Summer Fruits ripening bowl.

The consumer publicity program will be directed by the CTFA staff and will include the release of 18 recipe-photo features to 750 newspapers, and con-

tinued efforts to secure increased editorial exposure in consumer magazines. Also being released is a new colormat feature developed in cooperation with the Avocado and Iceberg Lettuce Commissions.

The following table shows detailed market development expenditure items for the individual commodities (all figures shown in dollars):

<u>Item</u>	<u>Nectarines</u>	<u>Pears</u>
Field Staff Activities	\$ 84,000	\$ 60,000
Retail Advertising Incentives	75,000	40,000
Trade Communications	25,000	25,000
POS Materials-1983	38,000	20,000
Other Retail Activities	17,500	17,500
Publicity, Education Activities	40,000	40,000
Magazine Tie-ins	62,000	25,000
Foodservice Activities	15,000	10,000
TV, Radio Production for 1983	65,000	35,000
TV Time for 1983	700,000	175,000
Radio Time for 1983	500,000	175,000
Promotional Research	17,500	17,500
Miscellaneous Activities	12,500	12,500
TOTAL	1,651,500	652,500
Ripening Bowl	60,000	60,000
GRAND TOTAL	1,711,500	712,500

<u>Item</u>	<u>Plums</u>	<u>Peaches</u>	<u>TOTAL</u>
Field Staff Activities	\$ 71,000	\$56,000	\$ 271,000
Retail Advertising Incentives	75,000	50,000	240,000
Trade Communications	25,000	25,000	100,000
POS Materials-1983	38,000	25,000	121,000
Other Retail Activities	17,500	17,500	70,000
Publicity, Education Activities	40,000	40,000	160,000
Magazine Tie-ins	62,000	44,000	193,000
Foodservice Activities	15,000	10,000	50,000
TV, Radio Production for 1983	55,000	45,000	200,000
TV Time for 1983	525,000	375,000	1,775,000
Radio Time for 1983	375,000	275,000	1,325,000
Promotional Research	17,500	17,500	70,000
Miscellaneous Activities	12,500	12,500	50,000
TOTAL	1,328,500	992,500	4,625,000
Ripening Bowl	60,000	60,000	240,000
GRAND TOTAL	1,388,500	1,052,500	4,865,000

Expenditures of \$108,492 are allocated for 11 research projects for nectarines, pears, plums and peaches. The accompanying project outline details cost allocation among commodities as well as total costs for all projects.

Recommended: AUG 2 1983 Approved: AUG 2 1983

/s/ WILLIAM J. DOYLE
Chief, Fruit Branch
Fruit and Vegetable
Division

/s/ D. S. KURYLOSKI
D. S. KURYLOSKI
Deputy Director
Fruit and Vegetable
Division

Federal Register
Vol. 48, No. 151
Thursday, August 4, 1983

[p. 35,345]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

* * * * *

7 CFR Parts 915, 916, 917, 921, 922, 924, 926, 930, 945, 946, 947, 948, 953, 958, 967, 982, 985, and 993

Expenses and Rates of Assessment for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation authorizes expenses of the committees functioning under Marketing Orders 915, 916, 917, 921, 922, 924, 926, 930, 945, 946, 947, 948, 953, 958, 967, 982, 985, and 993. Funds to administer these programs are derived from assessments on handlers of the fruits, vegetables and specialty crops regulated under the orders.

* * * * *

SUPPLEMENTARY INFORMATION: This rule has been reviewed under Secretary's Memorandum 1512-1 and Executive Order 12291 and has been designated a "nonmajor" rule. William T. Manley, Deputy Admin-

istrator, Agricultural Marketing Service, has certified that this action will not have a significant economic impact on a substantial number of small entities because it would not significantly affect costs for the directly regulated handlers.

These marketing orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). These actions are based [p. 35,346] upon the recommendations and information submitted by each committee, established under the respective marketing order, and upon other information. It is found that the expenses and rates of assessment, as hereinafter provided, will tend to effectuate the declared policy of the act.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice and engage in public rulemaking and good cause exists for not postponing the effective date until 30 days after publication in the Federal Register (5 U.S.C. 553). Each order requires that the rate of assessment for a particular fiscal period shall apply to all assessable fruits, vegetables, and specialty crops handled from the beginning of such period. To enable the committees to meet current fiscal obligations, approval of the expenses is necessary without delay. It is necessary to effectuate the declared policy of the act to make these provisions effective as specified, and handlers have been apprised of such provisions, and the effective time.

* * * * *

PART 916—NECTARINES GROWN IN CALIFORNIA

§ 916.222 Expenses and assessment rate.

Expenses of \$2,624,058 by the Nectarine Administrative Committee are authorized, and an assessment rate of \$0.13 per No. 22D standard lug box of nectarines is established for the fiscal year ending February 29, 1984. Unexpended funds may be carried over as a reserve.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

* * * * *

§ 917.236 Expenses and assessment rate.

Expenses of \$2,334,786 by the Plum Commodity Committee are authorized, and an assessment rate of \$0.16 per No. 22D standard lug box of plums is established for the fiscal year ending February 29, 1984; and unexpended funds may be carried over as a reserve.

§ 917.237 Expenses and assessment rate.

Expenses of \$1,955,740 by the Peach Commodity Committee are authorized, and an assessment rate of \$0.125 per No. 22D standard lug box of peaches is established for the fiscal year ending February 29, 1984; and unexpended funds may be carried over as a reserve.

PART 921—FRESH PEACHES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

§ 921.222 Expenses and assessment rate.

Expenses of \$21,208.75 by the Washington Fresh Peach Marketing Committee are authorized, and an assessment rate of \$2.20 per ton of peaches is established for the fiscal year ending March 31, 1984; and unexpended funds may be carried over as a reserve.

* * * * *

1984-1985 CALIFORNIA STONE FRUIT BUDGETS

Peach Commodity Committee
Plum Commodity Committee
Nectarine Administrative Committee

This is to forward the fiscal year 1984-1985 budgets for California peaches, plums and nectarines. The following supporting documents are enclosed:

1. Proposed Allocation of Joint Expenses Among Programs for 1984-1985
2. Individual Budgets with attachments
3. Research Proposals
4. Ripening Bowl Sales Recap

JOINT EXPENDITURE ALLOCATION

Total joint expenditures for 1984-1985 are budgeted at \$683,700, up 14% from last year's \$600,413. This increase results from the addition of compliance personnel in our Dinuba office, the hiring of additional seasonal personnel in the Sacramento area, salary increases, rent increases for both the Sacramento and Dinuba offices and general overhead increases.

Compliance activities this year will again include unannounced visits by CTFA field agents at packing-houses and fruit stands to enforce Federal Marketing Order regulations. Controlled buys from suspected violators which are expensive but effective will also

continue. Last year six cases involving violations of CTFA regulations were successfully litigated due in part to a new procedure of direct referral of complaints from the USDA Regional Attorney to the nearest U.S. Attorney's office.

No changes were made in the allocation percentages from last year. The total for all joint expenses is as follows:

Plums	22.5%
Peaches	22.5%
Nectarines	23.0%
Fresh Pears	12.0%
Pear Zone	20.0%

These percentages will be closely monitored during the year to see if staffing and program changes will necessitate adjustments in the allocation percentages for 1985-1986.

Primary expenses not jointly allocated by these percentages are research, inspection and market development which are outlined in the following sections.

RESEARCH

Eight research projects have been approved for the stone fruits with other projects likely to be approved in June for pears. The stone fruit research projects are listed on the reverse of each budget sheet and total \$131,550. Four of these projects represent continuations from last year while the following four are new: Postharvest studies of stone fruits (Kader/Mitchell), Evaluation of postharvesting han-

dling injuries of stone fruits (Mitchell), Controlled atmosphere for postharvest insect control and insects on tree fruits (Harvey) and fumigation schedules against [four illegible words] fruit flies (Harvey). [Illegible] no further work is planned. Survey of Marketing opportunities in Pacific Rim countries (Moulton), the balance of the 1983 budget has been carried over to cover the final project billing.

INSPECTION

Shipping Point Inspection has provided the estimated costs for 1984-1985 shown below. Per-container inspection costs are up for all three stone fruits, most significant for nectarines and peaches where crops are expected to be smaller than last year.

	Actual 1983-1984	Estimated 1984-1985
Plums	.05928	.06150
Peaches	.05306	.06100
Nectarines	.04355	.05200

MARKET DEVELOPMENT

However improved the general economy, the 1984 deciduous marketing season is not likely to be an easy one. Hence, direct California Summer Fruits® promotional expenditures totaling nearly \$5 million are contemplated. The budgeted nectarine outlay is \$1,763,500, the plum \$1,436,500 and the peach \$1,115,000. Subcommittee evaluation of a trial budget for fresh pears totaling \$643,500 is scheduled for May 30.

The lion's share—currently some \$3.8 million—is earmarked for television, radio in Los Angeles, outdoor advertising commencing as regards the stone fruits on May [] and continuing for 18 weeks through September 23. Of logistical necessity, 18 weeks of national network radio, 6 to 18 weeks of national network television, 16 to 18 weeks of nationally syndicated television and 7 to 18 weeks of cable television have already been purchased. The radio networks to be employed are ABC, CBS, NBC, RKO II and [] newly organized United Stations. The network television line-up includes ABC's "Good Morning America" for 6 weeks, NBC's "Today Show" for 6 weeks and for 18 weeks, daily newsbreaks on CBS. The syndicated programs are two—"Hour Magazine" for 16 weeks an "Morning Stretch" for 18 weeks. The cable effort involves 18 weeks on "Weather [illegible]" and 7 weeks on "Fresh Ideas."

As well, depending on audience efficiency, spot television and spot radio schedules have been arranged in 27 top U.S. markets. In Los Angeles, where the Olympic Games have blasted summer television costs into orbit, the principal local effort will be a combination of spot radio and outdoor advertising. To the North, 9 weeks of cable television are planned in Toronto and 6 weeks of radio in Montreal and Vancouver.

Length of network radio messages will be 30 seconds, of spot radio advertisements [illegible] seconds of television commercials either 30 or 10 seconds. A study of the o[illegible] radio combination's effectiveness will be conducted in Los Angeles against the possibility of future outdoor activity in

Dallas, Houston, Chicago and similar markets [illegible] should also be noted, before turning to matters other than advertising, that California Summer Fruits® is now a registered CTFA trademark, as well as service mark.

Given the success of last season's retail advertising incentive program, "The Second Annual California Summer Fruits® No-Contest Contest" has been announced. The off[illegible] extended to all known key trade factors with retail advertising authority, again [illegible] down to this: the more you advertise California peaches, plums and nectarines, the more dominant those ads and the more stores those ads cover, the more awards you [illegible]. A similar program will also be tried for the first time in major Canadian markets.

As in '83, pushing the No-Contest Contest will be an important responsibility of the eleven-man California Summer Fruits® field staff. Other major field staff duties will include disseminating crop, handling, display and ripening information, merchandising the advertising campaign, promoting the California Fruit Ripening Bowl and distributing point-of-sale materials. A new 18-piece line of POS has been developed for 1984 and includes price cards in Spanish and French, tried with some success a year ago, and two new bin strips featuring the California Summer Fruits® trademark logo. Supervision of the field staff in all activities funded entirely by California will again be handled by the CTFA office.

Supervision of the food-page publicity and consumer education programs will also remain an "in-house"

business. The former activity will involve the release the some 60 different color and black-and-white stone fruit recipe-photo features to some 750 newspapers, along with continued efforts to secure exposure in consumer magazines. A highlight of the latter will be of introduction of a new 48-page, 4-color California Summer Fruits® cookbook.

As for trade educational activities, the California Summer Fruits® retail training presentation will continue to be offered. This presentation, some 550 of which have thus far been furnished trade executives with training responsibilities, consists of 80 individual 35mm color slides, pre-inserted in a standard carousel; a cassette tape incorporating on one side audible "beeps" for manual use, on the other inaudible "beeps" for automatic equipment; and a complete script keyed for manual use. Another noteworthy trade venture is the release of a new kit of retailer advertising aids consisting of 20 color transparencies, 10 repro sheets of original line art and 6 sheets of suggested ad headings in various type sizes and styles. Some trade advertising has also been arranged and a detailed advertising and promotion guide presented to key factors. Variety charts, now aimed expressly at retailers, are likewise being distributed.

On the foodservice front, a survey conducted last season indicated that opportunities exist where California Summer Fruits® can be sold unprepared or prepared as ordered and where menu listing is not a lead-time problem. Ways professionals in the field propose to exploit these have been evaluated and two professional consultants retained. At this point, plans include a concentrated test market effort and

accelerated distribution of existing quantity recipe cards and other materials.

RIPENING BOWL

A recap of ripening bowl sales through April 30, 1984, is attached. Since the bowl was developed the excess of income over expenses is \$279,764. While the bowl continues to be an effective promotion device, sales have steadily declined in recent years. A new full-color display carton has been developed and will be introduced this season in an attempt to rejuvenate sales.

ASSESSMENT RATES

The following per-lug assessment rates have been recommended: Plums, 17¢; Peaches, 14¢; Nectarines, 18¢; Pears have not yet met. These rates are designed to carry out the 1984-1985 programs and to provide enough money at the end of the fiscal year to finance 1985-1986 programs until assessments are forthcoming from that year. Approximately \$150,000 per commodity is needed as of March 1.

/s/ RICHARD L. PETERSON
RICHARD L. PETERSON
President
California Tree Fruit
Agreement
701 Fulton Avenue
Sacramento, CA 95825

May 25, 1985

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal Omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
WASHINGTON, D.C. 20250

To: Director, Fruit and Vegetable Division
From: William J. Doyle
Chief, Fruit Branch
Subject: M.O. 916 (CA Nectarines) and M.O. 917
(CA Pears, Plums, and Peaches) Ap-
proval of Market Development and Re-
search-1984-85 Season

We recommend that you sign this memo which approves market development and research for California nectarines, pears, plums and peaches for the 1984-85 fiscal period. The administrative committees met in May and June and recommended these expenditures. The following table shows proposed 1984-85 season budgeted expenditures for market development and research for the individual committees:

Committee	Market Development*	Research	TOTAL
Nectarine			
Administrative	\$ 1,823,500	\$ 44,891	\$ 1,868,391
Pear	703,500	15,000	718,500
Commodity			
Plum	1,496,500	43,142	1,539,642
Commodity			
Peach	1,175,000	43,517	1,218,517
Commodity			
<hr/>			
TOTAL	\$ 5,208,500	\$ 146,550	\$ 5,345,050

* Includes \$60,000 for fruit ripening bowl for each program

Total budgeted market development expenditures for 1984-85 are increased from last season due to an estimated five percent increase in the fruit crops this season. The following table compares this year's budgeted expenditures for market development with last year's actual expenditures.

FORM AMS-400 (6-81)

Commodity	Actual Expenditures 1983-84*	Budgeted Expenditures 1984-85*	Increase
Nectarines	\$1,461,223	\$1,823,500	\$362,277
Pear	478,750	703,500	224,750
Plums	1,194,174	1,496,500	302,326
Peaches	975,227	1,175,000	199,773
<hr/>			
TOTAL	\$ 4,109,374	\$ 5,198,500	\$ 1,089,126

* Includes \$60,000 for fruit ripening bowl for each program

The California Summer Fruits media campaign presently calls for up to 18 weeks of national network, cable, and syndicated television; 18 weeks of national network radio; and up to 13 weeks of spot television and radio in 28 U.S. markets and in Montreal, Toronto, and Vancouver. Outdoor advertising, such as billboards, has replaced magazine tie-ins in this year's budget. In Los Angeles, where the Olympic Games have increased summer television costs significantly, the primary promotion effort will consist of a combination of radio and outdoor advertising. The effectiveness of this approach will be analyzed. If it is successful, outdoor advertising may be used in Dallas, Houston, Chicago, and similar markets in the future. It should also be

noted that "California Summer Fruits" is now a registered trade mark.

The Oregon-Washington-California Pear Bureau field staff has again been retained to disseminate crop and handling information, merchandise the advertising campaign, distribute point-of-sale materials, and promote the California Summer Fruits ripening bowl.

The consumer publicity program will be directed by the CTFA staff and will include the release of 66 features and photographs to 750 metropolitan newspapers and 200 smaller periodicals. Efforts will continue to secure increased editorial exposure in six national consumer magazines. A new, full-color, 48-page cookbook will be released to retailers as well as packed inside ripening bowls.

The following table shows detailed market development expenditure items for the individual commodities for 1984:

Item	:Nectarines	:Pears	:Plums	:Peaches	:TOTAL
Field Staff					
Activities	:\$81,500	:\$60,000	:\$69,500	:\$53,000	:\$264,000
	:	:	:	:	:
Retail Advertising					
Incentives	: 85,000	: 35,000	: 80,000	: 75,000	: 275,000
	:	:	:	:	:

Trade Communications	:25,000	:35,000	:25,000	:25,000	:110,000
	:	:	:	:	:
POS					
Materials	:41,500	:21,500	:41,500	:30,000	:134,500
	:	:	:	:	:
Other Retail Activities	:10,000	:10,000	:10,000	:10,000	:40,000
	:	:	:	:	:
	:10,000	:10,000	:10,000	:10,000	:40,000
	:	:	:	:	:
Publicity, Education					
Activities	:35,000	:35,000	:35,000	:35,000	:140,000
	:	:	:	:	:
Foodservice					
Activities	:25,500	:17,000	:25,500	:17,000	: 85,000
	:	:	:	:	:
Outdoor Advertising	:50,000	:5,000	:50,000	:50,000	:155,000
	:	:	:	:	:
Television, Radio					
Production	:80,000	:50,000	:75,000	:60,000	:265,000
	:	:	:	:	:
Television Time	:705,000	:200,000	:555,000	:420,000	:1,880,000
	:	:	:	:	:
Radio Time	:605,000	:155,000	:450,000	:320,000	:1,530,000
	:	:	:	:	:
Promotional					
Research	: 7,500	: 7,500	: 7,500	: 7,500	: 30,000
	:	:	:	:	:

Miscellaneous

Activities : 12,500 : 12,500 : 12,500 : 12,500 : 50,000

TOTAL :1,763,500 :643,500 :1,436,500:1,115,000:4,958,500

Ripening

Bowl : 60,000 : 60,000 : 60,000: 60,000: 240,000

GRAND

TOTAL :\$1,823,500 :\$703,500:\$1,496,500:\$1,175,000 -
: \$5,198,500

Expenditures of 146,550 are allocated for nine research projects for nectarines, pears, plums, and peaches. Project outlines detailing cost allocation among commodities as well as total costs for all research projects are attached.

Recommended: JUL 3 1984 Approved: AUG 09 1984

/s/ WILLIAM J. DOYLE /s/ THOMAS R. CLARK
Chief, Fruit Branch Deputy Director
Fruit and Vegetable Fruit and Vegetable
Division Division

Federal Register

Vol. 49, No. 158

Tuesday, August 14, 1984

[p. 32,323]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 911, 915, 916, 917, 918, 921, 922, 923, 924, 925, 928, 945, 946, 947, 948, 953, 958, 967, 982, 985, and 993

Expenses and Assessment Rates for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule authorizes expenditures and establishes assessment rates under Marketing Orders 911, 915, 916, 917, 918, 921, 922, 923, 924, 945, 946, 947, 948, 953, 958, 967, 982, 985, and 993 for the 1984-85 fiscal year, under Marketing Order 925 for the 1983-84 fiscal year, Marketing Order 928 for the 1984 fiscal year. Funds to administer these programs are derived from assessments on handlers.

* * * * *

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under Secretary's Memorandum 1512-1 and Executive Order 12291 and has been

designated a "non-major" rule. William T. Manley, Deputy Administrator, Agricultural Marketing Service, has certified that these actions will not have a significant economic impact on a substantial number of small entities.

These marketing orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). These actions are based upon the recommendations and information submitted by each committee, established under the respective marketing orders, and upon other information.

Accordingly, the Secretary finds that upon good cause shown it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice, engage in other public procedures, and postpone the effective dates until 30 days after publication in the Federal Register (5 U.S.C. 553). Each order requires that the assessment rate for a particular fiscal year shall apply to all assessable commodities handled from the beginning of such year. To enable the committees to meet current fiscal obligations, approval of the expenses is necessary without delay. Handlers have been apprised of the provisions and effective dates specified in this final rule. It is found that the specified expenses and assessment rates will tend to effectuate the declared policy of the Act.

* * * * *

PART 916—NECTARINES GROWN IN CALIFORNIA

§ 916.223 Expenses and assessment rate.

Expenses of \$2,775,965 by the Nectarine Administrative Committee are authorized, and an assessment rate of \$0.18 per No. 22D standard lug box of nectarines is established for the fiscal year ending February 28, 1985.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

§ 917.238 Expenses and assessment rate.

Expenses of \$2,580,211 by the Plum Commodity Committee are authorized, and an assessment rate of \$0.17 per No. 22D standard lug box of plums is established for the fiscal year ending February 28, 1985.

§ 917.239 Expenses and assessment rate.

Expenses of \$2,190,086 by the Peach Commodity Committee are authorized, and an assessment rate of \$0.14 per No. 22D standard lug box of peaches is established for the fiscal year ending February 28, 1985.

* * * * *

[p. 32,324]

PART 918—FRESH PEACHES GROWN IN GEORGIA

§ 918.221 Expenses and assessment rate.

Expenses of \$20,888 by the Industry Committee are authorized, and an assessment of \$0.01 per bushel of peaches is established for the fiscal year ending February 28, 1985.

PART 921—FRESH PEACHES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

§ 921.223 Expenses and assessment rate.

Expenses of \$23,393 by the Washington Fresh Peach Marketing Committee are authorized, and an assessment rate of \$2.00 per ton of peaches is established for the fiscal year ending March 31, 1985. Unexpended funds may be carried over as a reserve.

* * * * *

Federal Register
Vol. 50, No. 2
Thursday, January 3, 1985

[p. 231]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 905, 907, 908, 912, 913, 917, 928, and 932

Expenses and Rates of Assessment for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation authorizes expenditures and establishes assessment rates under Marketing Orders 905, 907, 908, 912, 913, 917, 928, and 932. In addition, this regulation increases the 1984 fiscal year budget for California olives, and the 1984-85 budget for California plums. Funds to administer these programs are derived from assessments on handlers.

* * * * *

SUPPLEMENTARY INFORMATION: This rule has been reviewed under Secretary's Memorandum 1512-1 and Executive Order 12291 and has been designated a "non-major" rule. William T. Manley,

Acting Administrator, Agricultural Marketing Service, has certified that these actions will not have a significant economic impact on a substantial number of small entities because they would not measurably affect costs for the directly regulated handlers

These marketing orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). These actions are based upon recommendations and information submitted by each committee, established under the respective marketing orders, and upon other information. It is found that the expenses and rates of assessment, as hereinafter provided, will tend to effectuate the declared policy of the act.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice and engage in public rulemaking, and good cause exists for not postponing the effective dates until 30 days after publication in the Federal Register (5 U.S.C. 553). Each order requires that the rate of assessment for a particular fiscal period shall apply to all assessable commodities handled from the beginning of such period. To enable the committees to meet current fiscal obligations, approval of the expenses and rates of assessment is necessary without delay. It is necessary to effectuate the declared policy of the act to make these provisions effective as specified, and handlers have been apprised of such provisions and the effective dates.

* * * * *

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

§ 917.238 Expenses and Assessment rate.

Expenses of \$2,710,081 by the Plum Commodity Committee are authorized, and an assessment rate of \$0.17 per No. 22 D standard lug box of plums is authorized for the fiscal year ending February 28, 1985.

[August 27, 1986]

To: Director, Fruit and Vegetable Division

From: Acting Chief, Marketing Order
Administration Branch

Subject: M.O. 916 (CA Nectarines) and M.O. 917
(CA Pears, Plums, and Peaches)
Approval of Market Development and
Research - 1985-86 Season

We recommend that you sign this memo which approves market development and research for California nectarines, pears, plums and peaches for the 1985-86 fiscal period. The administrative committees met earlier this year to recommend these expenditures. The Peach Commodity Committee, the Nectarine Administrative Committee, and the Pear Commodity Committee recently submitted revisions which are reflected in the tables below.

The following table shows proposed 1985-86 season budgeted expenditures for market development and research for the individual committees:

<u>Committee</u>	<u>Market Development*</u>	<u>Research</u>	<u>TOTAL</u>
Nectarine			
Administrative	\$1,646,000	\$53,717	\$1,699,717
Pear Commodity	536,000	20,000	556,000
Plum Commodity	1,509,500	75,719	1,585,219
Peach Commodity	1,200,000	56,432	1,256,432
TOTAL	\$4,891,500	\$205,868	\$5,097,368

*Includes the following contributions toward the fruit ripening bowl: \$10,000 from each committee except for the plum committee which contributes \$60,000.

Total budgeted market development expenditures for 1985-86 are increased from last season due to an estimated five percent increase in the fruit crops this season. The following table compares this year's budgeted expenditures for market development with last year's actual expenditures.

<u>Commodity</u>	<u>Actual Expenditures 1984-85*</u>	<u>Budgeted Expenditures 1985-86*</u>	<u>Increase (Decrease) Base 84-85</u>
Nectarines	\$1,656,617	\$1,636,000	\$(20,617)
Pear	589,826	526,000	(63,826)
Plums	1,414,368	1,449,500	35,132
Peaches	1,085,621	1,190,000	104,379
TOTAL	\$4,746,432	\$4,801,500	\$ 55,068

* Excludes fruit ripening bowl expenditures.

The following table shows detailed market development expenditure items for the individual commodities for 1985-86:

Item	Nectarines	Pears	Peaches	Plums	TOTAL
Field Staff Activities	\$ 83,000	\$ 70,000	\$ 70,000	\$ 86,000	\$ 309,000
Retail Advertising					
Incentives	100,000	30,000	81,000	100,000	311,000
Trade Communications	38,000	39,000	38,000	35,000	150,000
Other Retail Activities	23,000	23,000	23,000	25,000	94,000
POS Materials	38,000	23,000	24,000	38,000	123,000
Foodservice Activities	38,000	25,000	25,000	40,500	128,500
Publicity, Education					
Activities	30,000	30,000	30,000	35,000	125,000
Television, Radio					
Production	137,000	54,000	137,000	90,000	418,000
Television Advertising	669,000	20,000	431,000	575,000	1,695,000
Radio Advertising	20,000	8,000	20,000	20,000	68,000
Promotional Research	16,000	16,000	16,000	17,500	65,500
Misc. Activities	15,000	12,000	13,000	12,500	52,500
TOTAL	1,636,000	526,000	1,190,000	1,449,500	4,801,500
Ripening Bowl	10,000	10,000	10,000	60,000	90,000
GRAND TOTAL	\$1,646,000	\$536,000	\$1,200,000	\$1,509,500	\$4,891,500

Expenditures of \$205,868 are allocated for fourteen research projects for nectarines, pears, plums and peaches. Project titles detailing cost allocation among commodities as well as total costs for all research projects are attached.

Recommended:

Approved: FEB 18, 1986

/s/ G. KELHART
Acting Chief, Marketing
Order Administration
Fruit and Vegetable
Division

/s/ THOMAS R. CLARK
Acting Director
Fruit and Vegetable
Division

Federal Register
Vol. 50, No. 134
Friday, July 12, 1985

[p. 28,373]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 911, 915, 916, 917, 918, 921, 922, 923, 924, 930, 967, and 985

Expenses and Assessment Rates for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule authorizes expenditures and establishes assessment rates under Marketing Orders 911, 915, 916, 917, 918, 921, 922, 923, 924, 930, 967 and 985 for the respective 1985-86 fiscal year for each order. Funds to administer these programs are derived from assessments on handlers.

* * * * *

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under Secretary's Memorandum 1512.-1 and Executive Order 12291 and has been designated a "non-major" rule. William T. Manley, Deputy Administrator, Agricultural Marketing Service, has certified that these actions will not have a

significant economic impact on a substantial number of small entities.

These marketing orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). These actions are based upon the recommendations and information submitted by each committee, established under the respective marketing orders, and upon other information.

Accordingly, the Secretary finds that upon good cause shown it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice, engage in other public procedures, and postpone the effective dates until 30 days after publication in the Federal Register (5 U.S.C. 553). Each order requires that the assessment rate for a particular fiscal year shall apply to all assessable commodities handled from the beginning of such year. To enable the committees to meet current fiscal obligations, approval of the expenses is necessary without delay. Handlers have been apprised of the provisions and effective dates specified in this final rule. It is found that the specified expenses and assessment rates will tend to effectuate the declared policy of the act.

* * * * *

PART 916—NECTARINES GROWN IN CALIFORNIA

§ 916.224 Expenses and assessment rate.

Expenses of \$2,687,576 by the Nectarine Administrative Committee are authorized, and an assessment rate of \$0.14 per No. 22D standard lug box of nectarines is established for the fiscal year ending February 28, 1986. Unexpended funds from the 1984-85 fiscal year may be carried over as a reserve.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

§ 917.241 Expenses and assessment rate.

Expenses of \$2,651,280 by the Plum Commodity Committee are authorized, and an assessment rate of \$0.18 per No. 22D standard lug box of plums is established for the fiscal year ending February 28, 1986. Unexpended funds from the 1984-85 fiscal year may be carried over as a reserve.

§ 917.242 Expenses and assessment rate.

Expenses of \$2,346,443 by the Peach Commodity Committee are authorized, and an assessment rate of \$0.14 per No. 22D standard lug box of peaches is established for the fiscal year ending February 28, 1986.

PART 918—FRESH PEACHES GROWN IN GEORGIA

§ 918.222 Expenses and assessment rate.

Expenses of \$11,610 by the Industry Committee are authorized, and an assessment of \$0.01 per bushel of peaches is established for the fiscal year ending February 28, 1986.

PART 921—FRESH PEACHES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

§ 921.224 Expenses and assessment rate.

Expenses of \$21,556 by the Washington Fresh Peach Marketing Committee are authorized, and an assessment rate of \$1.50 per ton of peaches is established for the fiscal year ending March 31, 1986. Unexpended funds from the 1984-85 fiscal year may be carried over as a reserve.

* * * * *

Federal Register
Vol. 51, No. 50
Friday, March 14, 1986

[p. 8789]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 905, 907, 908, 912, 913, 916, 917, 928, and 932

Expenses and Rates of Assessments for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation authorizes expenditures and establishes assessment rates under Marketing Orders 905, 907, 908, 912, 913, 928, and 932. In addition, this regulation increases the 1985-86 budget under M.O.'s 916 (California nectarines) and 917 (applicable to California pears). Funds to administer these programs are derived from assessments on handlers.

* * * * *

SUPPLEMENTARY INFORMATION: This rule has been reviewed under Secretary's Memorandum 1512-1 and Executive Order 12291 and has been designated a "non-major" rule. The Administrator, Agricultural

Marketing Service, has certified that these actions will not have a significant economic impact on a substantial number of small entities.

These marketing orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). These actions are based upon recommendations and information submitted by each committee, established under the respective marketing orders, and upon other information. It is found that the expenses and rates of assessment, as hereinafter provided, will tend to effectuate the declared policy of the act.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice and engage in public rulemaking, and good cause exists for not postponing the effective dates until 30 days after publication in the Federal Register (5 U.S.C. 553). Each order requires that the rate of assessment for a particular fiscal period shall apply to all assessable commodities handled from the beginning of such period. To enable the committees to meet current fiscal obligations, approval of the expenses and rates of assessment is necessary without delay. It is necessary to effectuate the declared policy of the act to make these provisions effective as specified, and handlers have been apprised of such provisions and the effective dates.

[p. 8790]

* * * * *

PART 916—NECTARINES GROWN IN CALIFORNIA

§ 916.24 [Amended]

Section 916.224 is amended by changing \$2,687,576 to \$2,701,668.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

§ 917.243 [Amended]

Section 917.243 is amended by changing \$669,504 to \$672,504.

* * * * *

[Aug. 27, 1986]

To: David B. Fitz, OIC
Fresno Marketing Field Office

From: Deputy Director /s/ Thomas R. Clark
Fruit and Vegetable Division

Subject: Approval of Research and Market
Development Projects for California
Nectarines, M.O. 916, and California
Peaches, Pears, and Plums, M.O. 917

Please notify the chairman of each respective committee under the California Tree Fruit Agreement that the Department approves the various research and market development projects as noted on the attached lists.

Cost of the various projects is expected to total \$3,949,055. Adequate funds are included in the respective committees' proposed 1986 season budgets.

Attachment

Ams:F&V:Moab:JBrown:mfr:8/6/86
Dk-a Fitz.Bro

Federal Register
Vol. 51, No. 201
Friday, October 17, 1986

[p. 36,997]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916, 917, 919, 920, 926, 930, 932, 948, 958, 981 and 993

Authorization of Expenses and Assessment Rates for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule authorizes expenditures and establishes assessment rates under Marketing Orders 916, 917, 919, 920, 926, 930, 948, 958, 981, and 993 for the respective 1986-87 fiscal year for each order. Marketing Orders 916 and 932 expenses are amended for the 1985-86 fiscal year. Funds to administer these programs are derived from assessments on handlers.

* * * * *

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under Executive Order 12291 and Department Regulation 1512-1 and has been

determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

It is estimated that approximately 275 handlers of California nectarines, 608 handlers of California pears, plums, and peaches, 32 handlers of Colorado peaches, 76 handlers of California kiwifruit, 14 handlers of California Tokay grapes, 70 handlers of Michigan and other states cherries, 7 handlers of California olives, 72 handlers of Colorado Area II potatoes, 23 handlers of Idaho-Oregon onions, 70 handlers of California almonds, and 16 handlers of California dried prunes, will be subject to regulation during the course of the current season and that the great majority of these firms may be classified as small entities.

Accordingly, the Secretary finds that upon good cause shown it is impracticable, unnecessary, and contrary to the public interest to give preliminary

notice, engage in other public procedures, and postpone the effective dates until 30 days after publication in the Federal Register (5 U.S.C. 553). Each order requires that the assessment rate for a particular fiscal year shall apply to all assessable commodities handled from the beginning of such year. To enable the committees to meet current fiscal obligations, approval of the expenses is necessary without delay. Handlers have been apprised of the provisions and effective dates specified in this final rule. It is found that the specified expenses and assessment rates will tend to effectuate the declared policy of the act.

* * * * *

PART 916—NECTARINES GROWN IN CALIFORNIA

§ 916.224 [Amended]

Section 916.224 is amended by changing \$2,701,668 to \$2,707,093.

§ 916.225 Expenses and assessment rate.

Expenses of \$2,583,897 by the Nectarine Administrative Committee are authorized, and an assessment rate of \$0.16 per No. 22D standard lug box of nectarines is established for the fiscal year ending February 28, 1987. Unexpended funds from the 1985-86 fiscal year may be carried over as a reserve.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

§ 917.244 Expenses and assessment rate.

Expenses of \$1,704,964 by the Plum Commodity Committee are authorized, and an assessment rate of \$0.19 per No. 22D standard lug box of plums is established for the fiscal year ending February 28, 1987. Unexpended funds from the 1985-86 fiscal year may be carried over as a reserve.

§ 917.245 Expenses and assessment rate.

Expenses of \$2,173,062 by the Peach Commodity Committee are authorized and an assessment rate of \$0.16 per No. 22D standard lug box of peaches is established for the fiscal year ending February 28, 1987. Unexpended funds from the 1985-86 fiscal year may be carried over as a reserve.

* * * * *

PART 919—PEACHES GROWN IN MESA COUNTY, COLORADO

§ 919.225 Expenses and assessment rate.

Expenses of \$1,000 by the Administrative Committee are authorized, and an assessment rate of \$0.01 per bushel of peaches is [p. 36,998] established for the fiscal year ending June 30, 1987.

* * * * *

Federal Register
Vol. 52, No. 38
Thursday, February 26, 1987

[p. 5737]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 917, 932, 959, 971, and 979

Expenses and Assessment Rates for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule authorizes expenditures and establishes assessment rates under Marketing Order 932 for the 1987 fiscal year, and for Marketing Orders 959, 971 and 979 for the respective 1986-87 fiscal year for each order. Marketing Order 917 expenses are increased for the 1986-87 fiscal year. Funds to administer these programs are derived from assessments on handlers.

* * * * *

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (the Act, 7 U.S.C. 601-674), and rules promulgated thereunder, are unique in that they are brought about through group action of essentially small entities on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are an estimated 608 handlers of California pears, plums, and peaches, 7 handlers of California olives, 40 handlers of Texas onions, 4 handlers of Texas lettuce, and 35 handlers of Texas melons who will be subject to regulation under these marketing orders during the course of the respective season for each specified commodity. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual gross revenues for the last three years of less than \$100,000, and agricultural services firms are defined as those whose gross annual receipts are less than \$3,500,000. The majority of handlers are believed to be classified as small entities.

Pursuant to the requirements set forth in the RFA, the Administrator of the Agricultural Marketing Service has considered the economic impact on small entities. Each marketing order requires that the assessment rate for a particular fiscal year shall apply to all assessable commodities handled from the beginning of such year. An annual budget of expenses is prepared by each administrative committee and submitted to the Department of Agriculture for approval. The members of administrative committees are handlers and producers of the regulated commodities. This is appropriate because they are familiar with the committees' needs and with the costs for goods, services and personnel in their local area and are thus in a position to formulate an appropriate budget. The budgets are formulated and discussed in public meetings, thus all directly affected persons have an opportunity to participate and provide input.

The assessment rate recommended by each committee is a derived figure. It is merely applying a rate per unit of the commodity (e.g. per pound, ton box, carton, etc.), to the estimated production in order to produce income sufficient to pay the committees' expected expenses. Recommended budgets and rates of assessment are usually acted upon by the committees shortly before a season starts and expenses are incurred on a continuous basis, therefore budget and assessment rate approval must be expedited in order that the committee will have funds to pay their expenses.

While this action may impose some additional costs on handlers, including small entities, the costs are in the form of uniform assessments on all handlers

which do not impose significant economic impact on the small entities involved.

Based on the foregoing, the Secretary finds that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and to engage in public rulemaking procedure with respect to this action and that good cause exists for not postponing the effect date of this action until 30 days after publication in the Federal Register (5 U.S.C. 553). It is found that the specified expenses and assessment rates will tend to effectuate the declared policy of the Act.

* * * * *

PART 917—FRESH PEARS, PLUMS AND PEACHES GROWN IN CALIFORNIA

§ 917.244 [Amended]

Section 917.244 is amended by changing \$1,704,964 to \$1,799,926.

* * * * *

[June 10, 1987]

To: David B. Fitz, OIC
California Marketing Field Office

From: Acting Director /s/ Charles R. Broder
Fruit and Vegetable Division

Subject: Approval of Research, Market
Development, and Promotion Projects
for California Nectarines, M.O. 916, and
California Peaches, Pears, and Plums,
M.O. 917

Please notify the chairman of the nectarine, peach, and plum committees under the California Tree Fruit Agreement that the Department approves the subject projects as noted on the attached lists.

Cost of the various projects is expected to total \$4,329,212. Adequate funds are included in the respective committees' proposed 1987-88 season budgets.

Attachment

1987 RESEARCH PROJECTS

Project	Plum	Peach	Nect	Total
<u>University of California</u>				
Evaluation of Physiological Efficiency of Fruit Trees in Different Orchard Systems (DeJong)	4,733	4,734	4,733	14,200
Water Management for Maximum Fruit Size (Johnson)	2,000	2,000	2,000	6,000
Internal Breakdown of Stone Fruits (Kader)	5,344	5,344	5,344	16,032
Extending the Market Life of StoneFruits (Mitchell)	6,434	6,433	6,433	19,300
Pre- and Postharvest Decay of Fresh Market Peaches, Plums and Nectarines (Ogawa)	5,000	5,000	5,000	15,000
Nectarines for Export (Ogawa)			7,500	7,500
Evaluation of Mating Disruption for Codling Moth, Omnivorous Leafroller and Peach Twig Borer (Rice)	5,504	5,503	5,503	16,510

Plum Fruit Size Analysis:
Categorize Plums by Height,
Weight and Diameter
(Yoshikawa)

9,900 9,900

Plum 2-pound Subsample:
Mathematical Analysis of
Available Data (Thompson)

3,500 3,500

Other

Plum 2-pound Subsample:
Analysis of Fruit in Packed
Boxes (Hanley)

9,000 9,000

Africanized Bee Research
(California Department of
Food and Agriculture)

1,500 1,500

U. S. Department of Agriculture

Methyl Bromide as a
Quarantine Treatment for
Postharvest Control of Codling
Moth in Nectarines (Harvey)

11,400 11,400

Genotypic Variation in
Postharvest Behavior and
Quality of Stone Fruits
(Ramming)

1,733 1,733 1,734 5,200

Genetic Improvement of Stone
Fruit Rootstocks for Resistance
to Nematodes (Ramming)

4,333 4,334 4,333 13,000

Evaluation of Stone Fruit
Advanced Selection and New
Cultivars (Ramming)

1,167 1,166 1,167 3,500

Resistance to Stone Fruit
Cultivars to Attack by Codling
Moth and Oriental Fruit Moth
(Yokoyama)

1,666 1,667 1,667 5,000

Lethal Effects of Methyl
Bromide (MB) on Codling Moth
(CM) Embryos and Mass Rearing
of CM for Large-Scale MB
Fumigation Confirmatory
Tests on Nectarines (Yokoyama)

— — 5,400 5,400

Total 61,814 37,914 62,214 161,942

5/6/87

Federal Register
Vol. 52, No. 161
Thursday, August 20, 1987

[p. 31,375]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916, 917, 921, 923, 924, 931, 945, 946, 947, and 948

Expenses and Assessment Rates for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule authorizes expenditures and establishes assessment rates under Marketing Orders 916, 917, 921, 923, 924, 931, 945, 946, 947, and 948 for the 1987-88 fiscal period established for each order, and amends the 1986-87 fiscal period budget for Marketing Order 948. Funds to administer these programs are derived from assessments on handlers.

* * * * *

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been

determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has considered the economic impact on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (the Act, 7 U.S.C. 601-674), and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are an estimated 649 handlers of California nectarines, plums, and peaches, 43 handlers of California pears, 84 handlers of Washington peaches, 68 handlers of Washington cherries, 41 handlers of Washington-Oregon prunes, 78 handlers of Oregon-Washington Bartlett pears, 71 handlers of Idaho-Oregon potatoes, 60 handlers of Washington potatoes, 42 handlers of Oregon-California potatoes, and 72 handlers of Colorado Area 2 potatoes who will be subject to regulation under these marketing orders during the course of the respective season for each specified commodity. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual gross revenues for the last 3 years of less than \$100,000, and agricultural

services firms, which include handlers, are defined as those whose gross annual receipts are less than \$3,500,000. The majority of the handlers may be classified as small entities.

Each marketing order requires that the assessment rate for a particular fiscal period shall apply to all assessable commodities handled from the beginning of such year. An annual budget of expenses is prepared by each administrative committee and submitted to the Department of Agriculture for approval. The members of administrative committees are handlers and producers of the regulated commodities. This is appropriate because they are familiar with the committees' needs and with the costs for goods, services, and personnel in their local areas and are thus in a position to formulate appropriate budgets. The budgets are formulated and discussed in public meetings; thus all directly affected persons have an opportunity to participate and provide input.

While this action may impose some additional costs on handlers, including small entities, the costs are in the form of uniform assessments on all handlers which do not impose a significant economic impact on the small entities involved.

Based on available information, the Administrator of the Agricultural Marketing Service has determined that the issuance of this final rule will not have a significant economic impact on a substantial number of small entities.

The assessment rate recommended by each committee is derived by dividing anticipated expenses by

expected shipments of the commodity (e.g. pounds, tons, boxes, cartons, etc.). That rate is applied to actual shipments to produce income sufficient to pay the committees' expected expenses. Recommended budgets and rates of assessment are usually acted upon by the committees shortly before a season starts and expenses are incurred on a continuous basis. Therefore, budget and assessment rate approvals must be expedited in order that the committees will have funds to pay their expenses.

Based on the foregoing, the Secretary finds that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and to engage in public rulemaking procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the Federal Register (5 U.S.C. 553). It is found that the specified expenses and assessment rates will tend to effectuate the declared policy of the Act.

* * * * *

PART 916—NECTARINES GROWN IN CALIFORNIA

§ 916.226 Expenses and assessment rate.

Expenses of \$2,844,417 by the Nectarine Administrative Committee are authorized, and an assessment rate of \$0.16 per No. 22D standard lug box of assessable nectarines is established for the fiscal period ending February 29, 1988. Unexpended funds may be carried over as a reserve.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

§ 917.247 Expenses and assessment rate.

Expenses of \$3,036,485 by the Plum Commodity Committee are authorized, [p. 31,376] and an assessment rate of \$0.19 per No. 22D standard lug box of assessable plums is established for the fiscal period ending February 29, 1988. Unexpended funds may be carried over as a reserve.

§ 917.248 Expenses and assessment rate.

Expenses of \$2,401,435 by the Peach Commodity Committee are authorized, and an assessment rate of \$0.16 per No. 22D standard lug box of assessable peaches is established for the fiscal period ending February 29, 1988. Unexpended funds may be carried over as a reserve.

§ 917.249 Expenses and assessment rate.

Expenses of \$899,551 by the Pear Commodity Committee are authorized, and an assessment rate of \$0.20 per No. 29B special lug box of assessable pears is established for the fiscal period ending February 29, 1988. Unexpended funds may be carried over as a reserve.

PART 921—FRESH PEACHES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

§ 921.226 Expenses and assessment rate.

Expenses of \$25,136 by the Washington Fresh Peach Marketing Committee are authorized, and an assessment rate of \$2.00 per ton of assessable peaches is established for the fiscal period ending March 31, 1988. Unexpended funds may be carried over as a reserve.

* * * * *

Fresh California
Summer Fruits®

14c

California Tree Fruit Agreement
Pears Plums Peaches Nectarines

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TABLE 13
U. S. PRODUCTION OF FREESTONE PEACHES BY STATE, MILLION POUNDS

State	1981	1982	1983	1984	1985	1986	1987
Alabama	22.0	15.0	14.0	22.0	1.5	6.0	10.0
Arkansas	37.0	18.0	21.0	23.0	5.0	9.5	1.4
California	434.0	415.0	435.0	457.0	486.0	495.0	511.0
Colorado	20.0	11.0	10.0	12.0	15.0	6.7	19.0
Connecticut	0.3	2.4	2.6	2.7	3.0	2.6	2.7
Delaware	1.6	1.7	2.0	2.0	1.2	2.7	0.9
Georgia	140.0	120.0	100.0	150.0	90.0	105.0	100.0
Idaho	12.0	7.0	11.0	7.5	11.0	11.0	11.3
Illinois	22.0	*	13.0	16.0	*	21.0	20.0
Indiana	7.0	*	5.5	0.7	*	4.0	7.5
Kansas	6.5	1.8	5.0	2.5	3.5	5.0	2.5
Kentucky	16.0	*	6.0	3.0	*	2.0	9.0
Louisiana	6.0	5.0	6.0	7.0	6.5	0.2	0.6
Maryland	17.0	17.0	22.0	19.0	1.0	20.0	11.0
Massachusetts	0.2	1.5	1.7	1.9	2.1	1.9	2.0
Michigan	35.0	50.0	35.0	45.0	55.0	50.0	60.0
Mississippi	3.0	4.0	4.0	5.0	2.5	0.3	0.5
Missouri	15.0	4.5	12.0	15.0	*	12.0	13.0
New Jersey	90.0	80.0	105.0	50.0	95.0	105.0	80.0
New York	9.0	14.5	17.0	11.0	14.5	14.0	14.3
North Carolina	40.0	2.0	12.0	43.0	2.0	25.0	25.0
Ohio	2.0	0.7	7.0	*	*	2.5	9.0
Oklahoma	13.0	7.5	7.5	9.0	8.0	5.5	5.0
Oregon	13.0	13.0	14.0	14.0	15.5	13.0	15.0
Pennsylvania	65.0	90.0	94.0	85.0	40.0	100.0	85.0
South Carolina	430.0	210.0	95.0	480.0	230.0	260.0	350.0
Tennessee	10.0	1.5	4.0	10.0	*	4.0	2.6
Texas	34.0	16.0	27.0	23.0	30.0	10.0	6.0
Utah	12.0	3.5	12.0	12.0	11.0	10.5	10.5
Virginia	30.0	27.0	24.0	34.0	2.0	28.0	27.0
Washington	20.0	27.0	29.0	38.0	31.0	40.0	43.0
West Virginia	18.0	17.0	19.0	17.0	*	23.0	17.0
Total U.S. Freestone	1,580.6	1,183.6	1,172.3	1,617.3	1,162.3	1,395.4	1,471.8
Clingstone (California)	1,202.0	1,102.0	683.0	1,042.0	985.0	933.0	957.0
Total U.S. Peaches	2,782.6	2,285.6	1,855.3	2,659.3	2,147.3	2,328.4	2,428.8

*No significant commercial production due to frost.
Source: Agricultural Statistics Board, NASS, USDA

TABLE 14
INITIAL SHIPMENT DATES OF PEACHES BY VARIETY

<u>Variety</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>
Desertgold	4/20	4/26	4/11	4/13	4/22	4/15	4/11	4/23	4/7	4/20
Morning Sun				5/19	5/20	5/11	5/7	5/9	4/24	5/7
Prima Fire			5/28	5/25	5/25	5/23	5/19	5/21	4/28	5/7
May Crest	5/20	5/18	5/18	5/11	5/18	5/14	5/11	5/13	4/26	5/9
Ray Crest							5/15	5/14	4/29	5/11
Springgold	5/8	5/11	5/9	5/12	5/17	5/11	5/5	5/13	4/25	5/11
Springcrest	5/13	5/18	5/16	5/13	5/19	5/14	5/10	5/14	4/26	5/12
50-178			5/22		5/20	5/16	5/11	5/14	5/1	5/14
Spring Lady		6/1	5/30	5/30	5/28	5/20	5/18	5/20	5/3	5/16
Flavor Red			6/4	5/24	5/24	5/20	5/15	5/15	5/7	5/19
Golden Crest						6/2	5/29	5/21	5/13	5/22
Willie Red					6/7	6/2	5/25	5/31	5/19	5/25
Kern Sun						5/24	5/23	5/25	5/14	5/28
June Crest					6/7	5/31	5/24	5/29	5/16	5/28
Golden Lady		6/11	6/5	5/31	5/28	5/24	5/26	5/28	5/20	5/29
Royal May	5/26	5/29	5/26	5/25	6/3	5/28	5/22	5/28	5/16	5/29
Early Coronet	5/18	5/25	5/22	5/24	5/28	5/23	5/21	5/27	5/16	5/30
Merrill Gemfree	5/31	6/3	6/2	5/31	6/4	5/29	5/25	5/30	5/16	5/30
May Lady	5/27	5/28	5/30	5/29	6/4	6/1	5/25	5/31	5/17	6/1
First Lady	6/6	6/6	6/6	5/31	6/7	6/1	5/28	5/31	5/16	6/2
June Lady	6/5	6/7	6/6	6/5	6/11	6/3	5/30	6/3	5/17	6/2
Merrill Gem	6/2	6/9	6/12	5/31	6/10	6/7	6/5	6/6	5/22	6/3
Babcock, all types	5/29	6/4	6/3	5/31	6/5	5/31	5/28	5/29	5/19	6/5
Honey Red					6/7	6/1	5/30	6/3	5/19	6/5
Flavorcrest	6/7	6/11	6/6	6/4	6/12	6/4	6/2	6/4	5/24	6/8
Coronet	6/3	6/12	6/12	6/8	6/14	6/6	6/4	6/5	5/28	6/9
Regina	6/12	6/13	6/12	6/10	6/15	6/4	6/2	6/7	5/24	6/10
Redtop	6/12	6/20	6/17	6/17	6/19	6/20	6/14	6/17	5/30	6/16
Redhaven	6/12	6/16	6/14	6/9	6/14	6/20	6/18	6/26	6/10	6/21
Red Lady	6/28	7/5	6/25	7/1	7/2	6/29	6/27	7/4	6/16	6/23
Scarlet Lady	6/24	7/3	6/28	6/30	7/1	6/30	6/26	6/29	6/16	6/25
Flamecrest	7/5	7/7	7/3	7/6	7/1	7/5	6/28	7/2	6/16	6/28
Suncrest	6/29	7/3	6/28	6/30	7/1	6/30	6/30	7/1	6/16	6/29
Elegant Lady	7/19	7/17	7/4	7/7	7/8	7/7	6/28	7/2	6/21	7/1
Redglobe	6/23	6/29	6/26	6/29	7/6	7/4	6/26	7/4	6/21	7/2

July Lady	7/8	7/9	7/9	7/10	7/13	6/30	7/4	6/26	6/26	7/6
Cassie			8/3	7/23	7/9	7/13	7/4	7/8	6/17	7/7
Fay Elberta	7/11	7/13	7/16	7/19	7/20	7/19	7/12	7/17	7/4	7/7
Early O'Henry	7/15	7/17	7/18	7/22	7/19	7/18	7/14	7/18	7/5	7/8
Franciscan	7/10	7/11	7/10	7/15	7/9	7/11	7/9	7/13	7/2	7/8
Fortyniner	7/10	7/12	7/15	7/15	7/14	7/12	7/10	7/17	7/2	7/10
Fayette	7/13	7/13	7/14	7/17	7/20	7/18	7/9	7/18	7/2	7/10
Preuss Suncrest	7/11	7/17	7/9	7/15	7/12	7/9	7/11	7/13	7/5	7/10
Angelus	7/12	7/14	7/14	7/20	7/16	7/11	7/11	7/17	7/1	7/11
Berenda Sun						7/16	7/8	7/12	7/3	7/11
July Sun					7/13	7/11	7/3	7/9	6/25	7/13
Fire Red	7/22	7/25	7/21	7/22	7/19	7/20	7/10	7/17	7/4	7/13
Pacifica	7/15	7/19	7/16	7/20	7/20	7/18	7/17	7/22	7/5	7/14
Sparkle	7/17	7/21	7/20	7/24	7/21	7/14	7/14	7/18	7/3	7/15
Elberta	7/15	7/17	7/19	7/21	7/19	7/18	7/12	7/19	7/4	7/16
Red Cal	7/27	7/31	7/31	7/29	7/28	7/28	7/21	7/25	7/12	7/23
O'Henry	7/25	7/27	7/25	7/27	7/28	7/22	7/17	7/18	7/5	7/26
Lacey			9/10	8/14	8/18	8/6	8/8	8/6	7/25	7/27
August Sun					8/15	8/9	8/6	8/12	7/30	7/31
Cal Red	7/24	7/30	7/28	7/30	7/23	7/23	7/23	7/30	7/21	8/3
Ryan Sun						8/9	8/13	8/14	7/24	8/5
Toreador	8/4	8/4	8/8	8/11	8/23	8/18	8/13	8/15	7/29	8/6
Kings Lady				8/27	8/16	8/12	8/14	8/17	7/31	8/9
Parade	8/5	8/9	8/15	8/16	8/14	8/10	8/10	8/17	8/2	8/9
Sun Lady	8/19	8/13	8/20	8/31	8/18	8/17	8/18	8/19	7/29	8/11
Fairtime	8/18	8/20	8/25	8/26	8/26	8/16	8/20	8/23	8/9	8/12
Mary Ann									8/15	8/16
Carnival	8/30	8/27	8/25	9/2	8/31	8/27	9/1	8/30	8/18	8/18
Belmont (Fairmont)	9/2	8/24	9/5	8/30	9/4	8/27	8/28	8/30	8/13	8/24
Autumn Gem	9/15	9/10	9/16	9/10	9/14	9/9	9/4	9/4	8/29	9/1
Autumn Lady				9/25	10/5	9/15	9/14	9/17	9/5	9/11
Autumn Crest								10/12	10/2	9/11
Blum's Beauty			9/24	10/6	9/24	9/23	9/7	9/14	9/13	9/14
Sprague Last Chance								9/28	9/8	9/16

TABLE 13
INITIAL SHIPMENT DATES OF PLUMS BY VARIETY

<u>Variety</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>
Red Beaut	5/15	5/23	5/21	5/18	5/25	5/21	5/14	5/17	4/30	5/13
Rich Red					5/28	5/20	5/18	5/20	5/5	5/18
Durado	5/22	5/29	5/22	5/20	5/29	5/26	5/17	5/21	5/2	5/19
Spring Beaut			5/30	5/20	5/28	5/25	5/18	5/21	5/3	5/19
Ambra	5/28	6/6	6/5	5/29	6/4	6/6	5/24	6/1	5/19	5/25
Royal Red	6/5	6/5	6/1	6/1	6/2	6/4	5/29	5/30	5/15	5/28
Santa Rosa	6/8	6/12	6/10	6/4	6/11	6/10	6/6	6/7	5/24	6/1
Gar-Rosa	6/12	6/11	6/7	6/8	6/11	6/7	6/6	6/5	5/27	6/1
Royal Garnet							6/8	6/7	5/19	6/2
Black Beaut	6/8	6/9	6/9	6/5	6/14	6/7	6/5	6/4	5/17	6/2
Prima Black								6/7	5/21	6/10
July Santa Rosa	6/16	6/21	6/17	6/16	6/20	6/22	6/9	6/20	6/2	6/10
Rosa Ann	6/20	6/23	6/17	6/16	6/22	6/20	6/17	6/20	6/5	6/10
Frontier	6/16	6/20	6/14	6/17	6/23	6/21	6/16	6/24	5/29	6/14
Rose Ann	6/19	6/25	6/30	6/23	6/23	6/23	6/15	6/18	6/9	6/17
Ebony	6/21	6/22	6/19	6/22	6/29	6/28	6/14	6/24	6/10	6/17
Wickson	6/21	6/22	6/26	6/21	6/30	6/27	6/21	6/24	6/10	6/18
Blackamber			6/27	6/22	7/3	6/26	6/20	6/20	6/6	6/18
Queen Rosa	6/21	6/22	6/19	6/19	6/28	6/24	6/19	6/25	6/7	6/18
Carolyn Harris					7/5	7/1	6/26	7/6	6/10	6/19
El Dorado	6/27	6/28	6/24	6/22	6/30	6/26	6/25	6/28	6/11	6/22
Redroy	6/29	6/30	6/28	6/25	7/5	7/5	6/26	6/27	6/13	6/24
Catalina			7/10	7/1	7/7	7/7	6/27	7/5	6/17	6/27
Laroda	6/28	7/2	6/26	6/30	7/6	7/5	7/2	7/2	6/13	6/29
Black Gold			7/25	7/20	7/12	7/5	7/4	7/10	6/11	6/30
Simka	7/6	7/4	7/5	7/7	7/7	7/5	7/4	7/5	6/19	6/30
Early Hawaiian Ann	7/7	7/8	7/6	7/8	7/9	7/8	7/11	7/10	6/19	6/30
Mariposa	6/27	7/2	6/30	6/23	7/2	7/1	6/30	7/2	6/13	7/2
Nubiana	7/3	6/30	7/1	7/2	7/5	7/5	7/3	7/5	6/17	7/2
Midsummer	7/20	7/24	7/15	7/22	7/17	7/14	7/17	7/16	6/27	7/4

Queen Ann	7/4	7/5	7/2	7/6	7/6	7/5	6/28	7/6	6/17	7/4
Late Santa Rosa	7/1	7/2	7/1	6/30	7/2	7/1	7/3	6/27	6/18	7/5
Red Rosa	6/30	7/5	6/30	6/29	7/7	7/6	7/6	7/12	6/18	7/7
Friar	7/12	7/14	7/11	7/13	7/13	7/15	7/11	7/6	6/24	7/7
Black Diamond				7/20	7/16	7/6	7/7	7/13	6/23	7/8
King's Black	7/22	7/18	7/12	7/16	7/15	7/14	7/14	7/18	6/26	7/8
July Red				6/26	7/3	6/27	6/27	7/3	6/13	7/10
Grand Rosa	7/6	7/9	7/8	7/9	7/8	7/7	7/11	7/11	6/25	7/10
Kelsey	7/13	7/16	7/15	7/14	7/17	7/14	7/14	7/17	6/30	7/11
French (d'Agen) Prune								8/10	7/15	7/16
Casselman	7/25	7/27	7/23	8/4	7/26	7/26	7/27	7/30	7/16	7/17
Black Knight	8/2	8/6	8/1	8/11	7/27	7/29	8/4	8/5	7/14	7/19
Empress	8/1	8/2	8/6	8/6	8/5	7/28	8/4	7/30	7/18	7/19
Andys Pride	7/19	7/14	7/18	7/24	7/26	7/26	7/23	7/25	7/8	7/20
Black Giant		7/13		7/11	7/7	7/12	7/12		7/1	7/22
Freedom	7/31	8/1	8/1	7/30	8/2	7/28	7/27	7/31	7/16	7/22
Royal Diamond									7/30	7/24
Rosemary	8/16	8/10	8/7	8/3	7/27	8/2	8/3	8/3	7/12	7/24
President	7/26	7/30	7/31	8/1	8/3	7/30	7/30	8/1	7/24	7/27
Shayna	8/15	8/9	8/14	8/10	8/4	8/3	8/15	8/17	7/22	7/28
Angee		8/10	8/18	8/10	8/9	8/9	8/13	8/12	7/30	7/29
Standard	7/29	7/31	8/7	8/2	8/4	8/1	8/3	8/3	7/23	7/30
Linda Rosa	7/31	8/1	8/5	8/14	8/3	8/2	8/16	8/13	7/30	7/31
Autumn Rosa	8/11	8/11	8/7	8/19	8/11	8/5	8/8	8/22	7/23	8/1
Sharron's Plum									7/26	8/4
Moyer Prune								9/3	8/13	8/5
King David	8/19	8/15	8/19	8/19	8/16	8/11	8/21	8/22	8/4	8/12
Black Ace								8/30	8/12	8/16
King Richard					9/8	8/27	8/31	8/27	8/14	8/17
Angeleno	9/2	8/30	8/29	9/1	8/24	8/21	8/28	8/24	8/7	8/18
Roysum	9/8	9/4	9/10	9/15	9/16	9/3	9/7	9/9	9/3	9/4

TABLE 13
INITIAL SHIPMENT DATES OF NECTARINES BY VARIETY

Variety	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Maybelle (Coachella)				4/28	4/27	4/23	4/18	4/26	4/16	4/25
Mayfire									4/24	5/6
Maybelle (San Joaquin)	5/19	5/19	5/12	5/11	5/15	5/11	5/11	5/13	4/25	5/11
May Glo							5/22	5/20	5/2	5/12
Aurelio Grand	5/20	5/21	5/21	5/22	5/25	5/23	5/15	5/18	5/5	5/12
Royal Delight	5/23	5/24	5/22	5/22	5/25	5/21	5/14	5/16	5/3	5/14
Early Diamond								5/26	5/9	5/15
Apache	5/22	5/29	5/28	5/26	5/31	5/24	5/18	5/23	5/8	5/19
Grand Stan			6/3	6/1	6/2	5/26	5/18	5/22	5/12	5/19
Early May				5/28	5/28	5/26	5/21	5/23	5/12	5/20
Red Delight					6/10	5/30	5/21	5/23	5/14	5/25
Early May Grand					6/4	6/1	5/22	5/30	5/16	5/25
May Grand	5/26	6/1	5/30	5/29	6/2	5/29	5/23	5/28	5/14	5/26
Mayfair	5/27	5/31	5/28	5/31	6/3	5/30	5/25	5/30	5/17	5/27
Star Brite							5/29	5/31	5/16	5/29
Ama Lyn							5/25	5/28	5/17	5/29
June Grand	6/3	6/5	6/4	6/1	6/7	6/4	5/29	6/1	5/20	6/2
Sunfre	6/6	6/12	6/10	6/7	6/4	6/9	6/2	6/4	5/24	6/3
Pacific Star					6/18	6/7	6/4	6/3	5/20	6/5
June Glo					6/18	6/13	6/6	6/6	5/21	6/5
Red June	5/30	6/5	6/5	6/3	6/9	6/3	6/1	6/5	5/22	6/5
Spring Diamond								6/12	5/29	6/5
May Diamond								6/18	5/26	6/7
Mike Grand					6/12	6/8	5/31	6/7	5/23	6/7
Firebrite	6/11	6/13	6/13	6/10	6/17	6/9	6/4	6/10	5/24	6/8
Spring Grand	6/7	6/9	6/10	6/8	6/12	6/8	6/4	6/5	5/27	6/9
Spring Red	6/13	6/19	6/17	6/10	6/18	6/15	6/7	6/10	5/27	6/9
Sun Diamond									5/31	6/9
Early Sungrand	6/10	6/13	6/13	6/10	6/16	6/8	6/4	6/10	5/26	6/11
Early Star	6/13	6/15	6/17	6/14	6/18	6/16	6/14	6/13	5/31	6/11
Star Bright								6/17	5/27	6/13
Independence	6/10	6/13	6/16	6/12	6/17	6/10	6/8	6/10	5/23	6/14
Summer Beaut			6/26	6/21	6/24	6/14	6/12	6/17	5/28	6/14
Moon Grand	6/14	6/18	6/13	6/12	6/21	6/14	6/5	6/12	5/31	6/14
Red Diamond	6/17	6/21	6/17	6/18	6/21	6/17	6/11	6/15	5/31	6/16

Summer Diamond							7/11	7/20	6/3	6/22
Flavortop I	6/29	7/3	6/29	6/29	7/2	6/27	6/21	6/29	6/13	6/24
Flavortop	6/22	6/30	6/25	6/24	7/2	6/24	6/25	6/29	6/14	6/26
Grand Diamond						7/5	6/26	6/25	6/10	6/27
Ruby Grand	6/30	7/6	7/3	7/5	7/7	7/4	6/27	7/3	6/16	6/27
Sun Grand	6/19	6/29	6/27	6/30	7/2	6/26	6/19	6/26	6/17	6/27
Super Star					7/26	7/11	7/3	7/5	6/16	6/29
Niagara Grand	7/3	7/5	7/3	7/2	7/7	7/6	6/29	7/5	6/17	6/29
Summer Grand	6/27	7/3	7/2	6/30	7/5	7/5	6/29	7/2	6/19	6/29
Hi-Red	7/3	7/5	7/5	7/2	7/8	7/6	6/30	7/5	6/19	6/29
Larry's Grand	7/10	7/12	7/8	7/7	7/10	7/12	7/7	7/8	6/23	6/29
Fantasia	7/8	7/10	7/5	7/6	7/13	7/12	7/5	7/10	6/20	6/30
Kent Grand	7/3	7/4	7/4	7/3	7/9	7/8	6/29	7/5	6/19	7/1
Granderli	6/29	7/4	7/4	7/3	7/8	7/7	7/3	7/8	6/30	7/4
Red Free	7/5	7/6	7/8	7/14	7/14	7/9	7/8	7/11	6/18	7/6
Rio Red					7/22	7/13	7/4	7/10	6/30	7/6
Late Tina Red			7/20	7/20	7/17	7/16	7/14	7/19	6/30	7/10
Red Grand	7/10	7/12	7/6	7/10	7/15	7/15	7/11	7/17	7/4	7/10
Son Red	7/15	7/14	7/16	7/20	7/16	7/16	7/7	7/19	7/2	7/11
61-61						7/19	7/16	7/18	7/2	7/13
Bob Grand	7/17	7/20	7/23	7/20	7/23	7/20	7/17	7/20	7/7	7/16
July Red								7/25	7/3	7/17
Clinton-Strawberry	7/12	7/19	7/21	7/20	7/20	7/19	7/13	7/22	7/8	7/19
Kism Grand							8/4	7/30	7/15	7/20
Le Grand	7/15	7/19	7/22	7/21	7/24	7/22	7/18	7/22	7/11	7/20
Royal Giant	7/24	7/30	7/25	7/19	7/27	7/21	7/20	7/27	7/12	7/22
Autumn Delight		8/8	8/5	8/4	7/30	7/25	7/19	7/24	7/9	7/23
Sparkling Red		8/3	8/2	7/28	7/28	7/29	7/23	7/29	7/14	7/23
Late Le Grand	7/22	7/26	7/29	7/27	7/29	7/27	7/21	7/25	7/16	7/23
Gold King	7/25	7/31	8/4	8/6	8/6	8/3	7/31	7/31	7/28	7/30
Red Jim		8/16	8/20	8/9	8/11	8/2	7/31	8/7	7/26	8/2
Flamekist	7/27	7/30	8/6	8/2	8/3	8/3	7/31	8/2	7/23	8/3
Tom Grand	7/25	8/3	8/6	8/5	8/9	8/3	8/2	8/2	7/25	8/3
Flaming Red						8/25	8/23	8/22	7/31	8/3
Summer Red								8/6	7/25	8/4
Regal Grand	7/27	7/31	8/6	8/7	8/7	8/3	8/2	8/8	7/28	8/5
Scarlet Red								8/15	7/28	8/5
Sherri Red	8/17	8/14	8/12	8/8	8/10	8/6	8/3	8/9	7/25	8/9
Tasty Free	8/21	8/16	8/22	8/18	8/12	8/10	8/13	8/10	7/29	8/9
Fairlane	8/8	8/13	8/8	8/12	8/12	8/7	8/8	8/14	8/1	8/9
181-119						8/15	8/16	8/27	8/11	8/10
Autumn Grand	8/11	8/9	8/12	8/10	8/12	8/11	8/13	8/12	7/30	8/13
September Red									8/14	8/14
September Grand	8/16	8/16	8/20	8/18	8/19	8/17	8/16	8/28	8/7	8/16
P-R Red						9/1	8/22	8/29	8/22	8/29

BUSSE & CUMMINS

CLIENT: CALIFORNIA TREE FRUIT
AGREEMENT
JOB NO.: CTFA-228 A:SEASON INTRO
DATE: 2/7/86
MEDIUM: RADIO
SPACE: : 30

SINGERS: Summer, summer fruits . . .
(HOLD)
ANNCR: Remember the fresh summer
peaches, plums and nectarines last
year? Well, it's summertime again—
the fruit-toot-in-est best time of the
whole year!
SINGERS: Summer, summer fruits . . .
(Hold)
ANNCR: And fresh California peaches, plums
and nectarines are back!
SINGERS: Summer, summer fruits from
California. Fresh from the tree,
taste, taste 'em and see.
ANNCR: You'll find 'em now in stores
everywhere. Don't miss 'em!
SINGERS: Sunshine on a tree, delicious
naturally! Summer fruits . . .
(HOLD AND REPEAT)
ANNCR: Fresh peaches, plums and
nectarines . . . from the growers of
California Summer Fruits (R).

JOB NO.: CTFA-228 A:SEASON INTRO
DATE: 2/7/86
MEDIUM: RADIO
SPACE: : 30

SINGERS: Summer, summer fruits . . .
(HOLD)
ANNCR: Remember those go-o-olden yellow
summertime pears? The *special*
kind—real fresh and juicy—and just
slur-a-py sweet to eat?
SINGERS: Summer, summer fruits . . .
(HOLD)
ANNCR: Now those California Bartletts
are here again.
SINGERS: Summer, summer fruits from
California. Fresh from the tree,
taste 'em and see.
ANNCR: You'll wanta ripen 'em to a golden
yellow!
SINGERS: Sunshine on a tree, delicious
naturally! Summer fruits ... (HOLD
AND REPEAT)
ANNCR: Slur-a-py sweet California Bartletts
. . . from the growers of California
Summer Fruits(R).

JOB NO.: CTFA-228 A:SEASON INTRO
DATE: 2/7/86
MEDIUM: RADIO
SPACE: : 30

SINGERS: Summer, summer fruits . . .
(HOLD)

ANNCR: Can you remember biting into
your very first peach? . . . cool
and juicy—with little freshtickles
of flavor like you'd never tasted
before

SINGERS: Summer, summer fruits . . .
(HOLD)

ANNCR: Well, fresh California peaches are
here again!

SINGERS: Summer, summer fruits from
California. Fresh from the tree,
taste 'em and see.

ANNCR: They've got that same peachy
sweetness you've always
remembered.

SINGERS: Sunshine on a tree, delicious
naturally! Summer fruits . . .
(HOLD AND REPEAT)

ANNCR: Freshtickling California peaches. .
. from the growers of
California Summer Fruits (R).

JOB NO.: CTFA-228 A:SEASON INTRO
DATE: 2/7/86
MEDIUM: RADIO
SPACE: : 30

SINGERS: Summer, summer fruits . . .
(HOLD)

ANNCR: The last time you tasted a fresh
plum—were you surprised? That's
'cause fresh plums come in a whole

rainbow of tongue-tinglelating
flavors.

SINGERS: Summer, summer fruits . . .
(HOLD)

ANNCR: How fresh California plums are
here for the summer!

SINGERS: Summer, summer fruits from
California. Fresh from the tree,
taste 'em and see.

ANNCR: Sweet, juicy, tart and tangy—
you'll want to try 'em all.

SINGERS: Sunshine on a tree, delicious
naturally! Summer fruits . . .
(HOLD AND REPEAT)

ANNCR: Tongue-tinglelating fresh plums
. . . from the growers of California
Summer Fruits (R).

JOB NO.: CTFA-228 A:SEASON INTRO
DATE: 2/7/86
MEDIUM: RADIO
SPACE: : 30

SINGERS: Summer, summer fruits
. . . (HOLD)

ANNCR: Remember how good those fresh
nectarines were last summer?
Tasted like a brass band playin'.
Down-right, in-des-cribe-bab-ly
scrump-licious! ? (scrump-dilly-
icious)

SINGERS: Summer, summer fruits . . .
(HOLD)

ANNCR: Now those fresh California
nectarines are here again.

SINGERS: Summer, summer fruits from
California. Fresh from the tree,
taste 'em and see.

ANNCR: It's no wonder the call 'em nect-
tar-eeens!

SINGERS: Sunshine on a tree, delicious
naturally! Summer fruits . . .
(HOLD AND REPEAT)

ANNCR: Scrump-licious nectarines . . .
from the growers of California
Summer Fruits (R).

NPD/Nielsen Inc

EXECUTIVE SUMMARY
CONSUMER PURCHASING OF FRESH FRUIT
WITHIN KANSAS CITY
SUMMER 1987

I. Background

This study represents a continuation of a consumer research program begun with NPD Research by CTFA in 1984. The first phase, completed prior to the 1985 selling season, consisted of an indepth analysis of how fresh fruit was consumed/used in home, and the demographics of those users. Phase Two, completed prior to the 1986 selling season, represented a geographic mapping of highest potential markets, drawing from the previous research. Every major market in the U.S. was ranked with respect to the concentration of heavy fruit and heavy C.S.F. consumers; the objective being to concentrate CTFA advertising dollars in areas where the potential sales per dollar spent were highest.

This study represents Phase Three, an evaluation of the effects of increased advertising in one of the top ten "high potential" markets. Of these markets, Kansas City was selected for analysis due to its balanced demographics (relative to total U.S.), its isolation from other major markets, its near-average level of total grocery dollar expenditures, and the existence of good trade co-op with CTFA sellers. Within this market, a panel of approximately 800 households recorded purchases of fresh

fruit and other selected product categories on a monthly basis from May through September, 1987 in pre-structured ledger-style diaries. For each purchase, panelists recorded the type of fruit purchased, date purchased, quantity, whether or not they perceived the fruit to be "on sale", the price paid per pound, and the age/sex of the intended consumers. Thus, a full history of summer, 1987 fruit purchasing was obtained from this panel, which allowed us to view the development of purchasing throughout the entire season and to identify the most frequent users demographically.

In addition, after the return of September diaries, a subsample of 254 panelists were contacted for personal in-home interviews to establish whether or not they were aware of CTFA advertising during the summer season. Following that, purchase data from each of the two groups was compared to determine any differences in habits existing between the aware versus non-aware groups.

This summary will present highlights of the knowledge gained from analysis of the market as a whole, as well as those differences which emerged between the advertising aware versus not-aware groups.

II. The Total Market

A. CFFA Fruits vs. Top Fruits

Nearly all (94%) of Kansas City households purchased fresh fruit on at least one occasion during the May-September, 1987 time period, and 79% purchased at least one CTFA fruit. The percentage of households purchasing each type of fruit is as follows:

Peaches	66%	Bananas	81%
Plums	47%	Grapes	65%
Nectarines	37%	Apples	59%
Pears(7/15)	20%	Cherries	30%

On average, households purchased fresh fruit on 12 separate occasions (about once every 10 days). CTFA fruits were present on five of those twelve occasions. With the exception of bananas, CTFA fruits were competitive with other fruits in the average frequency of purchase occasions throughout the summer:

Peaches	3.6	Bananas	6.1
Plums	2.9	Grapes	3.5
Nectarines	2.9	Apples	3.0
Pears(7/15->)	2.0	Cherries	2.1

Consumers believed the price they paid for any fresh fruit was a "sale" price only 36% of the time; for CTFA fruits in aggregate, they believed they were receiving a special price 29% of the time. The percentage of occasions in which consumers

perceived a "sale" price on individual fruits is as follows:

Peaches	31%	Bananas	29%
Plums	25%	Grapes	39%
Nectarines	22%	Apples	12%
Pears(7/15)	35%	Cherries	29%

B. Development of CTFA Purchasing

Consumers tend to respond quickly to the availability of CTFA fruits. The week of 6/1-6/7/87 produced the largest weekly influx of first-time buyers for both Peaches and Plums (Nectarines peaked during the week of 6/22-6/28/87 and again during 7/6-7/12/87). By the end of June, nearly 60% of the season's peach buyers have made at least one purchase; for Plums, more than 50% of season buyers have been attracted at this point. Nectarines tend to lag a bit, but by the week ending 7/12/87 had attracted two-thirds of their eventual buyer base.

Securing buyers early in the season is important not only from a short-term sales position, but from a season-long position as well. It is obvious that they (early triers) have a greater length of time ahead of them to make subsequent purchases. However, the likelihood of any subsequent (repeat) purchase is much stronger among early triers versus mid-season or late-season buyers.

For each of the three C.S.F., a certain percentage of buyers purchase only once during the season, and thus, volumetrically, are not very important.

Over 90% of each fruit's volume is drawn from repeaters (those who purchase more than once during the season). The incidence of repeaters for each fruit is as follows:

Peaches	73%
Plums	64%
Nectarines	62%

Given the importance of these buyers, it is essential to focus directly on them and their initial entry into the market.

To illustrate the importance of early triers, peaches will be used as an example (as the remaining fruits followed the same behavioral pattern). Among buyers who purchased peaches during the first four weeks of availability (through Mid-June), 83% returned within the following four weeks to make a second purchase; among triers during the second four weeks of availability (Mid-June through Mid-July), only 65% had returned during the following four weeks to make a subsequent purchase. What this behavior suggests is that the earlier a buyer enters the market, the higher the likelihood of that buyer becoming a committed heavy buyer during the season. This fact is underscored further when viewing the volumetric impact of early triers; 70% of total peach volume during summer, 1987 was contributed by buyers who made their first purchase in June. These early buyers represented 57% of the season's total buyers, indicating that their purchasing was at a level 23% higher than if all buyers contributed a proportionate amount of purchasing.

In terms of total purchasing, July and most of August are the peak periods of CTFA sales; CTFA fruits are part of approximately 46% of all fresh fruit purchase occasions during this time. An interesting note is that when grapes reached a sharp sales peak in early August, the purchasing CTFA fruits did not appear to be impacted. This supports the behavior seen among the CTFA buyers with regard to CTFA fruits: that fruit buyers "add on" new fruits as they become available rather than trade-off one fruit for another.

III. Aware vs. Not Aware of Advertising Purchasing

Overall, the summer advertising program was very effective in reaching its target audience of younger, child-oriented, upper income households (The traditional CTFA and Total Fresh Fruit buyers skew towards older, childless households).

There were no major differences between the groups insofar as the pattern of initial buyer attraction for the CTFA fruits; both groups built rapidly during June. This is a very positive sign in that the "aware" groups contained a greater percentage of previous year non-buyers; without advertising we would not expect prior non-users to be attracted early in the season (if at all). The purchase rate (pounds per occasion) among the "aware" groups was slightly lower than the non-aware group, but this was expected. Newer users take time to develop to levels comparable to those historically in the market. In addition, we know that the non-aware groups were older, childless

households who, from past research, were shown to be prone to additional uses beyond out-of-hand consumption, i.e., canning, baking, and other ingredient usage.

The largest behavioral difference between the aware and not aware groups was in the prices that were paid for CTFA fruits. When they were not perceived as being "on sale". Among the aware group, the average price paid when not "on sale" was substantially higher than that of not aware buyers.

Average Cents Per Pound

	"On Sale"		Not "On Sale"	
	Aware	Not Aware	Aware	NotAware
Peaches	.46	.45	.72 <— .52	
Plums	.42	.42	.62 <— .53	
Nectarines	.56	.51	.77 <— .62	
Pears	.48	.51	.78 <— .63	

Typically, "not on sale" prices reflect the highest price consumers are willing to pay for a product (since they will not purchase at all if the price is too high). Thus, since the "aware" buyers are willing to purchase at a much wider range (on sale vs. not on sale) of price, it can be said that they are much less sensitive to prices than are those buyers who were not aware of advertising. This would support the concept that advertising contributes to the perceived value of a given product.

IV. Conclusions

From all of the analysis which has been done this year, two points emerge as the most significant. First, that advertising delivers a quality message, which enhances the "value" of California Summer Fruits in that ad aware buyers are willing to spend considerably more per pound than non-aware buyers. Essentially, this means that ad aware buyers can be counted on to purchase throughout the entire season, whereas non-aware buyers, as evidenced by their lower price ceiling, appear to purchase only when the price falls below a certain (low) threshold.

The second implication is that advertising should be concentrated early in the season in order to encourage earlier trial, and subsequently, greater retention of those early buyers throughout the season.

Carmelita _____ **ADVERTISING RESEARCH**
enterprises, inc.

A Communicus Measurement of the

CALIFORNIA SUMMER FRUITS

1987 ADVERTISING CAMPAIGN

Conducted by

CARMELITA ENTERPRISES, INC

P.O. BOX 1438 • JOSHUA TREE, CA. 92262 • (619) 365-1529

CALIFORNIA SUMMER FRUITS 87 ADVERTISING

SAMPLE: 254 members of the Kansas City diary panel

- 182 primary target audience
- 72 secondary target audience

PERSONAL IN-HOME INTERVIEWS

October, 1987

I. INTRODUCTION

This research applies the Communicus methodology to measuring the awareness and sales effectiveness of the 1987 California Summer Fruits advertising campaign.

Methodology

The persuasiveness of advertising is analyzed by comparing purchase behavior among respondents who proved awareness of the advertising with those who have seen none of the advertising.

To conduct a valid analysis of this type, it is necessary to have the ability to measure with a high degree of accuracy whether an individual has seen the advertising. The Communicus method for measuring the proved awareness of advertising is as follows:

Television Commercials: The respondent is shown a brief excerpt from the commercial in a hand-held viewfinder-type sound movie projector. Any respondent who claims to have seen the commercial before is required to prove it by describing material not included in the excerpt.

Radio Commercials: The method for measuring radio commercials is analogous to that used for measuring television. The respondent listens to an edited selection from the commercial.

Outdoor and Point-of-Purchase Ads: The respondent is shown a 35mm slide of the ad in portable tachistoscopic equipment. The duration of the

exposure is the individual's threshold speed of perception—anywhere from .2 to .8 of a second, as established by our special test slide. Any respondent who claims to have seen the ad before is required to prove it by describing details not discernible during the brief glimpse.

The Communicus technique used by Carmelita to measure proved awareness of advertising is based on developmental work originally conducted by the Advertising Research Foundation, and has been refined over the past thirty-five years. Experimental and other evidence have indicated that typically it is accurate at the 90% level for periods of a year or more after an individual has seen an ad or a commercial.

Research Design

The research involved personal in-home interviews in October, 1987, with 254 members of a Kansas City panel who had kept diary records of fruit purchases during the Summer of 1987.

Each respondent questioned about fruit purchasing during the Summer and was measured on his/her proved awareness of all California Summer Fruits television, radio, and outdoor advertising that appeared in Kansas City in 1987.

II. EXECUTIVE SUMMARY

Campaign Awareness

- The not campaign awareness was sufficient to provide a basis for substantial advertising effect.
- Television, radio and point-of-purchase all made major contributions to campaign awareness. The outdoor advertising played only a minor role.

Campaign Impact on Purchase

- The advertising substantially increased the frequency of purchasing nectarines and pears. To a lesser extent the advertising increased the frequency of purchasing peaches and plums.
- Respondents aware of the ads were more likely to have purchased all four California Summer Fruits.
- Among respondents who purchased any of the four fruits less frequently than the year before, the major reason was related to the condition of the fruit in the market.

III. DETAILED FINDINGS

For an advertising campaign to have substantial impact on attitudes and behavior, two objectives must be met:

- A large percentage of the target audience must be exposed to the advertising and pay sufficient attention so that some meaningful communica-

tion takes place. In addition, the more different executions an individual sees, the better, in terms of potential effect.

- The advertising must not only achieve awareness and communication, but it must stimulate favorable attitude shifts and behavioral changes among people who prove awareness of it.

Neither factor by itself—awareness or persuasiveness—will accomplish beneficial results. Both are necessary.

A. Advertising Awareness

1. Proved Awareness Scores:

The Individual Ads and Commercials

The basic measurement for individual ads or commercials is the proved awareness score—the percentage of the total sample who prove they have seen the ad or commercial and associate it with the correct advertiser.

See Following Chart: Television, radio and point-of-purchase all made important contributions to the campaign. The outdoor advertising did not make a major contribution.

CALIFORNIA SUMMER FRUITS 87 ADVERTISING

Proved Awareness of Individual Media

Television	<u>[bar graph]</u>	51%
Radio	<u>[bar graph]</u>	37%
Outdoor	<u>[bar graph]</u>	11%
Point of purchase	<u>[bar graph]</u>	48%

2. Net Campaign Awareness

The term "net campaign" awareness" refers to the percentage of the sample who proved awareness of at least one commercial or ad in the 1987 California Summer Fruits campaign.

The following criteria indicate the levels of net awareness associated with campaigns that provide a basis for substantial sales effectiveness.

Evaluative Criteria

<u>Net Awareness</u>	<u>Evaluation</u>
Over 80%	Exceptional
50% to 80%	Satisfactory
25% to 50%	Questionable
Under 25%	Unsatisfactory

These evaluative criteria are not *norms* (in the sense of average scores achieved by other campaigns), but represent levels of awareness needed to provide a basis for campaign effectiveness (assuming, of course, that the advertising is persuasive among those aware of it).

See Following Chart: The 1987 California Summer Fruits Campaign achieved a level of proved awareness sufficient to provide a basis for substantial sales impact.

CALIFORNIA SUMMER FRUITS 87 ADVERTISING

Proved Campaign Awareness

Any media
advertising

[bar graph] 65%

Media ads
plus P-O-P

[bar graph] 80%

CALIFORNIA SUMMER FRUITS 87 ADVERTISING
Proved Campaign Awareness Compared to Earlier
Years

1987	[bar graph]	80%
1984	[bar graph]	77%
1983	[bar graph]	43%
1978	[bar graph]	32%
1977	[bar graph]	38%
1976	[bar graph]	35%

B. Advertising Impact

In this section of the report we analyze the effect of the advertising on the purchase of the four California Summer Fruits. This analysis is based on comparisons between respondents who proved awareness of the advertising with those who saw none of the ads.

Two criteria are examined:

How often the respondent purchased the fruit during the Summer of 1987.

Whether the respondent purchased the fruit more often than during the Summer of 1986.

See Following Charts:

- The advertising substantially increased the frequency of purchasing nectarines and pears. To a lesser extent the advertising increased the frequency of purchasing peaches and plums.
- Respondents aware of the ads were more likely to have purchased all four California Summer Fruits.
- Among respondents who purchased any of the four fruits less frequently than the year before, the major reason was related to the condition of the fruit in the market.

Advertising, of course, can build intention to purchase, but if the fruit is not in satisfactory condition, people will not act on their pre-dispositions to buy.

CALIFORNIA SUMMER FRUITS 87 ADVERTISING

Ad effect on frequency of purchase: PEACHES

Proved Aware, CSF Ads

Total Sample



None



Any



% increase
over "no-
ad" group

Bought peaches more than once a month

Apple icon [bar graph] 50%

Apple icon with bite [bar graph] 60% 120%

Solid black square [bar graph] 58% 116%

CALIFORNIA SUMMER FRUITS 87 ADVERTISING

Ad effect on frequency of purchase: NECTARINES

Proved Aware, CSF Ads

Total Sample



None



Any



% increase
over "no-ad"
group

Bought nectarines more than once a month

Apple icon [bar graph] 24%

Apple icon with bite [bar graph] 37% 154%

Solid black square [bar graph] 35% 146%

CALIFORNIA SUMMER FRUITS 87 ADVERTISING

Ad effect on frequency of purchase: PLUMS

Proved Aware, CSF Ads

Total Sample ■	None ●	Any ○	
			% increase over "no-ad" group
<u>Bought plums more than once a month</u>			
● [bar graph]	29%		
○ [bar graph]	33%	114%	
■ [bar graph]	32%	110%	

CALIFORNIA SUMMER FRUITS 87 ADVERTISING

Ad effect on frequency of purchase: PEARS

Proved Aware, CSF Ads

Total Sample ■	None ●	Any ○	
			% increase over "no-ad" group
<u>Bought pears more than once a month</u>			
● [bar graph]	24%		
○ [bar graph]	-	37%	154%
■ [bar graph]	34%	142%	

CALIFORNIA SUMMER FRUITS 87 ADVERTISING

Ad effect: Purchased all four California Summer Fruits

Proved Aware, CSF Ads

Total Sample

None

Any

% increase
over "no-ad"
group

■ [bar graph] 33%

● [bar graph] 42% 131%

■ [bar graph] 40% 125%

C. FRUIT PURCHASES COMPARED TO LAST YEAR

In net terms, respondents reported purchasing peaches and plums less often than last year, and about the same amount of pears and nectarines.

The main reason for purchasing less fruit: the appearance or condition of the fruit in the market.

Secondary reasons:

"Personal" reasons, such as "family member who liked the fruit no longer lives at home", etc.

Price: A minor reason with peaches and plums; a more important factor in failure to purchase pears and nectarines this year compared to last year.

Advertising cannot, of course, do much to overcome these types of reasons for failing to purchase.

CALIFORNIA SUMMER FRUITS 87 ADVERTISING
Purchases compared to last year

	Same ■	More ☺	Less ▲	Net More/ Less Less
Peaches	■ [bar graph] 54	☺ 18	▲ 28	-10
Plums	■ [bar graph] 68	☺ 11	▲ 21	-10
Pears	■ [bar graph] 62	☺ 18	▲ 20	-2
Nectarines	■ [bar graph] 68	☺ 15	▲ 17	-2

CALIFORNIA SUMMER FRUITS 87 ADVERTISING
Reasons for buying less fruit this year

	■ = Condition of fruit	☺ = Personal Reasons	▲ = Price
Peaches	■ [bar graph] 68	☺ 25	▲ 7
Plums	■ [bar graph] 71	☺ 24	▲ 5
Pears	■ [bar graph] 49	☺ 34	▲ 17
Nectarines	■ [bar graph] 67	☺ 8	▲ 25

EVANS

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San Francisco, CA 94107
(415) 957-0300

CLIENT: CALIFORNIA SUMMER
FRUITS®
JOB NO.: CSF-268
DATE: 1/19/88, Rev. 2
JOB TITLE: 3-Fruit Intro/Truck
SIZE/LENGTH: 30
SFX: TRUCK ENGINE UNDER
ANNOUNCER

AXTON: At a supermarket near you, in the dim
(:13) light of dawn, a truck is making a
delivery. Now they're opening up the
doors (SFX) and (SHOUTS OVER
MUSIC) summer can begin! *MUSIC:*
BRASS BAND VERSION OF CSF
JINGLE. SFX: CHEERS, AP-
PLAUSE. (CONTINUE MUSIC UN-
DER.)
Fresh peaches, plums and nectarines are
here again!

SINGERS: SUMMER, SUMMER FRUITS FROM
(:07) CALIFORNIA FRESH FROM THE
TREE, TASTE THEM AND SEE.
(CONTINUE MUSIC UNDER.)

AXTON: Yes, taste them soon and taste them
(:10) often, because the sweet fruits of
summer, like summer itself, are here for
all too short a time. Fresh peaches,
plums and nectarines . . . from the
growers of California Summer Fruits.
(END MUSIC.)

JOB NO.: CSF-268
DATE: 1988 Radio—
JOB TITLE: CSF Nostalgia/Peaches
SIZE/LENGTH: 30
SFX: TRUCK ENGINE UNDER
ANNOUNCER

*MUSIC: INSTRUMENTAL, OPENING
PHRASE OF JINGLE.*

AXTON: When you bite into a big, juicy peach,
what memories come to mind?
SFX: BITING AND SLURPING.

SINGERS: SUMMER, SUMMER FRUITS FROM
CALIFORNIA

AXTON: The first time you danced with a girl,
one Fourth of July?

SINGERS: SUMMER, SUMMER FRUITS FROM
CALIFORNIA
SFX: SLURPING, ETC.

AXTON: Or the last, long summer before you
went to college?

SINGERS: SUMMER, SUMMER FRUITS FROM
CALIFORNIA

AXTON: Refresh the memory . . . bite into a fresh,
juicy California peach again soon, before
they leave you for another year.

SINGERS: DELICIOUS NATURALLY

AXTON: From the growers of California Summer Fruits.

JOB NO.: CSF-268
 DATE: 1988 Radio—
 JOB TITLE: CSF Nostalgia/Plums
 SIZE/LENGTH: 30
 SFX: TRUCK ENGINE UNDER
 ANNOUNCER

*MUSIC: INSTRUMENTAL, OPENING
 PHRASE OF JINGLE.*

AXTON: When you savor the juice of a fresh, ripe plum— what memories come to mind?
SFX: BITING, SLURPING.

SINGERS: SUMMER, SUMMER FRUITS FROM CALIFORNIA

AXTON: Going out to Gramma's place for picnics?

SINGERS: SUMMER, SUMMER FRUITS FROM CALIFORNIA
SFX: SLURPING, ETC.

AXTON: Or the boy you met one summer, and never saw again?

SINGERS: SUMMER, SUMMER FRUITS FROM CALIFORNIA

AXTON: So many memories, so many different kinds and flavors of California plums. They await you now—refresh the memory.

SINGERS: DELICIOUS NATURALLY

AXTON: From the growers of California Summer Fruits.

JOB NO.: CSF-268
 DATE: 1988 Radio—
 JOB TITLE: CSF Nostalgia/Nectarines
 SIZE/LENGTH: 30
 SFX: TRUCK ENGINE UNDER
 ANNOUNCER

*MUSIC: INSTRUMENTAL, OPENING
 PHRASE OF JINGLE.*

AXTON: Remember the first time you tasted a sweet, fresh nectarine?
SFX: BITING AND SLURPING.

SINGERS: SUMMER, SUMMER FRUITS FROM CALIFORNIA

AXTON: Was it the time you first kissed a boy, and like it?

SINGERS: SUMMER, SUMMER FRUITS FROM CALIFORNIA
SFX: SLURPING, ETC.

AXTON: Or the summer Dad taught you how to hook a trout?

SINGERS: SUMMER, SUMMER FRUITS FROM CALIFORNIA

AXTON: Remember why they're called nectarines? Refresh the memory. Fresh California nectarines are here again to sweeten your summer.

SINGERS: DELICIOUS NATURALLY

AXTON: From the growers of California Summer Fruits.

JOB NO.: CSF-268
 DATE: 1988 Radio—
 JOB TITLE: Station Annncr/3-Fruit Arrival
 SIZE/LENGTH: 30
 SFX: TRUCK ENGINE UNDER
 ANNOUNCER

*MUSIC: INSTRUMENTAL, OPEN-
 ING PHRASE OF JINGLE.*

AXTON: When you bite into the sweet softness of
 a Bartlett pear, what memories come to
 mind?
SFX: BITING AND SLURPING.

SINGERS: SUMMER, SUMMER FRUITS FROM
 CALIFORNIA

AXTON: Your first camping trip—in your own
 back yard?

SINGERS: SUMMER, SUMMER FRUITS FROM
 CALIFORNIA
SFX: SLURPING, ETC.

AXTON: Or double-dating at the drive-in in the
 family car?

SINGERS: SUMMER, SUMMER FRUITS FROM
 CALIFORNIA

AXTON: Fresh Bartlett pears from California are
 in your store again—ready to ripen into
 a sweet summer treat. Refresh the
 memory.

SINGERS: DELICIOUS NATURALLY

AXTON: From the growers of California Summer
 Fruits.
MUSIC: JINGLE UNDER.

ANNCR: Be first to taste the first of the crop.
 (:08) California Summer Fruits have arrived
 in volume at (STORE NAME). Fill your
 fruit bowl now with fresh peaches and
 plums and nectarines.

SINGERS: FRESH FROM THE TREE, TASTE
 (:03) THEM AND SEE

ANNCR: Which do you like the best—peaches,
 (:14) plums or nectarines? Well, let's not play
 favorites, let's just enjoy all three!
 Fresh peaches, plum and nectarines,
 three sweet signs that summer's really
 here, are ripe and ready at your (STORE
 NAME) now.

SINGERS: SUMMER, SUMMER FRUITS
 (:05) IT WOULDN'T BE SUMMER WITH-
 OUT THEM.
 (FADE SINGERS.)

P.O. Box 707

APR 13, 1988
 Phones:
 (209) 638-2531
 L.D. 638-6802

ITO PACKING CO., INC.
 Grower Packer Shipper
 South and Reed Avenues
 Reedley, California 93654

April 13, 1988

Mr. Raymond V. Pisciotta
 Director of Merchandising
 P.O. Box 255383
 Sacramento, CA 95865-5383

RE: Trade Communication Comment

Dear Mr. Pisciotta,

Upon reading your communication with the trade I became very upset. In your statement in paragraph four:

"Several late season varieties, characterized by more red blush color than other historical late varieties, will be available in August continuing into September."

Your statement makes our Red Jim Nectarine sound like it is obsolete. Who are you to make a statement which indicates these varieties will be the new varieties which will replace ours? The industry needs you like I need a hole in the head. Our variety is

still superior to the ones you have noted. The industry is constantly ostracizing my company because they know the marketing ability of our product which should be between 600,000 to 800,000 boxes. In the past we have given you a carte blanche on your marketing programs but no longer. Your position will be scrutinized to the tooth and nail along with your entire program. I will personally see to it as a standing member of the peach and nectarine board.

Sincerely,
 ITO PACKING CO., INC.

/s/ JIM ITO
 JIM ITO
 President

Facts fresh from
the tree!

CALIFORNIA BULLETIN #1 - SPRING UPDATE

The winter of 1987-88 brought adequate dormancy to most stone fruit varieties. Bloom date for most varieties were "normal" or a few days ahead of "normal". The bloom was uniform and good weather allowed for "better-than-needed" pollination. The rainfall for the production area has been only 60% of normal, but this is not expected to adversely affect the crop, nor the water supply, for this season. The lack of rainfall will contribute to fewer losses from decay and rot diseases.

The 1988 crop is now being pushed along by unseasonably warm weather and projections now indicate the 1988 harvest will start a week ahead of last year's dates. This could make 1988 the second earliest crop in the past decade, but still 5-7 days behind the 1986 crop.

Fruit set appears to be heavy for most varieties. Growers are attempting to farm for optimum sizes this year. Thinning crews have been observed in many orchards in the valley, 7-10 days ahead of normal thinning dates. Thinning practices this spring are reducing the counts on trees from their normal carrying capacities in the effort to grow

larger-sized fruit. Preliminary thinking indicates excellent volume for peaches, nectarines and plums.

Several new nectarine varieties will be more readily available in 1988, especially during May and late August-early September. Two major early varieties available this year will be Mayfire and May Glo. Several late season varieties, characterized by more red blush color than other historical late varieties, will be available in August continuing into September. These will include August Red, Flaming Red, Scarlet Red, September Red and Sparkling Red.

California
Summer Fruits'

[logo omitted]

[logo omitted]

California Tree Fruit
Agreement

April 19, 1988

Mr. Jim Ito
President
Ito Packing Co., Inc.
Post Office Box 707
Reedley, California 93654

Dear Jim:

I just received your letter in regard to our California Bulletin #1 Spring Update. I personally reviewed the bulletin and approved its content and take full responsibility for whatever misunderstanding may have occurred. The Red Jim nectarine is certainly not obsolete and this was not the intent of the letter or the perception which we tried to convey. Our reference to "historical" varieties was aimed at varieties such as Fairlane, Flamekist, Autumn Grand and Late Le Grand.

During our recent merchandising trips around the country, one of the areas addressed by retailers was the need for better communication between CTFA and the industry. This letter was our first attempt to provide valuable information to retailers to help them

in anticipation of the coming season. There was never any intent to downplay any variety but only to let retailers know that the industry is aware of the need for late-season red varieties. In fact, on our trips several retailers commented positively about the Red Jim and of course your own efforts to develop that variety into a mainstay in the nectarine industry. The Red Jim is certainly well known nationwide and its popularity will increase due first and foremost to the high quality standard that you have maintained in your pack, the flavor and appearance of the Red Jim generally and your own merchandising efforts.

Jim, your statement that our programs will be scrutinized by you as member of the peach and nectarine committees is appreciated. I feel that our programs must continually be scrutinized by committee members, by shippers and by growers in order to progress and continue to serve the best interests of the industry. Whatever information you may need to help you in evaluating our programs will be made readily available. I assure you that this organization has always held Ito Packing Co. in the highest regard. Oftentimes, because of the quality of your packs, we have selected fruit from Ito Packing for our advertising and promotion efforts. We hope in the future to improve our longstanding relationship and

to work jointly to the benefit of all nectarine shippers and growers. If I may be of any service, please call.

Sincerely,

/s/ JONATHAN W. FIELD
JONATHAN W. FIELD
Manager

JWF:kj

cc: Management Services
Gary Van Sickel

MINUTES

PEACH COMMODITY COMMITTEE NECTARINE ADMINISTRATIVE COMMITTEE PLUM COMMODITY COMMITTEE

PROMOTION AND RESEARCH

Fresno, California

May 4, 1988

A joint meeting of the Peach, Nectarine and Plum Committees was held on Wednesday, May 4, 1988, at the Piccadilly Inn Airport in Fresno, California. The meeting was called to order at 8:30 am by Promotion Subcommittee Chairman Roger Wood. He announced the meeting schedules for May 4 and 5 and then introduced Dr. Ted DeJong who works with the Cling Peach Advisory Board Liaison Committee. Dr. DeJong was standing in for Scott Johnson to explain University and USDA research proposals.

Research

* * * * *

Promotion

Mr. Field then introduced Robyn Wilk, Director of Advertising for CTFA. Ms. Wilk introduced members of the CTFA staff from both the Sacramento and Dinuba offices. She then directed attention to the proposed market development budgets for the three

stone fruits for 1988-89 (attached). These included a budget for peaches of \$1,225,435, for plums \$1,831,459 and for nectarines \$1,761,886. These budgets were predicated on an estimated 14 million packages of peaches at 18¢ per package, 17 million packages of plums at 19¢ per package and 17 million packages of nectarines at 18¢ per package. Mr. Wilk also pointed out that a trial promotional budget for pears will be reviewed by the Pear Commodity Committee the latter part of June.

Ms. Wilk announced that the format of the market development presentation was different than it had been in previous meetings. She stated that in the past twelve years CTFA has invested over a half million dollars in marketing research studies. The Communicus studies, for example, have been used to establish the level of advertising expenditure that is necessary to be effective. Studies by RMC International used focus groups and interviews to give a better understanding of what motivates users to buy. The 1985 National Eating Trends study conducted by NPD developed profiles of consumption behavior based on 12,000 representative households nationally. The follow-up NPD/Prizm study links the National Eating Trends information with an even larger national data base into 40 different lifestyle clusters. The Kansas City study links the services of both NPD and Communicus. This study tracked fruit purchases of 700 households throughout the season. Finally, the recently completed 1988 Retailer Research involved interviews with 25 major super-markets and distributors representing nearly 40% of U.S. food store sales. Ms. Wilk urged those members of the audience that were unable to attend the

presentation of the retailer research by Mr. Erv Thuerk to pick up available copies of the research summary as well as audio cassettes.

Ms. Wilk proceeded to present some of the most important findings of the studies. Todd Norgaard from Evans/San Francisco, Deborah Beall and Ray Pisciotta of the CTFA staff were introduced to explain how the information was being used to construct our advertising, consumer services and merchandising programs. Ms. Wilk pointed out that current heavy users of California Summer Fruits® tend to be 45 years old and over, above average in education and income, and live in highly urban areas. They are generally classified as naturalists, diet conscientious and sophisticates. Behaviorly they are nutritionally fit and busy urbanites. Developing new users in the 25 to 44 age group provides the greatest potential for increasing future sales.

Mr. Norgaard stated that this information was applied to both selecting and planning the media and in creating advertising messages. He then summarized the network and spot radio programs for the 1988 summer season and pointed out an added national component to the television schedule for this year—spots on three national cable networks. He stated that he relied on the NPD/Prizm study to define the television markets that give the highest concentration of current and prospective heavy buyers of the fruits.

The plum television spot was played. Ms. Wilk followed the spot with a statement that one of the more dramatic findings from last year's Kansas City study

was the effect on sales from early fruit buyers. The study shows the earlier the buyer enters the market the higher the likelihood of that buyer becoming a committed heavy buyer during the season. Early buyers are more likely to become buyers of two or more of the fruits. This study was reviewed by the Promotion Committee in March, and based on this information they recommended that the advertising schedules be moved earlier. The resulting proposed schedule was then presented by Mr. Norgaard showing eighteen weeks of national network radio beginning May 16, with spot radio, cable and spot television starting one week later running in three flights.

Ms. Wilk then turned to research from RMC/Communicus which indicated that nostalgia can be an effective consumer "hot button" for selling the fruits. Mr. Norgaard pointed out that we know the importance of eye appeal, and that the fruits are sweet and juicy and naturally good for you, but when it was discovered that nostalgia was also an important and powerful influence, this approach was built into our television commercials. Ms. Wilk went on to the focus group finding that peaches, plums, nectarines and Bartlett pears are more appealing when shown together. This effect is labeled "the fruit bowl effect" and it is confirmed by the fact that the heaviest buyers have a greater tendency to buy two or more of the fruits. Mr. Norgaard followed with examples of presentations of four fruits in the same picture.

Ms. Wilk stated that the proposed advertising campaign for this season for all four fruits is budgeted at \$865,000 for national network radio, \$250,000 for spot

radio, \$150,000 for national cable television and \$2,180,000 for spot television for a total media advertising budget of \$3,445,00. Ms. Wilk stated that the total for media advertising divided by the various fruits is shown on the budget sheets under the heading of radio and television media and totals by commodities are: peaches \$726,000, plums \$1,207,000, nectarines \$1,215,000 and Bartlett pears \$297,000 for a total of \$3,445,000.

Ms. Wilk then introduced Deborah Beall and stated that marketing research has helped Ms. Beall in developing a more effective consumer services program. Ms. Beall began her series of slides on the consumer program by stating that consumers "buy by eye." She said that visuals are very important and the placement of visuals among consumers is equally important. She pointed out that a package was recently sent to the trade with materials based on the theme of "Celebrate Summer" to further exploit the benefits of visual media. Celebrate Summer themes will be seen in 18 magazines this season. In addition, Ms. Beall pointed out that lugs of California Summer Fruits® will to be sent to 60 radio and television personalities in June to provide for live exposure of summer fruits to national television and radio audiences. Ms. Beall has also provided material to United Fresh Fruit & Vegetable Association to aid in producing their consumer videos for plums and peaches. She also pointed out that full color posters for all four of the summer fruits have been produced for this season and that samples were available.

Ms. Beall capitalized on the nostalgia theme in her consumer work. After a comment from Ms. Wilk

about defining groups and targeting selective groups through special appeals, Ms. Beall reiterated the importance of magazines in reaching select groups. She described a five day stone fruit tour for thirteen consumer food editors nationwide which will take place this June in the San Joaquin Valley.

Ms. Beall also indicated a spa theme leaflet has been produced this year and emphasized that the cookbook, *Recipes for Success*, had met with strong positive consumer response when it was offered at retail level. A summer fruits comic book designed to appeal to school age children received 350,000 requests from schools and pre-schools. Ms. Beall also touched on the opportunity for reaching Spanish speaking groups in some highly urban areas as well as the opportunity to reach consumers through recipe use. She stated that nutrition information is an important part of this mix, and the Retailer study shows that "consumers want both more recipes and more nutrition information at point-of-sale."

Ms. Wilk introduced Mr. Ray Pisciotta, Director of Merchandising, who expanded on the importance of visual appeal of summer fruits. He pointed out that displays were being built by major factors throughout the entire summer and stated that summer fruits displayed together urged consumers to buy all three stone fruits. He added that new point-of-sale materials had been produced, again with the nostalgia theme in mind. In regard to point-of-sale, Mr. Pisciotta stated that a test was being done with an outside merchandising agency which would help monitor displays using CTFA point-of-sale materials.

Mr. Pisciotta emphasized the importance of the field staff and stated that constant contact with CTFA was maintained by means of bulletins and mailgrams. He stated that the No-Contest Contest, beginning May 27, would run for an 18-week period. The field staff, Mr. Pisciotta added, also plays a role in monitoring quality, point-of-sale and in building and maintaining displays through the No-Contest Contest. An excerpt from the new video game show tape was played. The video tape ended with the feature that "four sell more" to encourage consumers to buy more fruits on impulse. Tear-off recipe pads are available for retailers to use at point-of-sale. In addition, a retail kit was displayed with line art, transparencies and many other features to assist retailer's in developing their own newspaper and TV ads. Mr. Pisciotta pointed to in-store sampling of summer fruits as being a highly successful method of increasing sales. Referring to the importance of Hispanic consumers, Mr. Pisciotta stated that it was a misconception that all Hispanics are in California. They also reside throughout the Southwestern states and in other parts of the country.

Ms. Wilk concluded her presentation by stating that the Kansas City study indicates that buyers of California Summer Fruits® are more concerned with quality than with price and stated finally that the retailer research efforts indicated that "consumers, retailers, handlers, sellers and growers would all benefit from improved industry communications."

Mr. Ed Odrón of Lucky Stores was introduced by Ms. Wilk. Mr. Odrón is the Vice President for Produce Marketing in the Northern area. He began his career

in 1965 with Lucky at Eagle stores in the Midwest. His experience includes field buying, quality control and merchandising. He is also the Chairman of the Merchandising Board for United Fresh Fruit and Vegetable Association.

Mr. Odron stated that he was impressed with the morning presentation. He said that he sees many presentations in the trade and that the program presented by CTFA was excellent. He further pointed out that his address for the day virtually paralleled the findings of CTFA. Lucky spends hundreds of thousands of dollars on consumer research and concluded their findings were very similar to those of the CTFA studies.

There are 165 Lucky stores in Mr. Odron's area, ranging from Tulare to Crescent City, with warehouses in San Leandro and Sacramento. Mr. Odron presented a series of slides which illustrated the level of quality maintained in the Lucky produce departments. He stated that surveys showed that a store's quality was considered synonymous with the quality of its produce department.

Mr. Odron proceeded to make a number of observations about today's consumer. Consumers prefer fresh fruit to canned fruit and that value to today's consumer does not necessarily mean low price. With more women in the work force, we now have a different family structure with 40% of today's buyers in the supermarket being male.

Mr. Odron stated that the consumer seems to have more money than time. Thus he is looking for a

quality product to buy and is not so concerned about price. Studies show that 28 is the median age for consumers and that the median age is continuing to rise. The effect on the produce department is a concern that prefers products that are low in sodium, low in calories, fresh, healthy and nutritious. Because of the active lifestyle of young consumers, big meals are a thing of the past and the phenomenon of grazing, or eating several "non-meals" during the day has become a common way of eating. Fresh produce sales have boomed in the last decade as a result of this social change. Mr. Odron stated that summer fruits meet all the criteria for this consumer group.

Mr. Odron then presented slides of a new Lucky store recently constructed where their consumer research was put to good use. His slides illustrated very effective utilization of neon lighting and complementary colors chosen with an eye to nostalgia. He mentioned that an older store might have had a wet rack 48 feet long, newer stores might have wet racks 100 feet long. 250 to 260 varieties of produce are displayed in a modern store compared with the fifty to sixty items displayed in the 1940's. Ethnic demographics were considered by Lucky on a store-to-store basis.

Mr. Odron stated that he looked forward to the opportunity of the summer season, that the summer fruits replace citrus fruits as the center stage items in the produce department. Pointing out the success of the video display at point-of-sale for pineapples, Mr. Odron said that prior to using the 30-second video tape he sold 10 cases of pineapples per week in a particular store. During the period in which the

video tape was used at point-of-sale the same store sold 50 cases of pineapples per week. He strongly encouraged CTFA to produce point-of-sale videos. He stated that they were not only good for consumer sales but for training of produce department personnel in terms of rotation, order control and display techniques. He went on to state that there was a shortage of video equipment in his stores and he was constantly vying with managers from other departments for use of the video equipment.

Mr. Odron then made a number of points which would assist the grower/shipper in knowing what was required at the supermarket level. Larger sizes of fruit were definitely required not so much by the buyer but by the consumer. However, he said that consistency and uniformity were equally important and that there was always a place for value and not just size. He mentioned that bagging would be a possible vehicle for moving small fruit but since wages in his stores equated to 40¢ per minute for employee, the thought of bagging small fruit in the store was precluded.

He stated that if we have good varieties that lack color then perhaps we must educate the consumer that quality is there. He cited the analogy of frosted artichokes being promoted as "frost-kissed." He firmly reinforced that we must strive, for better maturity as consumers are hungry for summer fruit and if they buy immature fruit at a high price they will not return to buy when more fruit is available and maturity is good. He urged growers to ensure good maturity on early varieties.

Turning to plum sizing, Mr. Odron said that the industry must come up with a better sizing nomenclature for the sake of younger people working in produce departments. In reference to advertising Mr. Odron said that CTFA must reach younger people with our fresh fruit advertising and said that the CTFA comic book is a good example of an effective means to do this. He also complimented CTFA for its Recipes for Success cookbook as an excellent tool for consumer education. He stressed that his store needs help in putting ads together far in advance of the season schedule, that he needs an early schedule of the windows that were available for ads matched up with variety peaks. He said that without a schedule far enough in advance he cannot appropriate the space available in his store's schedule to run ads for summer fruits. He went on to say that he can pull an ad if fruit isn't available at the last minute but he can't put an ad in the paper at the last minute.

Mr. Odron touched on the pesticide issue stating that he felt that we have good agencies in place in the form of the Department of Agriculture and the EPA and that he feels fruit available to the consumer is safe. However, doubt in consumers minds can jeopardize the entire industry so the growers must do the best job possible and follow the rules. He concluded by saying that retailers truly look forward to the summer fruit season and that the retailer and the grower/shipper community need to develop a better understanding of each other's opportunity areas.

Roger Wood then opened the question period by referring to the low prices obtained from last year's big crops stating that it seemed to him that retail

prices remained disproportionately high. Mr. Odron did allow that retailers had experienced increased operational costs in past years but stated that given advance notice of big volume that retailers looked forward to moving this kind of volume because they are definitely sales driven.

In response to a question about sampling or in-store demos, Mr. Odron answered that in-store demos sell product even if the product is familiar. He cited the example of some red delicious apples which had no surface color which nevertheless sold very well last season because in-store sampling was used as a sales tool. He said that a big opportunity existed in terms of the number of varieties of plums available for sampling.

A question was posed regarding the retail research finding which said that darker plums moved best. He answered that perhaps this just reflects patterns of behavior, that many red plums such as Santa Rosas still move very well. Mix and match promotions entice people to try other colors of plums.

Ms. Wilk mentioned her concern that varieties have been mismarked when she has entered a Lucky store. He responded that Lucky now sells plums as red, black or green and that he was not without opportunities to merchandise varieties. When Ms. Wilk asked how can CTFA help in this regard, Mr. Odron answered that it could provide variety charts to hang over the display area and then follow up by assisting in the signing effort.

In response to another question, Mr. Odron stated that big size fruit sells better, but with a recognized size difference small fruit will also move well. Furthermore, he stated that basic movement on large or small sizes was keyed to value.

Mr. Kozuki asked what he as a grower can do when fruit backs up in the cooler. Mr. Odron answered that if he were to be given a phone call that Lucky would respond the best they can. He cited an example of the desperate asparagus grower who called in with an emergency. Displays were set up in all their stores and three loads of asparagus were moved in three days. Mr. Odron stated that given the information as soon as possible he would make every effort to respond to moving emergency volume.

Mr. Wood then thanked Mr. Odron for the time involved in the preparation of such an excellent presentation and for his definite support of the summer fruits program.

Mr. Wood again repeated the schedule for the following meetings on Wednesday and Thursday. There being no further business the meeting was adjourned.

Respectfully submitted,

DAVID S. PARKER
Assistant Secretary

7/11/88
Attachments

	1987-88 <u>Budget</u>	1987-88 <u>Expenses</u>	1988-89 <u>Budget</u>
Field Staff Activities	85,000	81,728	96,000
Retail Advertising			
Incentives	85,000	85,855	98,000
Trade Communications	39,000	34,333	27,200
Retail Projects	40,000	36,254	22,500
POS Materials	22,000	24,297	25,300
Publicity, Education Activities	40,000	45,131	59,100
Foodservice Activities	46,500	36,210	32,500
TV, Radio Production	38,350	54,023	56,000
TV Advertising	398,510	422,807	456,135
Radio Advertising	228,290	214,346	220,000
Outdoor Advertising	37,800	41,766	
Canadian Promotion	17,500	16,182	80,000 ⁽⁴⁾
Advertising Research	29,700	29,879	2,500
Merchandising Research			10,750
Promotional Expense			22,500
Hispanic Promotion			6,950
Miscellaneous	<u>13,500</u>	<u>35,984</u>	<u>10,000</u>
Total	1,121,150 ⁽¹⁾	1,158,795 ⁽²⁾	1,225,435 ⁽³⁾

Estimated Balance Forward 3/1/88: 201,074

5/4/88

PLUM COMMODITY COMMITTEE
PROPOSED MARKET DEVELOPMENT
BUDGET 1988-89

	1987-88 <u>Budget</u>	1987-88 <u>Expenses</u>	1988-89 <u>Budget</u>
Field Staff Activities	98,000	94,255	112,000
Retail Advertising			
Incentives	100,000	151,013	189,750 ⁽⁵⁾
Trade Communications	39,000	34,512	27,200
Retail Projects	40,000	36,410	22,500
POS Materials	31,000	32,307	35,600
Publicity, Education			
Activities	40,000	50,543	59,100
Foodservice Activities	46,500	45,644	32,500
TV, Radio Production	39,350	55,185	63,000
TV Advertising	593,730	616,805	850,719
Radio Advertising	365,320	335,140	306,390
Outdoor Advertising	37,800	41,765	
Canadian Promotion	25,900	24,860	80,000 ⁽⁴⁾
Promotion Research	29,700	29,878	2,500
Merchandising Research			10,750
Promotion Expense			22,500
Hispanic Promotion			6,950
Miscellaneous	<u>13,500</u>	<u>36,583</u>	<u>10,000</u>
Total	1,499,800 ⁽¹⁾	1,584,900 ⁽²⁾	1,831,459 ⁽³⁾

- (1) Amended to 1,584,950 on 12/9/87
- (2) Direct promotional expenses @ 17,317,000 pkgs. =
.09152 per pkg.
- (3) Direct promotional expenses @ 16,000,000 pkgs. =
.10773 per pkg.
@ 16,500,000 pkgs. =
.10175 per pkg.
@ 17,000,000 pkgs. =
.09639 per pkg.
- (4) Application made for State matching funds
- (5) Includes Plum-A-Rama Promotion (\$75,000)
- Estimated Balance Forward 3/1/88: 619,114

5/4/88

	1987-88 <u>Budget</u>	1987-88 <u>Expenses</u>	1988-89 <u>Budget</u>
Field Staff Activities	102,000	97,630	112,000
Retail Advertising			
Incentives	100,000	101,115	114,750
Trade Communications	39,000	34,512	27,200
Retail Projects	40,000	36,419	22,500
POS Materials	31,000	32,307	35,600
Publicity, Education			
Activities	40,000	48,768	59,100
Foodservice Activities	46,500	51,626	32,500
TV, Radio Production	39,350	54,854	61,000
TV Advertising	608,860	630,653	858,146
Radio Advertising	392,010	360,375	306,390
Outdoor Advertising	37,800	41,765	
Canadian Promotion	26,600	24,416	80,000 ⁽⁴⁾
Promotion Research	29,700	29,878	2,500
Merchandising Research			10,750
Promotion Expense			22,500
Hispanic Promotion			6,950
Miscellaneous	<u>13,500</u>	<u>35,983</u>	<u>10,000</u>
Total	1,546,320 ⁽¹⁾	1,580,301 ⁽²⁾	1,761,886 ⁽³⁾

Estimated Balance Forward 3/1/88: 314,982

05/4/88

PEAR COMMODITY COMMITTEE
PRELIMINARY PROMOTIONAL BUDGET 1988-89

	1987-88 <u>Budget</u>	1987-88 <u>Expenses</u>	1988-89 <u>Budget</u>
Field Staff Activities ⁽⁴⁾	70,000	63,659	80,000
Retail Advertising			
Incentives ⁽⁴⁾	65,000	65,709	62,500
Trade Communications	39,000	43,184	43,400
Retail Projects	40,000	36,252	22,500
POS Materials ⁽⁴⁾	16,000	16,603	18,500
Publicity, Education			
Activities	55,000	67,888	47,700
Foodservice Activities	46,500	36,008	32,500
TV, Radio Production	16,700	15,968	25,000
TV Advertising ⁽⁵⁾	15,000	15,000	15,000
Radio Advertising	279,040	265,625	282,220
Canadian Promotion ⁽⁶⁾			30,000
Outdoor Advertising	26,600	26,639	
Advertising Research	20,900	21,171	2,500
Merchandising Research			10,750
Promotion Expense			22,500
Hispanic Promotion			4,150
Miscellaneous	<u>13,500</u>	<u>25,015</u>	<u>10,000</u>
Total	703,240 ⁽¹⁾	698,721 ⁽²⁾	709,220 ⁽³⁾

⁽¹⁾ Amended to 713,800 on 1/27/88

⁽²⁾ Direct promotional expenses @ 4,387 cars = .1770 per ctn.

⁽³⁾ Direct promotional expenses @ 3,700 cars = .2130 per ctn.

@ 4,000 cars = .1970 per ctn.

@ 4,300 cars = .1833 per ctn.

⁽⁴⁾ Item shared with Northwest. Budgets based on 50% CA/50% NW.

⁽⁵⁾ Grant to stone fruits.

⁽⁶⁾ Application made for State matching funds

Balance Forward 3/1/88: 183,352

5/4/88

CALIFORNIA SUMMER FRUITS¹ PROPOSED PROMOTIONAL EXPENSES 1988-89

	Peaches		Plums		Nectarines		Pears		Total	
	1987-88 Expenses	1988-89 Budget	1987-88 Expenses	1988-89 Budget	1987-88 Expenses	1988-89 Budget	1987-88 Expenses	1988-89 Budget	1987-88 Expenses	1988-89 Budget
Field Staff Activities	81,728	96,000	94,255	112,000	97,630	112,000	63,659 ¹	80,000	337,272	400,000
Retail Advertising Incentives	85,855	98,000	151,013	189,750	101,115	114,750	65,709 ²	62,500	403,692	465,000
Trade Communications	34,333	27,200	34,512	27,200	34,512	27,200	43,184	43,400	146,541	125,000
Retail Projects	36,254	22,500	36,410	22,500	36,419	22,500	36,252	22,500	145,335	90,000
POS Materials	24,297	25,300	32,307	35,600	32,307	35,600	16,603 ¹	18,500	105,514	115,000
Publicity, Education Activities	45,131	59,100	50,543	59,100	48,768	59,100	67,888	47,700	212,330	225,000
Foodservice Activities	36,210	32,500	45,644	32,500	51,626	32,500	36,008	32,500	169,488	130,000
TV, Radio Production	54,023	56,000	55,185	63,000	54,854	61,000	15,968	25,000	180,030	205,000
TV Advertising	422,807	456,135	616,805	850,719	630,653	858,146	15,000 ³	15,000	1,685,265	2,180,000
Radio Advertising	214,346	220,000	335,140	306,390	360,375	306,390	265,625	282,220	1,175,486	1,115,000
Outdoor Advertising	41,766		41,765		41,765		26,639		151,935	
Canadian Promotion ⁴	16,182	80,000	24,860	80,000	24,416	80,000		40,000	65,458	270,000
Promotional Research	29,879	2,500	29,878	2,500	29,878	2,500	21,171	2,500	110,806	10,000
Merchandising Research		10,750		10,750		10,750		10,750		43,000
Promotional Expense		22,500		22,500		22,500		22,500		90,000
Hispanic Promotion		6,950		6,950		6,950		4,150		25,000
Miscellaneous	35,984	10,000	36,583	10,000	35,983	10,000	25,015	10,000	133,565	40,000
Total	1,158,795	1,225,435	1,584,900	1,831,459	1,580,301	1,761,886	698,721	709,220	5,022,717	5,528,000

¹ 1987-88 expenses for these items shared with Northwest based on shipments 50.43% CA/49.57% NW.

² 35,669 shared with Northwest based on shipments 50.43% CA/49.57% NW. 30,040 for California Bartletts only.

³ Grant to stone fruits.

⁴ Application has been made for State matching funds.

5/4/88

MINUTES

SUBCOMMITTEE ON ADVERTISING
& PROMOTION

May 17, 1988

Sacramento, California

The meeting of the Subcommittee on Advertising & Promotion was called to order by Chairman Dave Elliot at 1:30 p.m. at the Red Lion Inn in Sacramento, California. Roll call was waived in favor of passing an attendance register. Those present were:

Dave Elliot	Ron Hoston	Rick Barnett
John Barr	Tom Thomas	Dennis Icardi
Phil Scully		

Also:

Kurt Kimmel	Jonathan Field	Robyn Wilk
Deborah Lane Beall	David S. Parker	Ray Pisciotta
Todd Norgaard	Patricia Makris	Edie Clark

MINUTES

* * * * *

FINANCIAL REPORTS

* * * * *

LITIGATION

* * * * *

CROP PROSPECTS

* * * * *

PROMOTION

Ms. Wilk reviewed the 1988 proposed market development budget for pears, totaling \$709,220, along with the market development budgets recently approved by the stone fruits committees (copies attached). She noted that both the Peach and Nectarine Committees had elected to increase their assessment rate from 16 to 18¢ per package. She said that due to a large crop and balance forward, plums would stay at a 19¢ assessment and had approved increased television expenditures and a Plum-A-Rama adbuy promotion to help move this year's crop.

Ms. Wilk said that the proposed promotion budget for pears has not increased dramatically over the 1987 budget. She noted increases primarily in the area of radio production and Canadian promotion. Ms. Wilk added that some of the proposed work was necessarily already underway. She pointed out for the Subcommittee's consideration that budget speculations based on the estimates put forth at this meeting with a 20¢ assessment indicated a balance forward at March 1, 1989 of \$35,840. Ms. Wilk said more than this amount is required to start a new fiscal year since substantial billings are received prior to assessment income. Responding to Chairman Elliot, Mr. Field said that at least \$900,000 was payable before assess-

ment income, a major portion of it by April 1. He added that while one committee could carry for an interim period, as plums are doing at the present time, this was not a recommended practice. Mr. Field suggested a balance forward of \$1 million dollars for all four programs would be ideal.

Market Development

Mr. Pisciotta said that the 1988 field staff meeting had concluded that morning and that CTFA will again be represented by eleven field men with the assistance of five detail men for special projects such as in-store sampling. He added that an expanded program of in-store sampling for both Bartletts and stone fruits is projected this year to stimulate increase ads, features and displays.

Mr. Pisciotta recommended a change in the Bartlett retail advertising incentive program. He suggested that for the first phase California Bartletts join in the No-Contest Contest for a special bonus period from July 17 through August 31. Participation in the Pear Bureau Bartlett adbuy program will commence September 1 until Bartletts run out.

Trade communications for Bartletts will commence July 9 with a Bartlett season introduction ad in *The Packer* and *Produce News*. Bartletts will join the stone fruits in the July issue of the *Fresh Produce Council Digest*. Mr. Pisciotta said the Bartlett advertising and Promotion Guide is scheduled for distribution to the trade within the same week.

Mr. Pisciotta reported that the new Retail Training Video had been completed on schedule and released for distribution to the trade in March. He noted that demand for training materials is high due to the continuous turnover in produce departments, adding that major retailers gear up in March and April for the summer selling season. Mr. Pisciotta displayed the new point-of-sale materials and in-store recipe pads produced for the 1988 season, stating the materials were being well-received by trade factors.

Mr. Pisciotta said that costs for in-store sampling were covered in the budgets outlined for Field Staff Activities and Advertising Incentives. He further confirmed that Bartlett sampling was undertaken by the Pear Bureau which has, this year, asked CTFA to join them. CTFA's obligation would be a percentage based on shipments as in other shared expenses. He said that sampling programs would be used only in major markets. Each fieldman is given a specific demo budget. Normally, sampling is conducted with Northwest Pear-A-Rama promotions, so Bartletts bear only 1/5 of the demo cost. Answering Mr. Scully's concerns, Mr. Pisciotta said that negative comments in the recent retailer research concerning the No-Contest Contest stemmed from their preference to receive dollars rather than premiums. He added that budget increases in Field Staff costs were due primarily to increased cost of travel, pensions and payroll.

Responding to Mr. Icardi, Mr. Norgaard said that the increases in radio and television production reflected a 10% increase in talent costs and the production of new radio commercials for 1988.

Publicity, Education Activities

Ms. Beall reported that the food-page publicity program is well underway since most food editors need a 6-month lead time for feature articles. She displayed the 1988 color selectors, in recipe box style, which have been distributed to 350 food editors across the country. Additionally, black-and-white press its containing photography, line art, recipes and editorial copy have been distributed to 800 food editors. Ms. Beall said that CTFA has cooperated with the Pistachio Commission in producing a full-page editorial feature release which has been ordered by 160 editors representing eight million circulation. A second cooperative tie-in with the Rice Council will be released later in the season.

Ms. Beall said television and radio publicity will be stepped up this season with a "First Day of Summer" promotion in twelve major markets. With the assistance of the field staff, mini-lugs of California Summer Fruits® will be delivered "on the air" to key radio and television news and talk show personalities on June 21.

Ms. Beall displayed the new California Summer Fruits® "Summer Fun" comic book with accompanying story cassette which has been produced for children in the day care and early elementary school age group. She said that originally 50,000 books had been scheduled for printing but orders had been received for 350,000. Answering Mr. Icardi, Ms. Beall said that summer camps had not been included this year but should certainly be addressed next year.

Ms. Beall said that the "Fresh Ideas" and nutritional information consumer brochures have been translated in Spanish. She stated initial distribution of these brochures will be in the Los Angeles Hispanic market in conjunction with in-store sampling in major Hispanic supermarkets. Ms. Beall showed a set of four posters, one for each commodity, produced this year to become part of the consumer publicity materials which are available upon order.

Ms. Beall announced that 13 magazine food editors have accepted CTFA's invitation to participate in a stone fruits harvest tour similar to the Bartlett tour last year. The tour will begin June 11.

Foodservice Activities

Ms. Wilk noted that the proposed foodservice activities budget was reduced from the previous year because production of the new foodservice video has been completed. She said that a number of foodservice promotions have been scheduled for the 1988 season with operators such as United Airlines and ARA, the country's largest contract feeder. The United Airlines promotion, "Salute to the Northwest" will be featured on all flights originating from Seattle during the month of July. The promotion will feature fresh California plums along with salmon, cherries and other Pacific Northwest commodities.

ARA's promotion, "Fruit-The Alternative Dessert," will run for three months—June, July and August—in the western U.S. and will feature, in turn, all four fruits. This promotion will include 200 cafeteria units and 160 vending machine accounts. Ms. Wilk

also noted that from mid-July to mid-August, Coco's Restaurants will feature California peach desserts and beverages in their 172 units nationwide. She said that Flick International, a 50-account foodservice company in New York will run a California Summer Fruits® promotion in June and July, featuring all four fruits.

Ms. Wilk stated that four new "Chef's Creations" foodservice recipe cards have been developed for 1988 to complete the series started last year. The materials are designed for upscale restaurants and feature recipes endorsed or developed by leading operators or chefs.

Ms. Wilk said that the main focus of foodservice activities for 1988 will be a foodservice research project. She noted that a number of years have passed since a study was made in 1982 and it is time to reevaluate the program which has been directed by the results of that study. She added that if CTFA is to continue a foodservice program it is necessary to look at where foodservice dollars are going and how effectively they are being spent. With a limited budget, Ms. Wilk stated, activities and funds must be targeted accurately. She said the Hale Group of Massachusetts has been selected to conduct the study, the total cost of which will be approximately \$50,000. A foodservice advisory panel of eight grower/shipper representatives met with the Hale people in April to provide input and background on our industry. Ms. Wilk said the study will be conducted during the summer season and findings will be completed in the fall.

Consumer Advertising

Mr. Norgaard presented the 1988 18-week national network radio campaign, with spot radio fill in selected markets. Bartletts are proposed to participate beginning July 17. The proposed program includes a Bartlett five-week spot radio extension in select markets commencing September 19. Mr. Norgaard added that the stone fruits' programming included spot television in eight markets and cable television on a national basis. He said cable television was very efficient in targeting our best audience.

Mr. Norgaard stated that the bulk or weight of the 1988 media campaign is centered early in the season, noting that the Kansas City research showed early season buyers buy more often and throughout the entire season. He said the media campaign must get going early in the season to establish these purchase patterns.

Ms. Wilk called the subcommittee's attention to the history of CTFA's promotional spending and allocations for media advertising. Mr. Norgaard said that in earlier years, both cable and syndicated television had been purchased in addition to spot television. Answering Mr. Thomas, Ms. Wilk said the total promotional budget proposed for 1988, all commodities, is \$5.5 million.

Mr. Norgaard pointed out that the \$30,000 proposed for CanadianPromotion is a merchandising budget and does not include media. Ms. Wilk said a meeting concerning our application for matching funds was scheduled with the State the following week and

indications were favorable. Mr. Norgaard said that media costs for the Canadian program would be an additional \$50,000 and that the existing Bartlett television commercial could be used. He added that this would be for the Toronto market only. Mr. Field estimated that \$100,000 in matching funds would be granted by the State for the Canadian promotional effort. Answering Mr. Thomas, Mr. Norgaard affirmed that the expenditures would be for the Toronto market only. He added that the original Canadian proposal, for all three of their major markets, had totaled \$408,000, \$267,000 of which represented television advertising. He said the idea was to treat Canada as a major U.S. market.

Responding to Mr. Icardi, Mr. Field said that he didn't know the total number of applications pending for matching funds, but had been informed that there were 47 new applicants this fiscal year. He added that a \$200,000 discrepancy, has been found in the State's books, so it is doubtful there will be any leftover 1987 funds, some of which we had hoped to receive. In answer to Mr. Barnett, Mr. Field said the matching funds program was similar to the FAS program but was conducted by the State. Mr. Norgaard confirmed to Mr. Elliot that the original application to the State included tracking and evaluation, primarily by assessing shipment figures. Mr. Field added that Dr. Kirby Moulton had been asked to do the study but he was doing a similar study for the Pacific Rim export program and a project for peaches which involved too much to add the Canadian project.

Mr. Thomas asked for an explanation of why Canada was chosen for extra promotion. Mr. Norgaard re-

plied that every indication shows Canada should be a great market for CTFA. He suggested that perhaps because they are farther north, summer has more impact and there is a strong demand for our fruits. Ms. Wilk commented that the total population of Canada is less than California and inquired if the subcommittee felt it was appropriate to divert funds to Canadian promotion. Mr. Thomas said that 80-85% of the pears that go to Canada are from Lake County and that it was a developed market. Mr. Norgaard stated that all research indicated that San Francisco and Boston are our best potential markets, followed by New York and Los Angeles. He added that we could move much more fruit in Toronto, noting that it would be hard to come to the conclusion that we have saturated any market.

Promotion Research

Ms. Wilks announced that a full report of the recent merchandising research would be presented at the June 21 commodity committee meeting. She added that Jim Culbertson and Larry Thornton, both of whom participated in the tours, will be present at that meeting to give a firsthand report. Ms. Wilk informed the subcommittee that the Merchandising Research Presentation in Fresno on April 21 was recorded and cassette tapes are available to those interested. In addition, summaries of all 1987 research projects will be made available to committee members at the June 21 meeting.

Ms. Wilk outlined plans to begin promotion in the Hispanic market which holds good potential for California Summer Fruits®. In addition to the Spanish lan-

guage brochures and sampling program to be undertaken by Ms. Beall, a Hispanic media tour will be conducted in June and August utilizing the services of a bilingual food professional. Media appearances in June will take place on Hispanic stations in major California markets and the August appearances, involving all four fruits, will occur on Hispanic media in Texas.

Pear Budget Speculations

Chairman Elliot opened discussion on budget speculations requesting subcommittee's comments on an assessment increase. Mr. Field said that general and administrative budgets had been computed very conservatively and there could be some savings in this area of approximately \$20,000. It was noted that even with an assessment increase to 22¢, cuts would be required in the market development budget. Ms. Wilk suggested that the Canadian Promotion budget of \$30,000 could be reduced to \$10-15,000. Being assured by the subcommittee members that estimates put forth were realistic, Mr. Field observed that budget speculations would have to be based on fresh shipments of approximately 3,800 cars. Mr. Scully questioned any promotion at all in Canada if no State funds are available. Ms. Wilk said that we must show a commitment to this export promotion or we will get no consideration. Mr. Field concurred, stating CTFA must have a presence in the market in order to make a grant possible.

The subcommittee discussed the various options available to support a promotional program for pears in the 1988 season. Mr. Thomas commented that

pears couldn't "borrow on the come" any longer and it was time to pay for the last few years. In further discussion Mr. Field reminded the subcommittee of the need to give direction to staff to go ahead with the proposed program or make reductions, but that the final decision would be made on June 21. He added that alternative programs can be prepared and available if cutbacks are directed. Mr. Field also noted that, historically, all pear research has been funded by Pear Zone and that a reallocation of funds committed to research could be considered. Mr. Norgaard said the option also existed to sell some of the allocated Bartlett radio spots to the stone fruits where they can use them, adding that the spots must be traded with equity.

Mr. Icardi moved, Mr. Thomas seconded and it was unanimously carried to recommend a promotional budget reduction to \$675,000 with appropriate cuts to be determined by staff. In discussing the motion Mr. Scully expressed concern about the adequacy of the carryover into the 1989 season. Mr. Barnett moved, seconded by Mr. Barr, that in view of a less than normal crop a 2¢ increase in assessment, to 22¢ per package, be recommended. Following subcommittee discussion, the motion carried unanimously.

Meeting dates

Chairman Elliot called the subcommittee's attention to the meeting dates listed in the agenda. There being no further business, the meeting adjourned at 4:30 p.m.

Respectfully submitted,

EDIE CLARK
Acting Secretary

JUNE 13, 1988

[attachments omitted in printing]

MARKETING POLICY STATEMENT FOR
CALIFORNIA PEACHES, PLUMS AND
NECTARINES

1988 Season

Submitted by
Peach Commodity Committee
Plum Commodity Committee
Nectarine Administrative Committee

This statement deals with various marketing prospects for 1988 fresh California peaches, plums and nectarines. It contains examinations of the crops, the general economic situation, equivalent parity prices, the national peach outlook, other crops, transportation, the status of the canned fruit industry and market development plans. Some conclusions are also furnished.

THE CALIFORNIA CROPS

* * * *

GENERAL ECONOMIC SITUATION

* * * *

EQUIVALENT PARITY PRICES

* * * *

THE NATIONAL PEACH OUTLOOK

* * * *

OTHER CROPS

* * * *

TRANSPORTATION

* * * *

THE CANNED FRUIT INDUSTRY

* * * *

EXPORT MARKET DEVELOPMENT

During 1987 the California Tree Fruit Agreement began investing promotion dollars to develop markets in Hong Kong, Singapore and Taiwan for peaches, plums and Bartlett pears. These efforts will be continued during 1988 and should be increased with the hope of additional funds through the Foreign Agricultural Service cooperator fund program. The program anticipated in these markets is similar to that carried out during 1987. Primary emphasis will be placed on introducing plums and peaches in these markets. Increases in shipments to Hong Kong, Singapore and Taiwan ranged from 80% to 300% during 1987. Although these increases cannot be expected to continue, it is hoped that these markets can be developed to provide additional stability for fresh sales domestically. The focus of these programs will be to increase product turnover and introduce these products through in-store demonstrations.

MARKET DEVELOPMENT

The Stone Fruits Promotion Subcommittee recommended at a meeting held on March 23, 1988, California Summer Fruits® promotion budgets totaling more than 5 million. The suggested peach budget is 1,225,435, plums 1,831,459 and nectarines 1,761,886. Subcommittee evaluation of a trial budget for fresh Bartlett pears totaling 709,220 is scheduled for May 17.

More than \$3 million of this sum is planned for media expenditures, including national network radio, spot radio, spot television and cable television. The nationwide effort will begin on May 16 and will continue for eighteen weeks through September 18. California Bartlett pear national advertising begins July 11. To extend the campaign, spot radio will also be utilized for fresh Bartletts beginning September 19 through October 23.

New arrangements of the California Summer Fruits® commercials for radio have been produced for the 1988 season. Five 30-second spots, again featuring the voice of Hoyt Axton and the memorable California Summer Fruits® jingle, will be utilized for network radio. A "season opener" will introduce the campaign followed by four individual fruit spots. Spot radio will feature 60-second commercials, the additional 30 seconds devoted to a "music bed" that will "piggyback" the 30-second commercials with a continuation of the music and announcer-read copy with timely crop information.

The four television spots include one for each stone fruit as well as a California Summer Fruits® season introduction spot. Bartletts receive television exposure on the individual spots through a grant provided to the stone fruits. An average of 70 radio commercials will air nationwide each week on CBS Radio Network, CBS Radio Radio, ABC Information, ABC Direction and Satellite Music Network along with eight weekly nationally syndicated programs sponsored by California Summer Fruits®. With this schedule, the California Summer Fruits® message

will reach virtually every U. S. market with almost 212 billion impressions against U. S. adults.

The season opening radio commercial promoting the stone fruits will run for two weeks starting May 16. The individual spots, one for each of the fruits, will then be rotated for the remaining sixteen weeks. In support of the national network radio schedule, spot radio is being run in two flights of four and three weeks. The first flight runs from May 23 through June 19, the second flight running June 27 through July 17. Spot radio will be heard in Boston, Chicago, Dallas, Los Angeles, New York and San Francisco. The two spot radio flights will reach adults 25 through 54 years old an average of 2.8 times during each flight period.

This season's major market television campaign consists of three flights and runs from May 23 through August 21 for ten weeks. The commercials, which also feature Hoyt Axton, will air during the Today Show, Good Morning America, early and late news, independent prime time movies, specials and other top shows. During each of the three flights, the commercials will reach 88% of adults 25 through 54 years old an average of 5.7 times in the following markets: Boston, Chicago, Fresno, Los Angeles, Minneapolis, New York, Sacramento, San Francisco, Toronto and Washington, DC.

This year's promotion plans of California Summer Fruits® in Canada call for television in the Toronto market following the same spot television schedule as the United States. National cable television, also beginning May 23, will include the Arts & Entertain-

ment-Cable Network, The Discovery Channel and Video Hits One. The last cable flight will continue through August 21.

A special radio and television publicity effort will focus on the Hispanic markets in California and Texas. Two media tours featuring California Summer Fruits® will be conducted this season using a bilingual Hispanic food professional. Radio and television coverage will include talk and food shows discussing and demonstrating the value of California Summer Fruits® to this influential market.

The consumer services program is divided into two areas—publicity and education. The newspaper publicity program will reach nearly 750 food editors nationwide and in Canada. Mailings of sixteen different "Celebrate Summer" press kits, four for each fruit, will include recipes, line art, quick usage ideas and black-and-white photography. Twenty color photographs and editorial copy will be made available to nearly 300 food editors.

Dailies and weeklies with 20,000 circulation and more will receive special features co-produced with the National Rice Council and the California Pistachio Commission. Smaller publications will also receive a special four-fruit release.

Direct placement of California Summer Fruits® recipes, usage ideas and photography in consumer magazines will continue. Increasing magazine food editors' knowledge of California Summer Fruits® will be accomplished with a special five-day harvest tour for the stone fruits this June. Radio and

television publicity efforts will receive increased attention during this season. On the first day of summer, radio and television stations in six major markets will receive boxes of fresh California peaches, plums and nectarines with a "Celebrate Summer" lug label and informational press kit.

Efforts in the education program include a California Summer Fruits® comic book, for ages three to nine, that has been published for distribution through education systems. An accompanying cassette tape "tells" the story for children under reading age. Five consumer brochures have been translated into Spanish and will be distributed in sampling programs to be conducted in Hispanic markets. A "spa inspired" new consumer recipe leaflet to attract females in CTFA's primary target audience will also be available this season.

Efforts in foodservice include completion of a new sales-oriented foodservice video entitled "Lifestyles of the Ripe and Edible." It will be made available to foodservice distributors, operators and university programs in hotel and restaurant management. A new set of four "chef's creations" recipe cards complete an eight-recipe series highlighting well known chefs or foodservice establishments. A major emphasis in foodservice this season will be research. Objectives of a proposed research project are to determine current and future foodservice potential for California Summer Fruits®, establish strategic direction and focus and identify results-oriented "measurable" programs targeted at prioritized segments of the foodservice industry.

The proposed trade promotional program for 1988 will be merchandised by eleven field staff representatives, assisted by five part-time consultants. The fieldmen will personally visit major factors in the U. S. and Canada every four weeks. Elements of the program include distribution of California Summer Fruits® Advertising and Promotion Guides and Planners to assist merchandisers in developing their own promotional programs, Retail Ad Material Kits and the No-Contest Contest. A stone fruits in-store sampling program will be tested in major markets in the 1988 season. An in-store video concept will also be tested with select accounts.

Promotional materials available for the 1988 season will include variety charts for each of the fruits, all new point-of-sale combination posters/price cards and a companion tear-off recipe pad providing ripening information, serving suggestions, recipes and a "Recipes for Success" cookbook offer. A new retail training video, the "California Summer Fruits® Bowl," will be offered to all retail factors for their pre-season produce meetings. Trade advertising in *The Packer*, *Produce News* and *Fresh Produce Council Digest* has been scheduled for five peak periods during the season along with special articles and interviews in the California Summer Fruits® edition of each of these publications in June.

A spring update bulletin was mailed to all key trade factors in early April describing weather conditions, timing, varietal information and other timely information about the stone fruits. Additional trade mailings will be employed as the season dictates. Supervision of the field staff, including continuous training in

all activities funded entirely by California, will again be handled by CTFA staff.

CONCLUSION

Supplies of stone fruits in California will again be bountiful. All indications are that the economy will keep pace with previous years, primarily due to consumer spending. Exports, especially of plums, during the season should improve over last year or at least remain the same. The large crops, however, will definitely impact the marketplace. Larger supplies of peaches out of the South and other peach producing areas are also expected which will put marketing pressures on California product in some local areas. Growers in many instances have thinned and pruned for large sizes and hopefully more large sizes will mean better prices and better marketing. Some shippers may not even pack fruit at the smallest size. Quality should also be good for the stone fruits, although some frost and hail damage has occurred in the Bartlett pear industry. It is hoped that good quality and good size will help in moving the crop.

One conclusion is certain—California peaches, plums and nectarines will not exceed parity.

May 3, 1988

[08 AUG 1988]

To: William J. Doyle, Acting OIG
California Marketing Field Office

From: Robert C. Keeney, Deputy Director /s/
Robert Keeney
Fruit and Vegetable Division

Subject: Approval of 1988-89 Fiscal Year Research,
Market Development, and Promotion
Projects for California Nectarines, M.O.
916, California Peaches and Plums, M.O.
917

Please notify the chairmen of the nectarines, peach, and plum committees under the California Tree Fruit Agreement that the Department approves the projects specified in attached memo and attachments.

Cost of the various projects is expected to total \$5,043,387. Adequate funds are included in the respective committees' approved 1988-89 season budgets to cover the estimated projects' costs.

Attachments

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal Omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE

[AUG 08 1988]

To: Robert C. Keeney, Deputy Director
Fruit and Vegetable Division

From: James M. Scanlon, Assistant Chief
/s/ James M. Scanlon
Marketing Order Administration Branch

Subject: Approval of Research, Market Development, and Promotion Projects for
California Nectarines; M.O. 916, and
California Peaches and Plums; M.O. 917

In early May, the Nectarine Administrative Committee, established under M.O. 916 and the Plum and Peach Commodity Committees established under M.O. 917 recommended approval of the attached research, market development and promotion projects for the 1988-89 fiscal year.

The recommended projects are expected to total \$5,043,387, which is \$554,619 more than last year's actual expenditures of \$4,488,768. Of the \$5,043,387 allocated, \$4,818,780 is for market development and promotion and \$224,607 is for research projects. These projects are similar to those of last year's, but with an increase in television advertising expenses of \$494,735. The committees plan to spend \$2,165,000 on

television advertising this season, but as a result of increased media costs, will have to decrease the number of spot television markets in which they advertise to five from last year's total of eight.

The various funded projects for the 1988-89 fiscal year are listed in the attachments, and the descriptive reviews of the projects are provided in the attached minutes of the Committee.

Adequate funds are included in the committees' approved 1988-89 season budgets to cover the expenses involved in conducting the recommended projects.

We recommended approval of the committees' research, market development and promotion projects. A letter informing our California Marketing Field Office of such approval is attached.

Attachments

[logo omitted in printing]

Federal Register
Vol. 53, No. 138
Tuesday, July 19, 1988

[p. 27,151]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916, 917, and 919

Expenses and Assessment Rates for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule authorizes expenditures and establishes assessment rates under Marketing Order No.'s 916 and 917 (California nectarines, plums, and peaches) and 919 (Colorado peaches) for the 1988-89 fiscal year established for each order. The proposal is needed for the Nectarine Administrative Committee, the Plum and Peach Commodity Committees, and the Colorado Peach Administrative Committee to incur operating expenses during the 1988-89 fiscal year and to collect funds during that year to pay those expenses. This would facilitate program operations. Funds to administer this program are derived from assessments on handlers.

* * * * *

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No.'s 916 (7 CFR Part 916) regulating the handling of nectarines grown in California; 917 (7 CFR Part 917), regulating the handling of fresh pears, plums, and peaches grown in California; and 919 (7 CFR Part 919) regulating the handling of peaches grown in Mesa County, Colorado. These orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act.

This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this final rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 650 handlers of California plums, peaches, and nectarines subject to regulation under marketing orders (7 CFR Parts 916, and 917),

and there are approximately 2,030 producers of these commodities in the regulated area. There are approximately 28 handlers of Colorado peaches subject to regulation under a marketing order (7 [p. 27,152] CFR Part 919), and there are approximately 245 producers of peaches in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having average gross annual revenues for the last three years of less than \$500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than \$3,500,000. The majority of these handlers and producers may be classified as small entities.

Each marketing order requires that the assessment rate for a particular fiscal year shall apply to all assessable commodities handled from the beginning of such year. An annual budget of expenses is prepared by each administrative committee and submitted to the U.S. Department of Agriculture for approval. The members of the committees are primarily handlers and producers of the regulated commodities. They are familiar with the committees' needs and with the costs for goods, services, and personnel in their local areas and are thus in a position to formulate appropriate budgets. The budgets are formulated and discussed in public meetings. Thus, all directly affected persons have an opportunity to participate and provide input.

The assessment rate recommended by each committee is derived by dividing anticipated expenses by expected shipments of the commodity. Because that rate is applied to actual shipments, it must be

established at a rate which will produce sufficient income to pay the committees' expected expenses. Recommended budgets and rates of assessment are usually acted upon by the committees shortly before a season starts, and expenses are incurred on a continuous basis. Therefore, budget and assessment rate approvals must be expedited so that the committees will have funds to pay their expenses.

The Nectarine Administrative Committee met on May 5, 1988, and unanimously recommended 1988-89 marketing order expenditures of \$3,123,908 and an assessment rate of \$0.18 per No. 22D standard lug box (package) of fresh nectarines. For comparison, 1987-88 fiscal year budgeted expenditures were \$2,844,417 and the assessment rate was \$0.16 per package. Major expenditure categories in the 1988-89 budget are \$1,801,886 for market development and \$867,000 for inspection, with most of the remainder for program administration. Total income for 1988-89 is expected to amount to \$3,173,900, including assessment income of \$3,132,900 based on shipments of 17,405,000 packages of fresh nectarines, \$20,000 from the California Department of Food and Agriculture, and \$21,000 from other sources such as interest earned on the reserve fund. Committee reserves are within limits authorized under the program.

The Plum Commodity Committee met on May 4, 1988, and unanimously recommended 1988-89 marketing order expenditures of \$3,510,878 and an assessment rate of \$0.19 per No. 22D standard lug box (package) of fresh plums. For comparison, 1987-88 fiscal year budgeted expenditures were \$3,125,626 and the assessment rate was \$0.19 per package. Major

expenditure categories in the 1988-89 budget are \$1,971,459 for market development and \$1,085,960 for inspection, with most of the remainder for program administration. Total income for 1988-89 is expected to amount to \$3,508,030, including assessment income of \$3,465,030 based on shipments of 18,237,000 packages of fresh plums, \$20,000 from the California Department of Food and Agriculture, and \$23,000 from other sources such as interest earned on the reserve fund. Additional estimated income includes \$100,000 from the USDA's Foreign Agricultural Service for export matching funds. Reserves are within the maximum amounts authorized under the program.

The Peach Commodity Committee met on May 5, 1988, and recommended, by a 12-1 vote, 1988-89 marketing order expenditures of \$2,562,089 and an assessment rate of \$0.18 per No. 22D standard lug box (package) of fresh peaches. For comparison, 1987-88 fiscal year budgeted expenditures were \$2,409,180 and the assessment rate was \$0.16 per package. Major expenditure categories in the 1988-89 budget are \$1,280,435 for market development and \$896,000 for inspection, with most of the remainder for program administration. Total income for 1988-89 is expected to amount to \$2,590,980, including assessment income of \$2,553,480 based on shipments of 14,186,000 packages of fresh peaches, \$20,000 from the California Department of Food and Agriculture, and \$17,500 from other sources such as interest earned on the reserve fund. Additional estimated income includes \$20,000 from the USDA's Foreign Agricultural Service for export matching funds. Reserves are within the maximum amounts authorized under the program.

The Colorado Peach Administrative Committee met on May 23, 1988, and unanimously recommended 1988-89 marketing order expenditures of \$1,830 and an assessment rate of \$0.01 per bushel of fresh peaches. The Federal marketing order program is operated in conjunction with a State program. For comparison, 1987-88 fiscal year budgeted expenditures were \$683. There was no assessment rate for the 1987-88 season because the committee wanted to reduce the Federal portion of the reserve account. The reserve was reduced to \$30. Federal assessment income for 1988-89 is expected to amount to \$1,800 based on shipments of 180,000 bushels of fresh peaches. Operating reserves are well within the amounts authorized under the program. The Federal program budget expenditures of \$1,830 will be used to help pay the manager's salary.

While this section will impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be significantly offset by the benefits derived from the operation of the marketing orders. Therefore, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

A proposed rule regarding this action was issued on June 16, 1988, and published in the Federal Register (53 FR 232244, June 21, 1988). That document provided that interested persons could file comments through July 1, 1988. No comments were received.

Based on the foregoing, it is found that the specified expenses are reasonable and likely to be incurred, and that such expenses, assessment rates, and operating reserves will tend to effectuate the declared policy of the Act.

Approval of the expenses, assessment rates, and operating reserves should be expedited because the committees need to have sufficient funds to pay their expenses which are incurred on a continuous basis. In addition, handlers are aware of this action which was recommended by the committees at public meetings. Therefore, the Secretary also finds that good cause exists for not postponing the effective date of this action until 30 days after publication in the Federal Register (5 U.S.C. 553).

* * * * *

[p. 27,153]

* * * * *

PART 916—NECTARINES GROWN IN CALIFORNIA

§ 916.227 Expenses and assessment rate.

Expenses of \$3,123,908 by the Nectarine Administrative Committee are authorized, and an assessment rate of \$0.18 per No. 22D standard lug box of assessable nectarines is established, for the fiscal period ending February 28, 1989. Unexpended funds may be carried over as a reserve.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

§ 917.250 Expenses and assessment rate.

Expenses of \$3,510,878 by the Plum Commodity Committee are authorized, and an assessment rate of \$0.19 per No. 22D standard lug box of assessable peaches is established for the fiscal period ending February 28, 1989. Unexpended funds may be carried over as a reserve.

§ 917.251 Expenses and assessment rate.

Expenses of \$2,562,089 by the Peach Commodity Committee are authorized, and an assessment rate of \$0.18 per No. 22D standard lug box of assessable plums is established for the fiscal period ending February 28, 1989. Unexpended funds may be carried over as a reserve.

PART 919—PEACHES GROWN IN MESA COUNTY, COLORADO

§ 919.227 Expenses and assessment rate.

Expenses of \$1,830 by the Administrative Committee are authorized, and an assessment rate of \$0.01 per bushel of assessable peaches is established for the fiscal period ending June 30, 1989. Unexpended funds may be carried over as a reserve.

Dated: July 14, 1988.

* * * * *

Lucky Tour June 21 & 22, 1989

June 21:

<u>Arrive</u>	<u>Place</u>	<u>Leave</u>
	Modesto	6:45 am.
9:00 am.	Wawona	9:45 am.
10:30 am.	LTD orchard & packing	11:30 am.
noon	Lunch—La Esperanza	1:00 pm.
1:15 pm.	George Bros.	2:15 pm.
3:00 pm.	Mineral King	4:00 pm.
4:20 pm.	Visalia Holiday Inn	
7:00	Dinner @ hotel	

June 22:

6:30 am.	Breakfast/Checkout	7:30 am.
	Visalia Holiday Inn	7:45 am.
8:30 am.	Kingsburg Apple Packers	9:30 am.
10:00 am.	Ito Packing	11:15 am.
11:20 am.	Royal Valley	11:55 am.
noon	Lunch—Bear Club	1:10 pm.
1:15 pm.	Ballantine Produce	2:30 pm.
	grape vineyard and shed	
3:30 pm.	Metzler and Sons Ranch	4:15 pm.
5:15 pm.	Modesto	

[logo omitted]
California Tree Fruit
Agreement

June 21, 1989

6:45 am	Drive Modesto to Clovis	9:00 am
9:00 am	Wawona Orchards (peaches)	9:45 am
9:45 am	Drive Clovis to Reedley	10:30 am
10:30 am	Field visit, follow fruit to packing shed - LTD (peaches)	11:30 am
11:30 am	Drive to restaurant	12:00 pm
12:00 pm	Lunch at La Esperanza	1:15 pm
1:15 pm	George Bros. (nectarines)	2:15 pm
2:15 pm	Drive to Farmersville	3:00 pm
3:00 pm	Mineral King packing and field tour (plums)	Open pm
7:00 pm	Dinner with Committee Chairmen	
	Lodging: Holiday Inn - Plaza Park	
	9000 West Airport Drive	
	Visalia, CA 93277	
	(209) 651-5000	

June 22, 1989

6:30 am	Breakfast and check-out	7:30 am
8:00 am	Drive to Kingsburg	8:30 am
8:30 am	Kingsburg Apple Packers	9:30 am
9:30 am	Drive to Reedley	10:30 am
10:00 am	ITO Packing (various fruits, mechanical sizes)	11:15 am
11:15 am	Drive	11:20 am
11:20 am	Royal Valley (optic sizes)	11:55 am
11:55 am	Drive	12:00 pm
12:00 pm	Lunch at Bear Club with Virgil Rasmussen, a Pandol rep and Bruce Obbink	1:10 pm
1:10 pm	Drive	1:15 pm
1:15 pm	Ballantine Produce, grape field tour and brief shed visit with Virgil Rasmussen	2:30 pm
2:30 pm.	Drive	3:30 pm
3:30 pm.	Metzler and Sons, Madera (field pack)	4:15 pm
4:15 pm.	Return to Modesto	5:15 pm

[address omitted]

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal Omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE

[AUG 02 1989]

To: William J. Doyle, Acting Deputy Director
Fruit and Vegetable Division

From: Ronald L. Cioffi, Chief /s/ Ronald L. Cioffi
Marketing Order Administration Branch

Subject: Approval of Research and Marketing
Projects for California Nectarines, Plums
and Peaches - M.O. No's. 916 and 917

The Nectarine Administrative Committee and the Plum and Peach Commodity Committees recommended approval of the attached production and market research, market development and promotion-advertising projects for the 1989-90 season. The projects are intended to maximize sales in domestic and export problems. The three committees have developed comprehensive programs for the 1989-90 season. The various projects are described in the attached minutes of the stone fruit promotion subcommittee. The budgets for the projects, by commodity, are also attached.

The recommended projects are expected to cost \$5,338,915, which is 13 percent more than last year's expenditures for similar projects. Of the projected

amount, 87 percent (\$4,684,150) is allocated for market development and promotion, 4 percent (\$214,765) is allocated for production research projects and 9 percent (\$440,000) is allocated for a food safety program. The food safety program is vital to the California tree fruit industries. It is intended to provide positive food-safety information on an on-going basis and to allow the industries to react to food safety problems in a positive way.

Authority for the nectarine projects is contained in §916.45 and in §917.39 for plum and peaches. The various projects to be funded are adequately justified. Funds to conduct the projects were included in the approved 1989-90 budgets for the two marketing orders. We recommend approval. A letter informing the California Marketing Field Office of our approval is also attached.

Attachments

[logo omitted]

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal Omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
P.O. BOX 96456
WASHINGTON, D.C. 20250

To: Gary Olson, Officer-In-Charge
California Marketing Field Office

From: William J. Doyle, Acting
Deputy Directors Fruit and
Vegetable Division

Subject: Approval of 1989-90 Fiscal Year Market-
ing and Research Projects for California
Nectarines, Plums and Peaches—M.O.
No's. 916 and 917

Please notify CTFA Manager, Jonathan Field, that the Department approves the Nectarine Administrative Committee's and the Plum and Peach Commodity Committees' production and market research, market development and promotion—advertising projects for the 1989-90 fiscal year.

The cost of the various projects totals \$5,338,915. Adequate funds to cover projected expenses are included in the respective committees' approved 1989-season budgets.

Federal Register
Vol. 54, No. 138
Thursday, July 20, 1989

[p. 30,365]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Docket No. FV-89-063]

Expenses and Assessment Rates for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule authorizes expenditures and establishes assessment rates under Marketing Order Nos. 916 and 917 (California nectarines, plums and peaches) for the 1989-90 fiscal year which began March 1, 1989. The action is needed for the Nectarine Administrative Committee, and the Plum and Peach Commodity Committees established under these orders to incur operating expenses during the 1989-90 fiscal year and to collect funds during that year to pay those expenses. This will facilitate program operations. Funds to administer these programs are derived from assessments on handlers.

* * * * *

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order Nos. 916 [7 CFR Part 916] regulating the handling of nectarines grown in California and 917 [7 CFR Part 917] regulating the handling of fresh pears, plums, and peaches grown in California.

These orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601-674], hereinafter referred to as the Act.

This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this final rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 650 handlers of California plums, peaches and nectarines subject to regulation

under these marketing orders [7 CFR Parts 916 and 917], and there are approximately 2,030 producers of these commodities in the regulated area. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.2] as those having average gross annual revenues for the last three years of less than \$500,000. Small agricultural service firms are defined as those whose gross annual receipts are less than \$3,500,000. The majority of these handlers and producers may be classified as small entities.

Each marketing order requires that the assessment rate for a particular fiscal year shall apply to all assessable commodities handled from the beginning of such year. An annual budget of expenses is prepared by each administrative committee and submitted to the U.S. Department of Agriculture for approval. The members of the committees are primarily handlers and producers of the regulated commodities. They are familiar with the committees' needs and with the costs for goods, services and personnel in their local areas, and are thus in a position to formulate appropriate budgets. The budgets are formulated and discussed in public meetings. Thus, all directly affected persons have an opportunity to participate and provide input.

The assessment rate recommended by each committee is derived by dividing anticipated expenses by expected shipments of the commodity. Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the committees' expected expenses. Recommended budgets and rates of assessment are usually

acted upon by the committees shortly before a season starts, and expenses are incurred on a continuous basis. Therefore, budget and assessment rate approvals must be expected so that the committees will have funds to pay their expenses.

The Nectarine Administrative Committee met May 3, 1989, and unanimously recommended 1989-90 marketing order expenditures of \$3,515,037 and an assessment rate of \$0.185 per 25-pound package or equivalent. For comparison, 1988-89 fiscal year actual expenditures were \$2,787,093 and the assessment rate was \$0.18 cents per package or equivalent. Major expenditure categories projected for 1989-90 with actual 1988-89 expenditures in parenthesis are: salaries and employee benefits, \$193,191 (\$177,712); consultant fees, \$45,000 (\$53,179); production research, \$86,587 (\$87,403); market development and promotion, \$2,076,100 (\$1,494,762); and inspection, \$907,500 (\$871,209). With the exception of \$65,000 budgeted for uncollected assessment accounts, the remaining expenses are for program administration.

Estimated total income for 1989-90 of \$3,824,490 includes projected assessment income of approximately \$3,101,155 based on anticipated shipments of 16,763,000 packages of fresh nectarines, carryover income from 1987-88 of \$620,085, anticipated income from export development and research subsidies from state and federal agencies of \$70,250 and interest income totalling \$33,000. This income will cover anticipated expenditures for 1989-90 and provide an adequate carryover to meet authorized committee expenses until 1990-91 assessment funds are col-

lected. Committee operating reserves are within the limits authorized under the program.

The Plum Commodity Committee met May 3, 1989, and unanimously recommended 1989-90 marketing order expenditures of \$3,154,353 and an assessment rate of \$0.21 per 28-pound [p. 30,366] package or equivalent. For comparison, 1988-89 fiscal year expenditures were \$3,090,693 and the assessment rate was \$0.19 per 28-pound package or equivalent. Major expenditure categories projected for 1989-90 with actual 1988-89 expenditures in parenthesis are: salaries and employee benefits, \$193,190 (\$168,713); consultant fees, \$5,000 (nothing budgeted); production research, \$67,091, (\$77,302); market development and promotion, \$1,749,663 (\$1,679,526); and inspection, \$1,078,000 (\$1,038,355). With the exception of \$85,000 budgeted for uncollected assessment accounts, the remaining expenses are for program administration.

Total income for 1989-90 would amount to \$3,402,340, including projected assessment income of \$2,969,190 based on shipments of 14,139,000 packages of fresh plums at \$0.21 per 28-pound package or equivalent. Assessment income would be supplemented with unexpended 1988-89 funds (\$311,650), interest income (\$20,000) and export subsidies (\$101,500) from state and federal agencies. This income will cover the anticipated expenditures for 1989-90 and provide an adequate carryover to meet authorized committee expenses until 1990-91 assessment funds are collected. Committee reserves are within limits authorized under the program.

The Peach Commodity Committee met May 4, 1989, and unanimously recommended 1989-90 marketing order expenditures of \$2,849,419 and an assessment rate of \$0.185 cents per 25-pound package or equivalent. For comparison, 1988-89 fiscal year expenditures were \$2,269,778 and the assessment rate was \$0.18 per 25-pound package or equivalent. Major expenditure categories projected for 1989-90 with actual 1988-89 expenditures in parenthesis are: salaries and employee benefits, \$182,282 (\$159,261); consultant fees, \$5,000 (nothing budgeted); production research, \$61,087 (\$61,902); market development and promotion, \$1,546,700 (\$1,073,846); and inspection, \$864,000 (\$863,223). With the exception of \$50,000 budgeted for uncollected assessment accounts, the remaining expenses are for program administration.

Total income for 1989-90 would amount to \$3,218,650, including projected assessment income of approximately \$2,572,240, based on shipments of 13,904,000 packages of fresh peaches at \$0.185 per 25-pound package or equivalent. Assessment income would be supplemented with unexpended 1988-89 funds (\$564,660), interest income (\$24,000) and export subsidies (\$57,750) from state and federal agencies. This income will cover the anticipated expenditures for 1989-90 and provide an adequate carryover to meet authorized committee expenses until 1990-91 assessment funds are collected. Committee reserves are within limits authorized under the program.

While this action will impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these

costs will be significantly offset by the benefits derived from the operation of the marketing orders. Therefore, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

This action adds new §§ 916.227, 917.250, and 917.251 and is based on the Committees' recommendations and other information. A proposed rule concerning this action was published in the Federal Register [54 FR 26382, June 23, 1989]. Comments on the proposed rule were invited from interested person until July 3, 1989. No comments were received.

After consideration of all relevant matter presented, including the Committees' recommendations, and other available information, it is found that this final rule will tend to effectuate the declared policy of the Act.

This final rule should be expedited because the committees need to have sufficient funds to pay their expenses, which are incurred on a continuous basis. In addition, handlers are aware of these actions which were recommended at public meetings. Therefore, it is found that good cause exists for not postponing the effective dates of these actions until 30 days after publication in the Federal Register [5 U.S.C. 553].

* * * * *

PART 916—NECTARINES GROWN IN CALIFORNIA

§ 916.227 Expenses and assessment rate.

Expenses of \$3,515,037 by the Nectarine Administrative Committee are authorized, and an assessment of \$0.185 per 25-pound package or equivalent of assessable nectarines is established for the fiscal period ending February 28, 1990. Unexpended funds may be carried over as a reserve.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

3. A new § 917.250 is added to read as follows:

§ 917.250 Expenses and assessment rate.

Expenses of \$3,154,353 by the Plum Commodity Committee are authorized, and an assessment of \$0.21 per 28-pound package or equivalent of assessable plums is established for the fiscal period ending February 28, 1990. Unexpended funds may be carried over as a reserve.

4. A new § 917.251 is added to read as follows:

§ 917.251 Expenses and assessment rate.

Expenses of \$2,849,419 by the Peach Commodity Committee are authorized, and an assessment of \$0.185 per 25-pound package or equivalent of assess-

able peaches is established for the fiscal period ending February 28, 1990. Unexpended funds may be carried over as a reserve.

Dated: July 17, 1989.

* * * * *

RMC international

QUALITATIVE RESEARCH
CONCERNING
THE CALIFORNIA TREE FRUIT
AGREEMENT

(JULY-SEPTEMBER, 1989)

By Rick M. Chapman

September 28, 1989

5754 Cabot Drive, Oakland, Co. 94611, 415-339-8284

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BACKGROUND/OBJECTIVES

Following research which had been conducted in 1978 as well as in the early 1980s and as late as 1985, the California Tree Fruit Agreement determined that it was necessary to update its perspective regarding consumers of its products. Qualitative research was selected as the most effective technique for understanding the basic issues which underlie usage and non-usage of these fruits, and accordingly, a research plan was devised, with an emphasis on heavy and light users in particular, to uncover what the primary purchase influences are with these tree fruits; what the consumer knows about these fruits and how they handle them; and what their typical consumption patterns are.

In essence, the primary, most basic objective throughout the project was to develop an understanding of the reasons why heavy users consume tree fruits as regularly as they do, and why light users, are light users, that is, why they do not purchase and eat these tree fruits with the regularity of heavier users. With both categories, another major objective was to gain reaction to creative approaches toward presenting these fruits to the consumer: in addition to evaluating current creative in the form of existing television commercials, new creative approaches, represented in the form of concept statements, were also tested, with the aim of evaluating the optimal means of encouraging these consumers to buy and eat more tree fruits.

Additional objectives included an evaluation of existing and potential point-of-sale materials and educational and promotional pieces, including everything from banners and recipe tearaway sheets to ripening bags, video presentations, recipe booklets and magazine and newspaper articles. All in all, once again, the governing objective was to understand what themes and emphasis would be most meaningful to the consumer with regard to these fruits, to enable the creation of guidelines for developing the most effective collateral materials possible.

RESEARCH APPROACH

Eighteen focus groups were conducted in seven markets across the United States and Canada for this project. Two groups were conducted in each of the following markets between July 12 and September 13, 1989: Los Angeles, Toronto, Montreal, Houston, Minneapolis, Boston and Atlanta. Four additional groups were conducted with Hispanic respondents, two each in Los Angeles and in Houston. All the groups were conducted in English with the exception of those in Montreal, which were conducted with French-speaking Canadians in French, by a French-speaking moderator.

Every focus group had roughly identical screening specifications, with the primary exception being that one group in each market was with *heavy* users of the tree fruits and one group was with *light* users. The only other exception was that respondents in the four Hispanic groups had self-designated their ethnic background to be Hispanic.

The recruiting directions which follow indicate the screening specifications used for obtaining re-

spondents for this research. The subsequent Discussion Guide describes the subject matter covered in this research. In different markets, the emphasis varied from one or more of the primary issues to others: for example, in some groups the primary focus of discussion was fruit attitudes and usage and creative evaluation; while in others the point-of-sale and promotional materials were the main object of discussion.

See the Appendix for the concept statements and other materials used as stimulus throughout the group discussions conducted in this research.

Recruiting Directions—Fresh Fruit Groups

Two (2) Focus Groups per night, scheduled at 6:00 and 8:00pm.

Identical recruiting specifications for both groups, *except with regard to heavy or light fruit usage (see screener)*:

- Group One: *heavy* users;
- Group Two: *light* users.

All respondents will be *adult heads of household*, who are the *principal grocery shoppers* in their households (doing at least 50% of the shopping on a regular basis).

Each group should consist of a rough balance of *males and females*, with an effort to achieve a total recruit per group of 4-5 males and 7-8 females.

- Recruit 12 qualified respondents per group to get 8-10 to show.

Each respondent must have *bought and eaten and/or served at home at least one* of the following fruits within the *past three months*:

- apples
- bananas
- oranges.

Each respondent must have *bought and eaten and/or served at home at least two* of the following fruits within the *past six weeks* (or during the previous summer, if some of these fruits are not yet available this year):

- fresh nectarines
- fresh peaches
- fresh pears
- fresh plums.

TO QUALIFY FOR *HEAVY USER GROUP*: each respondent must indicate that he or she personally buys and eats *two or more of the four fruits listed immediately above at least once a week or more often*.

TO QUALIFY FOR *LIGHT USER GROUP*: each respondent must indicate that he or she personally buys and eats two or more of the four fruits listed immediately above *once a month or less often, or once in 2-3 weeks or more*, but not as often as once-a week or more often.

Respondents for *each group* will range in age from 25-34, with *good dispersion in each group*.

Each group should consist of a rough mix of approximately 50-50 *married and single or divorced*.

Roughly *half the respondents* in *each group* should have *one or more children* under the age of 18 *living at home*.

All respondents will be given a security screen to eliminate anyone associated with advertising or

public relations, marketing or marketing research, or the manufacture, distribution or sales of any food products.

No respondent who has attended a focus group on *any subject* within the past *six months* can qualify.

No respondents in these groups can be acquainted with each other.

* * * * *

Please note: we will need cassette audio recording of all groups—no reel-to-reel. We will not be videotaping these groups.

Please provide 3/4" and 1/2" VCR equipment with color monitor inside the group rooms so that commercials and other materials can be shown to the respondents.

Please provide *pads and pencils* in a stack on the table for all respondents in each group. (Not distributed at each place setting.)

Also provide one *lecture pad* with good markers in the group room.

Plan on up to 8 *observers* and *arrange dinner* food for this number, to be ready in the observation room by 5:30pm at the latest. Respondents at the 6:00pm group will be served deli food as usual. Please see that wine, beer and bottled water are on hand in reasonable quantities for the clients in the back room.

Please note: respondents are to be fed *prior* to the group, and in some place other than the group room itself. Please show them into the group room only when the discussion is to begin.

California Tree Fruit Discussion Guide

I. Introduction to the Research

Nature of the research

Subject of the research

Independent researcher; no vested interests

Be frank, vocal

II. Fruit Usage and Perceptions

Probe fruit eating experience

—unaided: favorites

—focus: tree fruits

—when eaten

—how eaten

—how often

—why?

—why at some times vs. others

—what like about these fruits

—what not like about these fruits

—Why *not* use at other times

—probe awareness of length of seasons

—summary: key benefit of these fruits

—overall

—versus other fruits

Projective techniques

—"personalize" tree fruits

—attributes, behavior, "at a party"

Kelly triad comparisons

—key competitive fruits versus tree fruits

—probe associations, differences

In summary: why are you/are you not buying and eating tree fruits?

—awareness of fruit handling, ripening techniques

- role of bad previous experiences
- mode of eating: as found on shelf?
otherwise?
- reasons for eating
 - really like these specific fruits
 - eating fruit “on principle”
- momentum of childhood patterns
 - e.g., eat only apples because did so as
kid
 - other influences
- what limits usage; why/why not a
“heavy user”?

III. Creative Evaluation

- Concept boards
- Animatics
- Current campaign
- Reaction
 - overall impressions
 - pros/cons
 - interest
 - relevance
 - motivational impact

Evaluation of each approach individually
Force choice overall after all exposed

IV. Recipes and Information

- Interest in recipes
 - Recipe cards
 - “Fresh Ideas”
 - “American Classics”
 - “Chef’s Creations”
 - “Recipes for Success”
 - “Spa Recipes”
 - “Summer Fun” video
- Impact of informational material

- brochures
- availability chart
- comic book (pp. 4=5)
- promotional interviews

V. Point of Sale Aids

- Banners
- Photos
- Fruit stickers
- Informational brochures (see IV)
- Recipe cards (see IV)
- Bag-your-fruit cards (saving stations)
- Ripening bag

VI. Miscellaneous

- Tag line evaluation
 - “It wouldn’t be summer without ‘em.”
 - “Naturally delicious.”
 - “Take a bite out of summer.”
 - Etc.)
- California labeling

PREFACE

The following conclusions are based on *qualitative* research. The number of respondents for this research does not permit these findings to be interpreted as projectible in the statistical sense. They represent *qualitative* observations only—an assessment of the positives, negatives, points of resistance and other issues and concerns which emerged within the scope of this study.

CONCLUSIONS AND RECOMMENDATIONS

1. The grouping of peaches, plums, nectarines and Bartlett pears is essentially an artificial one imposed by the pragmatic considerations of the California Tree Fruit Agreement. From the consumers’ per-

spective, no compelling theme automatically links these fruits or provides for a common perception of them.

2. Tree fruits are more special than many more common fruits—owing to their unusual juiciness and tastiness when they are at their best, as well as to their relatively limited season—yet this specialness is not sufficient to make these fruits stand out from all the others on an unaided basis.

3. Eating tree fruits is enjoyable, to be sure, but the category itself is not highly ego-projective.

4. A typical tree fruit purchase involves at least two of the four fruits, and sometimes more.

5. Heavy and light users alike seem to be fairly strongly opinionated about which tree fruits they like and which they don't; with both categories of users, their dislikes are generally founded on inaccurate perceptions about one or another of the fruits.

6. Respondents of all types show pervasive ignorance regarding how tree fruits should be ripened, with the primary exceptions to be found among heavy users and Hispanics.

7. Respondents generally—but especially light users—consider tree fruits a relatively “riskier” purchase than most other seasonal fruits.

8. Heavy users appear to be both more knowledgeable and less picky about selecting tree fruit.

9. The light user is commonly the victim of a self-perpetuating cycle which discourages the purchase of tree fruits whenever a fruit purchase is considered.

10. A significant proportion of these respondents—but particularly the light users—pass up making tree fruit purchases when they do not find the fruit ready to eat immediately.

11. Reaction to the point-of-sale materials tested in this research revealed the potential value of such items and provided solid guidelines for optimizing their effectiveness.

12. Magazine and newspaper articles featuring tree fruit understandably had mixed appeal in these groups, with light users only occasionally evidencing any real-interest in them.

13. Table cards featuring tree fruit entrees and desserts at restaurants show promise, as respondents almost unanimously showed a likelihood of acting on such pictorial suggestions.

14. Reaction to the California branding of tree fruits varied from market to market, provoking the least enthusiasm in the East and in Canada; yet overall it creates no serious negatives and some positives when relegated to background information.

15. Apart from their relative ignorance about nectarines and their mildly chauvinistic disdain for

California branding, Canadian respondents' attitudes essentially paralleled those seen in the U.S. markets.

16. Fruit usage patterns of Hispanics departed from those of non-Hispanics in two significant ways: for one thing, eating and cooking with tree fruits is culturally a more natural and thoroughgoing part of life for Hispanics, and secondly, a majority of Hispanics have at least a working sense of how to ripen these fruits at home.

17. Of all the demographic niches which emerged from this research as showing promise for significant tree fruit consumption—weight-conscious females, health-conscious young adults, working women in general, or even the old-fashioned cooking-intensive housewife—perhaps the one with the greatest potential is families with young children.

18. Over all of the concept statements tested in these focus groups, the single theme which consistently provoked outstanding taste attributes of these tree fruits. Several other themes also showed strength, including the refreshing quality of these fruits; the healthy, good-for-you quality of these fruits; the characteristics which make these fruits such an ideal snack food; and the strong association of these particular fruits with the good times of summer.

19. The strongest banner themes among those tested focused on the "naturally delicious" attributes of these "fresh summer fruits," and their integral association with "summer" and "sunshine."

20. The current television commercials for tree fruit which were exposed to these respondents appeared to be on target from a positioning standpoint, but they showed some weakness in motivational power. The jingle, however, showed remarkable strength and memorability.

Recommendations

Despite the absence of any natural grouping of these four fruits, they nevertheless work very well together. In order to communicate effectively about them, however, some artifice is needed to hang them together. "Summer" has been used in the past and is certainly acceptable, but it is not specific enough. Despite its various positives, and despite being very probably the most positive of all the linkages which have been tested, it nevertheless does not, in itself, identify the four tree fruits in the consumer's mind. In essence, there is no substitute for the mention of the fruits themselves, inasmuch as one can never assume that "summer fruits" or "tree fruits" or any other similar term is actually communicating these particular fruits to consumers.

All this having been said, it must be reiterated that these fruits "play well" together. People typically buy tree fruits more than one type at a time, that is to say, peaches and pears, or peaches, nectarines and plums, and so on. Interest begets interest in this category, and purchase begets purchase. There is a definite advantage, therefore, to the presentation of these fruits as a group, especially in the absence of any single fruit having

a sufficient advertising and promotional budget to create a unique presence all for itself.

Many users of tree fruits—both heavy and light users as well—remain completely unfamiliar with the joys of a great peach, a great pear, a great plum, or a great nectarine. What may pass as a seemingly inconsequential finding has, in fact, exciting implications. Inasmuch as this research has discovered that many consumers have misperceptions about various tree fruits at their best, it is clear that a significant potential new volume in consumption realistically lies ahead, as efforts are made to help consumers-discover that not all peaches are woody, not all pears are hard, not all nectarines tasteless, and so on. It is essential to realize that one cannot assume that the typical consumer—and this even includes heavy users of tree fruits—understands what is really meant by a description of a "juicy, delicious peach" or a "delectable golden Bartlett pear." What this finding reveals is that trial and experimentation needs to be encouraged in this age-old category in a way one could never imagine to be necessary.

Most consumers are virtually totally ignorant of proper ripening techniques for tree fruits, and what is more, they are often ignorant of their ignorance. As a result of this ignorance of ripening techniques, and also because of common misperceptions about many of these fruits when they are at their best, tree fruit purchases are more often than not considered to be "a gamble." The California Tree Fruit Agreement needs to meet this sense of risk head on. Instead of

imagining that everyone who fits the profile of a probable consumer is simply waiting for the tree fruit season to arrive, it is important to realize that many light users have suffered discouragement after discouragement in their attempts to select and enjoy tree fruit in the past. The Light User Tree Fruit Discouragement Syndrome, referred to in detail in Conclusion Number 9 in the text of the report, describes the cycle in which many of these light users have become caught. The result is that purchase after potential purchase of tree fruits is currently passed over by light users, who are afraid to take the risk of spending money on a category of fruit which has burned them in the past.

This cycle of discouragement has to be broken by both creative and promotional efforts if the average consumer is ever expected to come into the fold of regular usage. New awareness must be created about these fruits, and the fear of failure taken away. The consumer has to be armed with a new confidence in an arena which has previously been filled with many bad experiences with this fruit. If anyone still believes and wishes to contend that the majority of consumers in America (and Canada) are comfortable with the purchase of tree fruit and sufficiently familiar with ripening techniques that they can successfully buy unripe fruit and enjoy it throughout the ensuing week, let them come forward and fight these research results to the death! It is critical to realize that, on the one hand, most consumers will not buy fruit which is too hard to eat in the immediate future, and on the other hand, virtually no one under-

stands how to ripen unripe tree fruit. Consequently, the problem of increasing purchase and consumption of tree fruits has to be solved from both ends of the spectrum: growers and retailers must work to try to provide fruit to the consumer which is closer to the stage of ripeness which they consider acceptable, while the consumer has to be reinvented to the party, reacquainted with the glories of these fruits at their best and introduced to an understanding of ripening techniques which will help him feel more confident buying fruit which is not perfectly ripe.

The results of this research elevate point-of-sale materials to a new level of importance. Everything from banners to ripening bags, from recipe tearaway sheets to point-of-sale videos, can clearly play a crucial role in not only drawing the consumer's awareness toward tree fruits in particular, but also in delivering the needed information to help make the next tree fruit purchase successful. What all of these materials need, however, is an *effective positioning*. Rather than simply (and naively, given the findings of this research) offering new recipes and factual information about these fruits to the consumer who has been discouraged into submission by previous failures with these fruits, these materials need to *encourage* the consumer that he or she can select and enjoy peaches, nectarines, plums and Bartlett pears at their best. As has been stated before in the body of this report, the old army maxim holds true, especially here: "Tell them that you're going to tell them; tell them; and tell them that

you told them." The same holds true for informational articles in magazines and newspapers.

This research has provided strong guidelines with respect to the testing of the most effective creative communication concerning tree fruits. What is unique to these fruits—and uniquely appealing about them—is their particular taste-and-texture combinations, what food scientists call their *organoleptic* qualities. However much these fruits may be praised for their *refreshing* attributes, their *healthfulness*, their attributes which make them the *perfect snack food*, or their place in completing the overall picture of *summer nostalgia*, make no mistake: the driving factor which motivates interest in these fruits is primarily their *taste*. All the other themes play important supporting roles, but taste is clearly the only candidate for the "best positioning" oscar.

While the current campaign is on target from a positioning standpoint and can hardly be faulted, with the revelation of the Light User Tree Fruit Discouragement Syndrome, in combination with limited media budgets, the problem of communicating effectively about these fruits takes on a different connotation. Just as the recent California Raisin advertising was specifically designed to counter the somewhat "nerdy" image which was associated with raisins, tree fruits have their own unique problem and require unique solutions. The consumer needs to be reassured with respect to his ability to choose and enjoy high quality tree fruits and the promise of sensational taste delivery needs to be reissued. Much that one might

have taken for granted with regard to these fruits has to be seen in a new light, inasmuch as many consumers are not even fully acquainted with the pleasures of one or another of these fruits when they are at their best. The challenge is great, but the information which has been gathered about the problem has also been great. From what has been learned in this research, it seems clear that the more that consumers come to know about tree fruits and their proper ripening, the more likely they will be to break out of their current "discouragement" syndrome and into a pattern of regular usage of these fruits.



CALIFORNIA SUMMER FRUITS

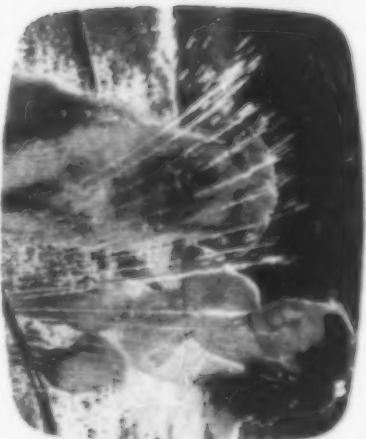
CALIFORNIA SUMMER FRUITS® 1989

TELEVISION :30

"PEACHES"



MUSIC THEME.
Remember ...



that special feeling ... called summer?



Remember the taste ...



of summer peaches ...



so cool, juicy ...



and good for you!
SUMMER, SUMMER FRUITS FROM
CALIFORNIA.



FRESH FROM THE TREE.



TASTE THEM AND SEE!



They have a special sweetness that only
summer can bring. But like summer ...



they'll soon be just a sweet memory.



SUMMER, SUMMER FRUITS, IT
WOULDN'T BE SUMMER WITHOUT 'EM.

and the Fruit Agreement

CALIFORNIA SUMMER FRUITS MID-LATE SEASON VARIETIES

[illegible]



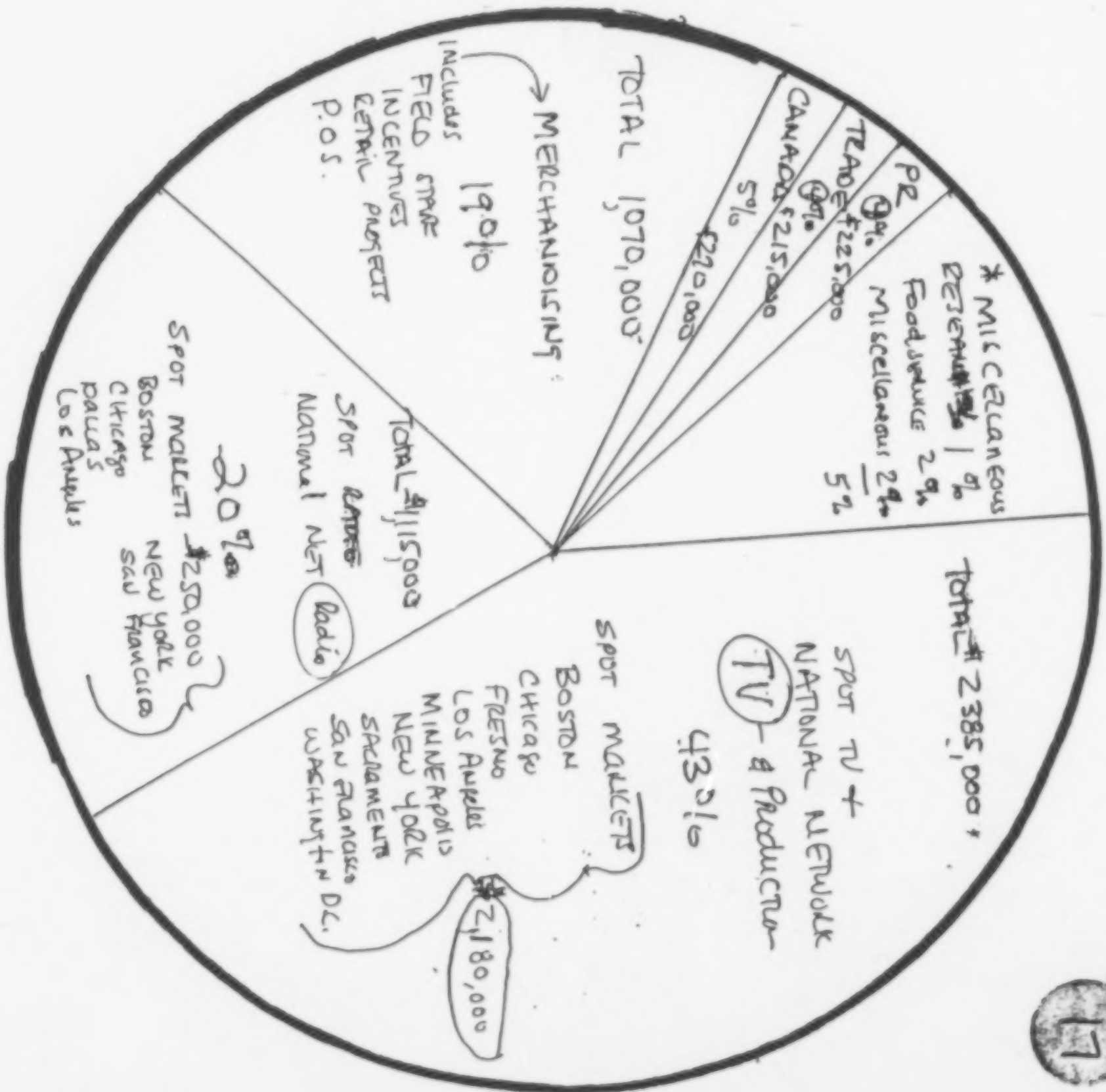
CALIFORNIA SUMMER FRUITS EARLY-MID SEASON VARIETIES

	MAY				JUNE				JULY								
	WEEK OF				1	8	15	22	29	5	12	19	26	3	10	17	24
PEACHES																	
May Crest																	
Springcrest																	
Spring Lady																	
Merrill Gemfree																	
June Lady																	
Flavorcrest																	
Redtop																	
Flamecrest																	
Elegant Lady																	
Sparkle																	
Red Beauf																	
Black Beauf																	
Santa Rosa																	
Queen Rosa																	
July Santa Rosa																	
Blackamber																	
El Dorado																	
Loroda																	
Frior																	
Simko																	
Queen Ann																	
Grand Rosa																	
Maybelle																	
May Glo																	
May Grand																	
Spring Red																	
Firebrite																	
Red Diamond																	
Flavorlap																	
Summer Grand																	
Fontosa																	

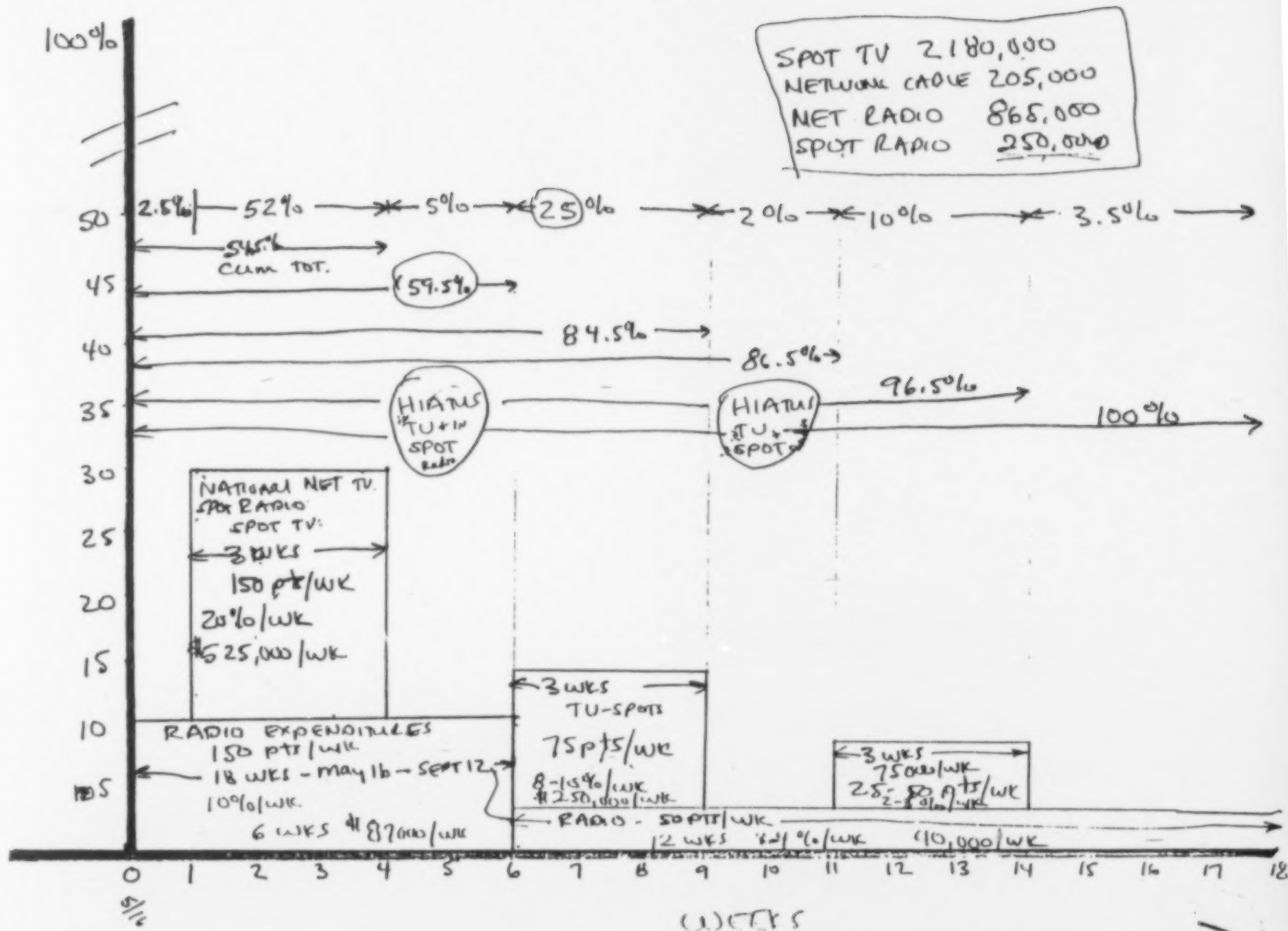
1988 MARKET DEVELOPMENT

BUDGET 5528000

35/ 17

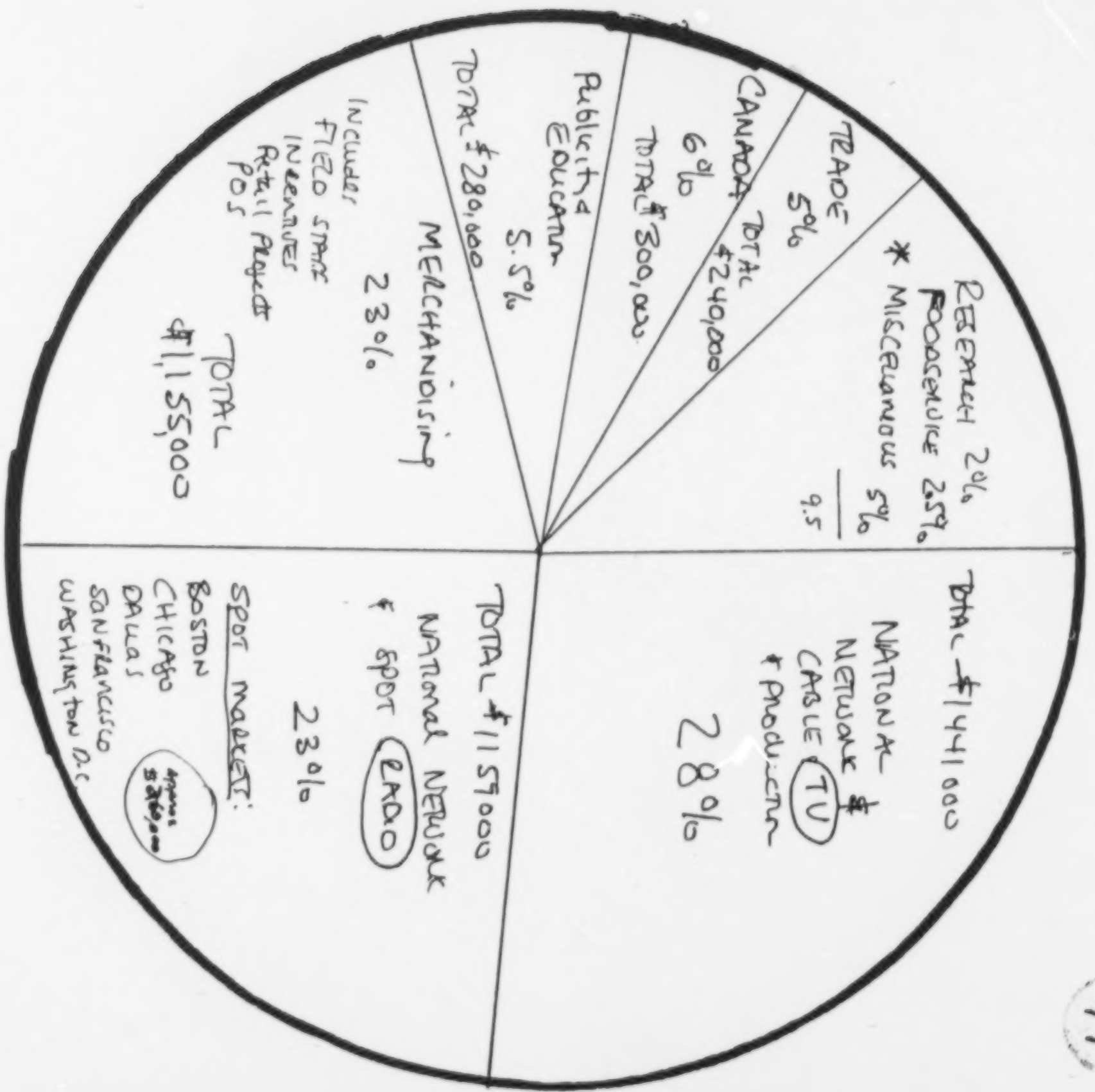


1988 MEDIA EXPENDITURES



1989 MARKET DEVELOPMENT Budgeted \$5080 000

19



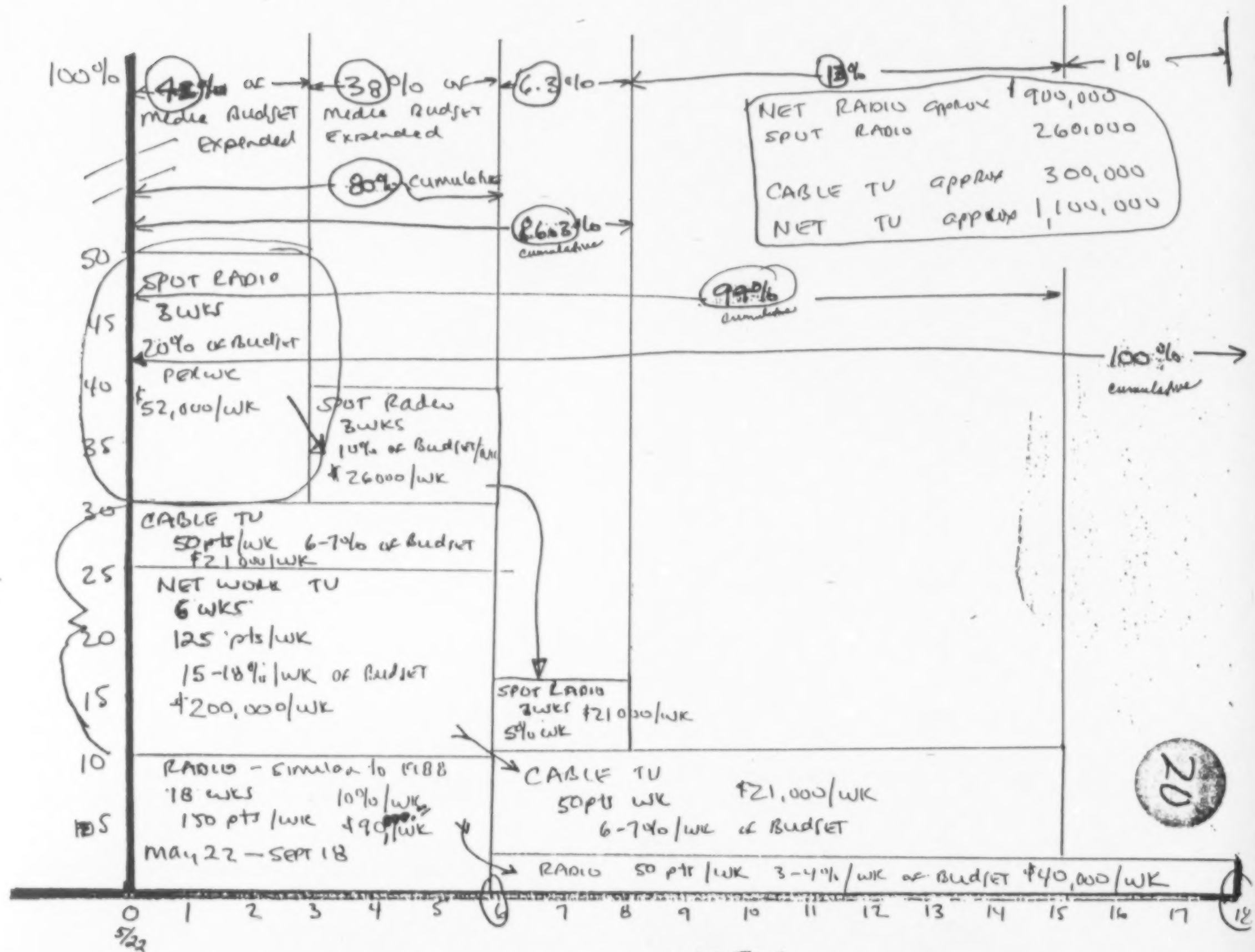
* SEE NOTE #1 - AIRWORK HAS NOT IMPROVED

1985 % of Budget by Line & Month

350

%

ALL TV



(1) F.F.F.S



LOOK
BRAND

Bluebird
PACKED AND SHIPPED BY
WILEMAN BROS. & ELLIOTT, INC.
CUTLER, CALIFORNIA



PRODUCT OF U.S.A.

Flash

PRODUCED BY
WILEMAN BROS. & ELLIOTT, INC.
CUTLER, CALIF. U.S.A.

PRODUCT OF U.S.A.


WHISTLE
BRAND

WILEMAN BROS. & ELLIOTT, INC.
CUTLER, CALIFORNIA, U.S.A.

LISTEN
BRAND



California GRAPES



THE SECOND AND



538

THIRD GENERATION

WILLEMANN BROS. & ELLIOTT

In 1925 Frank Elliott Sr., joined Charlie & Ralph Willemann in the fruit packing and shipping business. They had a modest 350 acres of grapes and tree fruit and a wood shed that was used for packing. Located in the heart of the world's richest agricultural area (Central California) and full of hope and optimism they proceeded to push ahead in the fresh fruit business. At this time the fresh fruit business was, according to all reports, considered unstable, and the domestic fruit marketing policies and practices were less than satisfactory, so Frank spent the better part of a year traveling to foreign countries to set up their own export market for the fruit. In 1929 this venture had enough interest and success to deserve a two-page feature article in the Los Angeles Times. "Grape Grower Is His Own Salesman in the Far East", the Sunday August 11, 1929 article read . . . "This Grower Played Columbus and Found a Market Overseas", reported the Times. Not only had his venture paid off for the fresh fruit business but by 1936 WB & E had prospered enough to move from that original wood shed to a large brick building formerly used by Sun Maid Raisins. Business continued to grow and in 1944 WB & E built their first building on its present site. By 1949 a

refrigerated cold storage building was added.

When Frank Elliott, Sr. passed on in 1952 WB & E went through a complete change in top personnel. Frank Elliott, Jr. (Tom) stepped up to President, Leonard Willemann to Vice-President, and Bernard Willemann became Secretary-Treasurer. They also closed their export-import office in San Francisco and moved the entire operation to Culler. The second generation had completed the take-over. These young men who had started in the fields and worked through the operation continued to grow. With additions to their own ranches and by taking on absentee ownership management and increasing the number of their packing and marketing clients, WB & E stayed a leader in their field.

In 1964 WB & E took on another big expansion program when they added the orange processing, packing and storage plant. This brought the total of refrigerated storage space up to 317,000 cubic feet; one of the largest orange plants in Central California.

The entire history of Willemann Bros. & Elliott is a story of dedicated people; individuals willing to grow and expand because they know their jobs and put faith in their abilities based on their long experience as growers. This is as evident now with the third generation as it was with the original partners in 1925.

The facilities, equipment, experience, knowledge and people of WB & E are the sum total that mean greater profits for our clients and continued growth for the firm.



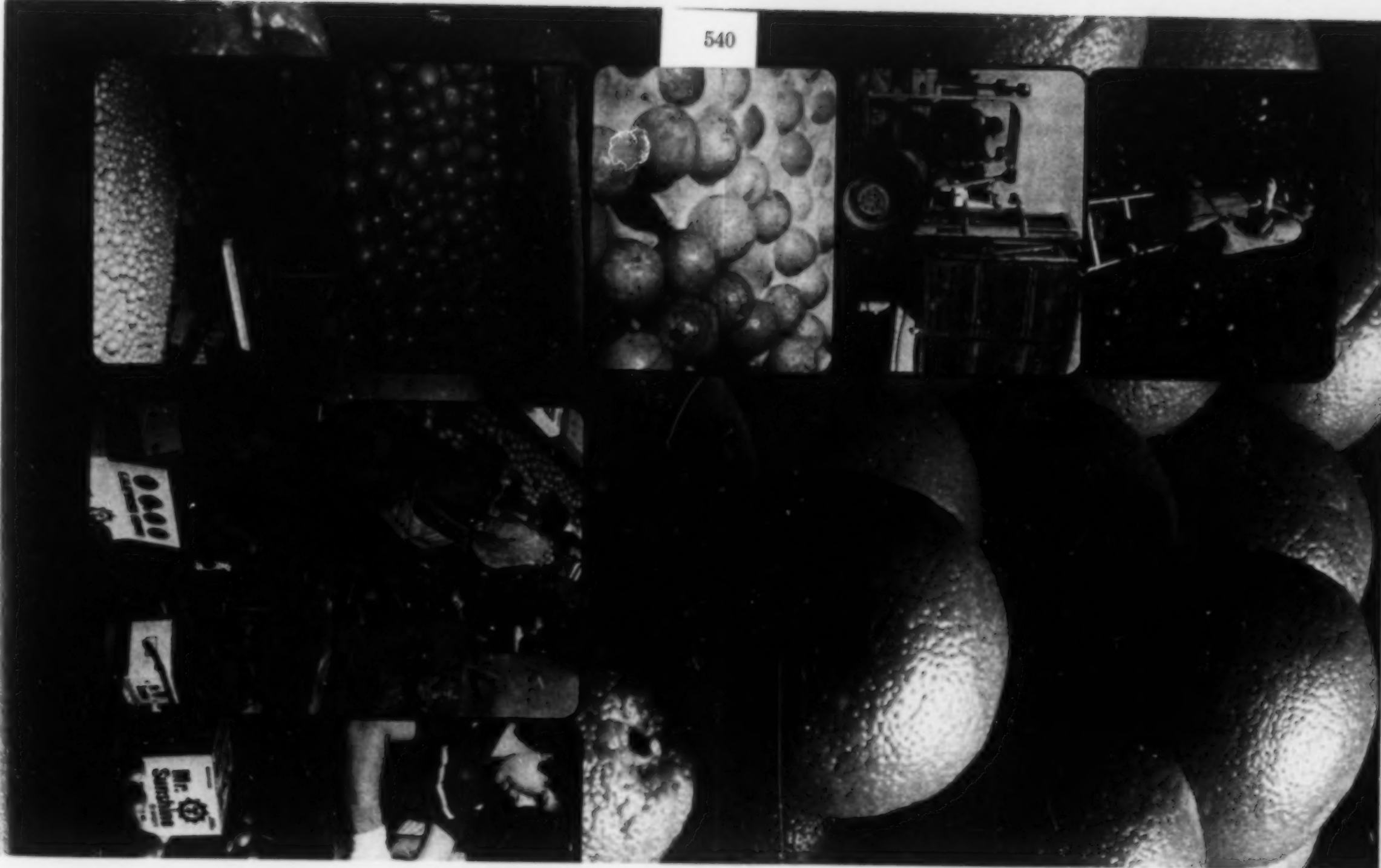
FRANK T. ELLIOTT, JR. - President

Frank T. Elliott Jr. represents the second generation of one of the most interesting and successful produce houses in California. Frank Jr. began his produce career at age eleven by working in the fields. His field experience carried him through his third year in college when he was advanced to the position of purchasing agent. He graduated from USC in 1941 with degrees in Business Administration-Foreign Trade. During World War II he was Squadron Commander and Deputy Group Commander in the U.S. Air Force. He still flies his own planes. Within a year after his return to civilian life he had taken over sales and general management of WB & E. Tom is also currently on the Board of Directors at Visalia Community Bank, Great American Federal, Elliott Land & Cattle Co., and Visalia Dodge, Inc.

FRANK T. ELLIOTT, III - General Manager

"Tokkie", as he is affectionately called, started in the fields at WB & E at age nine working for 25 cents an hour. He worked his way through every department at WB & E after school and during summer vacations. He attended the University of Arizona and graduated with a degree in Accounting from Parson's College in Iowa in 1972. Tokkie is a favorite with everyone at WB & E from the office staff to the supervisors, foremen, department heads and the employees in the plant and groves. He has the respect of all of these people because he has done their jobs and can still take over, but is willing to grant the authority and responsibility that shows his ability to lead. Tokkie has other duties such as: President-Visalia Dodge, Inc.; President-Kaweah Supply Co.; President-Elliott Land and Cattle Co.; Secretary-California Citrus Producers, Inc.; Director-Real Fresh Milk, Inc.; Director-Kaweah Land Co.; Director-Kaweah Crop Dusters.

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ORANGES JUST DON'T GET ANY BETTER!

The difference is QUALITY through constant care and supervision. At WB & F every part of our operation from the groves and fields through picking, bathing, sorting, packing, and storage is given supervision with tender loving care by experienced people.

541



THE EXPERIENCE OF THREE GENERATIONS

The owners and managers of WB & E have spent an entire lifetime in the fields, packing houses, cold storage and shipping facilities, loading docks and direct marketing offices. Now in our third generation with one of the largest packing plants in Central California as a work center, we are more than middle men; WB & E is an integral part of California's vital agricultural lifestyle.



MR. NECTARINE®

California Nectarines

WILEMAN BROS. & ELLIOTT INC.,

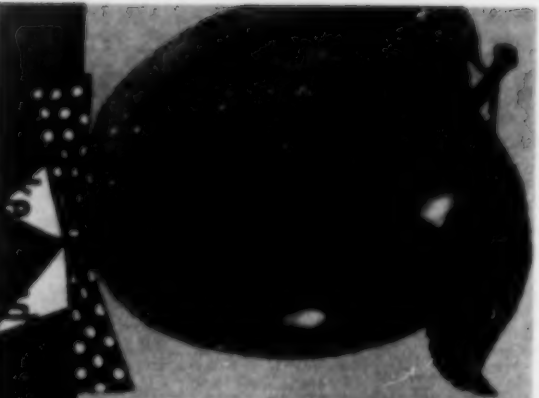
542



MR. PEACH

California Peaches

WILEMAN BROS. & ELLIOTT INC., Culter, California

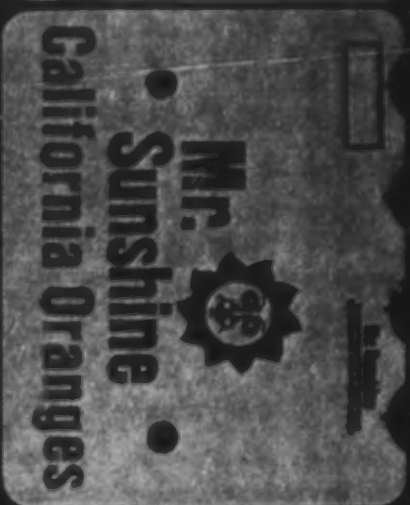


MR. PLUM®

California Plums
PRODUCE OF U.S.A.

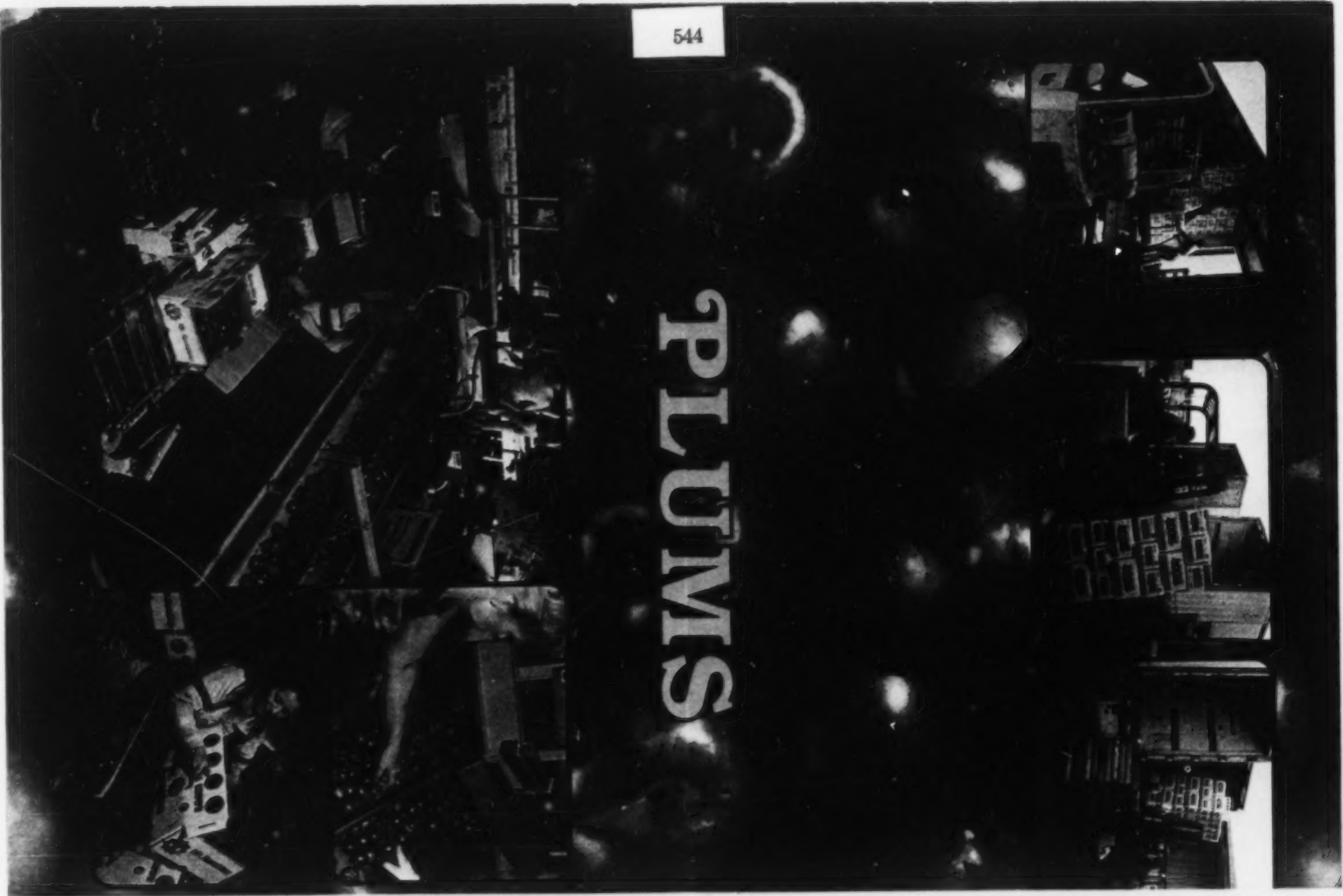
WILEMAN BROS. & ELLIOTT INC.,

NECTARINES



544

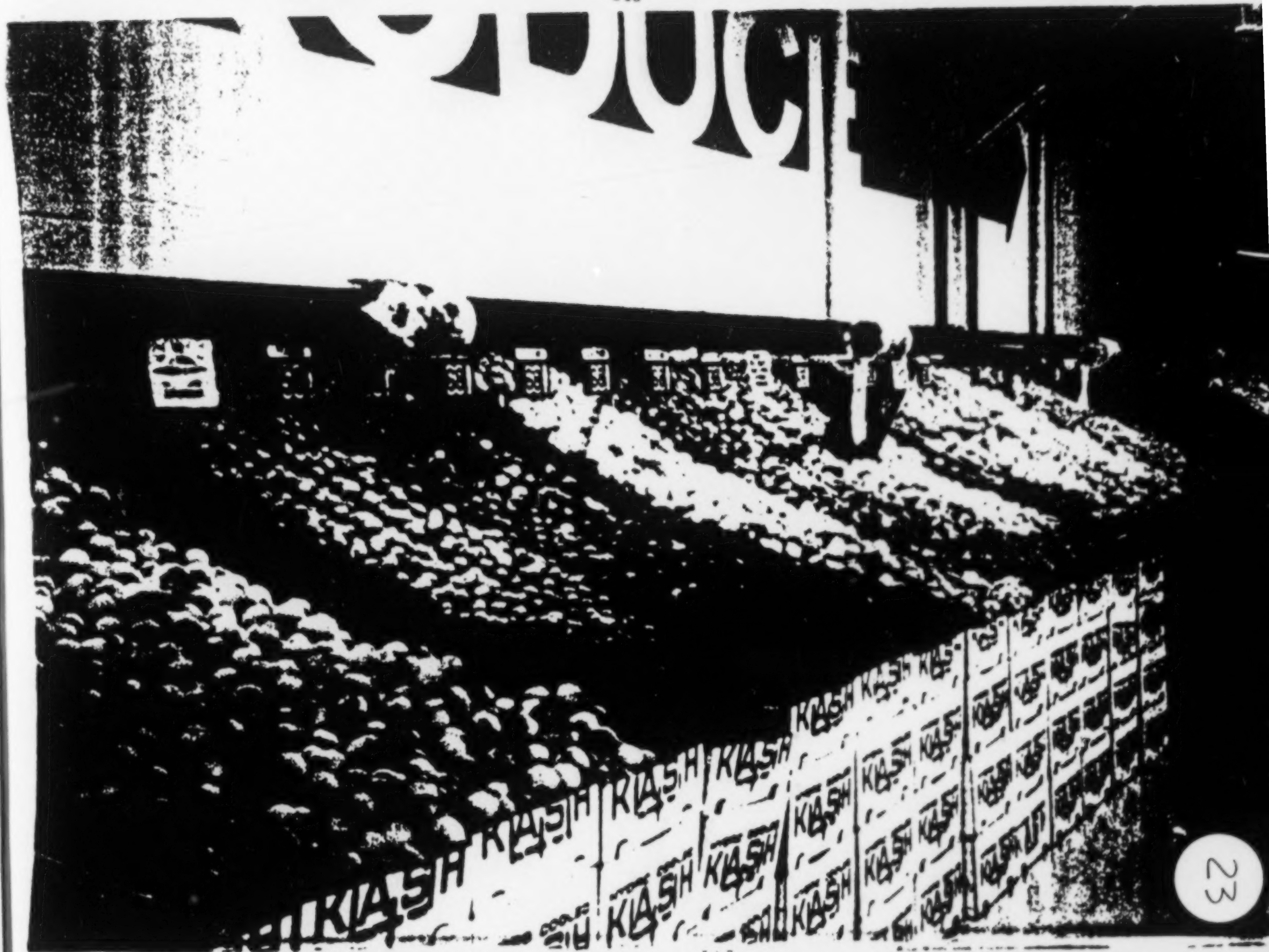
PLUMIS



Fall in Love
with a
Sweetheart
Plum

KASH INC.





In the Supreme Court of the United States AUG 22 1996

OCTOBER TERM, 1995

CLERK

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX
Volume III

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NOTATION RE ITEMS PREVIOUSLY SUBMITTED

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[1491]

UNITED STATES DEPARTMENT
OF AGRICULTURE
BEFORE THE SECRETARY OF
AGRICULTURE

AMA DOCKET No. F&V 916-3
AMA DOCKET No. F&V 917-4

IN THE MATTER OF WILEMAN BROTHERS & ELLIOTT,
INC., A CALIFORNIA CORPORATION AND KASH, INC.,
A CALIFORNIA CORPORATION, PETITIONERS

Federal Building
1130 "O" Street
Room 2002
Fresno, California,

Wednesday, January 31, 1990

[Excerpts from testimony of Ray Gerawan]

The above-entitled matter came on for hearing,
pursuant to Notice, before the Secretary of Agriculture,
at 9:00 a.m.

Before: DOROTHEA A. BAKER, Administrative
Law Judge

APPEARANCES:

For The Government

GREGORY COOPER, Esq.
Ms. HELEN BOUTROUS Esq.
U.S. Department of Agriculture
Office of General Counsel
Marketing Division
14th & Independence Avenue
Washington, D.C. 20250

* * * * *

[1689]

MR. COOPER: Thank you, Mr. Petersen, no further questions.

JUDGE BAKER: Very well, are there any additional questions of this witness?

MR. CAMPAGNE: No, your Honor. Thank you, Mr. Petersen.

JUDGE BAKER: Thank you, very much, Mr. Petersen.

Now, I understand some arrangements have been made with respect to the presentation of the next witness.

MR. CAMPAGNE: Yes, your Honor. Our next witness will be Mr. Ray Gerawan.

JUDGE BAKER: Very well. Would you step forward and be sworn in on the stand.

Whereupon,

RAYMOND MICHAEL GERAWAN,

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAMPAGNE:

Q Mr. Gerawan, I know that a lot of us in this room know you, but your Honor has never met you before so I need to ask you some background data and please bear with me. Can you please state your full legal name for therecord?

[1690]

A Raymond Michael Gerawan.

Q And are you the owner of a company which grows, ships and sells tree fruits?

A Yes, I am.

Q And what is the name of that company?

A Gerawan Company.

Q And is this a family owned company?

A Yes, it is.

Q Consisting of you and your children?

A Yes.

Q And—

A Consisting of my wife and I and family, yes.

Q I see. And—let's put it this way, it's not a public corporation or—

A No, it is not.

Q —not traded on the American Stock Exchange or anything like that?

A No, privately held, family owned company.

Q Yes, and what varieties of commodities does your family grow?

A We're basically just about equally divided between peaches, plums, nectarines and grapes.

Q And approximately how much acres in total does your family grow?

A 6,000 acres.

[1691]

Q And those are acreage that your family owns and/or leases?

A Family owns.

Q Owns?

A Yes.

Q That's owned property?

A Yes, it is.

Q Does your family, through your family company, does it also lease property that it farms?

A No, we do not.

Q Okay. Does your family pack fruit for people other than the properties you've described?

A No, we do not.

Q Your packing house only handles and/or ships, I guess is the word—and I'll use the word handle and ship—pack, ship and handle, I'll use them interchangeably. Is that an industry term?

A Yes, yes.

Q I take it that handling or packing or shipping is a term that's used interchangeably, as opposed to growing or producing?

A Yes, I use the terminology of producer, processor, marketer.

Q So you do all—

A Fully integrated in all phases. Referring back [1692] to your question, we do have two growers—

Q Are those what are called—

A —employee related. They're also members of the—working for the family that have a small acreage and we do process for them.

Q Are those two individuals, what a shipper might normally call a "outside grower"? In other words—

A The terminology of outside grower could—could be, but—

Q In other words, a grower who is not a shareholder of the shipping company?

A That's right.

Q You only have those two small outside growers, but they are employees of your family corporation?

A Yes.

Q And—but your family corporation packs fruit off of approximately 6,000 acres?

A 6,000 acres, yes.

Q And these two small growers who work for your company, and whose fruit you also pack, they're provided with about how many acres of addition?

A A total of roughly 80 acres.

Q Okay, so a very small percentage of what you have?

A Yes.

[1693]

Q And is that grapes or tree fruit that they provide you with?

A Tree fruit.

Q Okay. Can you describe for your Honor how you got started in the tree fruit business, your history of how you got involved in this crazy business?

A Well, yes, my father and mother moved here from Oklahoma here in the late '30's and ended up with a 40 acre ranch—how much detail do you want on this? Do you want a whole life story here?

Q Just a general —

A I'll try to be as brief as possible.

Q Just a general family detail.

A And I started working at a very, very young age and saving money and acquired a ranch.

Q And how old were you when you acquired your first ranch?

A I was 17 years old.

Q While you were still in high school?

A Just after the year I graduated high school.

Q And how many acres—

A That was 30 acres.

Q You had acquired that with your earnings as a farm laborer for your father?

A That's right, a farm laborer for my father, as
[1698] * * * * *

Q Is it fair to say that your physical facility is probably the largest in the world?

A For just—we do—I would say yes, it is one of the largest, yes.

Q Now I would like to change the subject a bit, Mr. Gerawan.

A Sure.

Q And you just recently, I understand, received a bill in the mail from CTFA for advertising assessments, is that correct?

A Yes, we have.

Q Or, I should say for all assessments?

A That's true.

Q With respect to peaches, plums and nectarines, correct?

A Yes.

Q And approximately how much was that bill you received?

A Just under \$700,000.

Q Around \$698,000; 699,000?

A 670 to 700,000.

Q Okay. And that's your assessment for the entire harvest season of the 1989 harvest season of peaches, plums and nectarines?

A Yes, it is.

[1699]

Q That doesn't include any grape assessments?

A That does not include grapes.

Q And I understand from a data sheet that you've given me that your total assessment for the harvest season of 1988, with respect to peach, plum and nectarine billings from CTFA amounted to approximately \$490,000; is that correct

A Yes, it is.

Q And that your total assessment from CTFA with respect to peaches, plums and nectarines for the harvest season of '87, was approximately \$533,000?

A Yes.

Q And that your total assessment for the harvest season, 1986, for peaches, plums and nectarines was approximately \$262,000 and some odd?

A Yes, it is.

Q And that your total assessment for peaches, plums and nectarines from CTFA for the harvest season '85 was approximately \$397,000?

A That correct.

Q And that your total assessment for peaches, plums and nectarines for the harvest season 1984 was approximately \$370,500.

A Correct.

Q And that your total assessment for peaches [1700] plums and nectarines for the harvest season, 1983 was approximately \$295,000.

A Correct.

Q And for harvest season—

A That was the total, Tom.

Q Total, 295,000. And for '82 harvest, approximately \$234,500?

A Right.

Q And the last one for harvest season, 1981, approximately \$244,00 for peaches, plums and nectarines en toto.

A Correct. And what did that total? Is there a total—

Q Yes, that totals for '81 through and including '88, that totals almost \$3 million.

A Correct.

Q Plus the bill that you've just received for the '89 harvest of almost 700,000?

A Correct.

Q So, in essence, for the last eight or nine years, you've been billed approximately \$3.7 million?

A Correct.

Q And just peaches, plums and nectarines, not grapes.

A That's correct.

[1701]

Q Now, Mr. Gerawan, I take it you understand that approximately half the assessments that you're being billed and paying go to advertising?

A That is correct.

Q Do you want to pay CTFA any money to advertise for you?

A Of course not.

Q Pardon me?

A Of course not.

Q Why not?

A Well, I guess I have to consider, you know, some philosophy here and I'll enter into it. I'm a firm believer in the system that was being created here. I believe in it. I'm a constitutionalist. I'm an individualist. I don't exist for anybody else. I exist solely for myself.

And my main purpose is to be free in a country, to do and grow what I wish to grow. Process it in the way I wish to process it and market it the way I wish to market it. I don't believe in doing it in association with anybody. I believe in doing it by myself with my family and nobody else.

I don't believe in any socialistic endeavors or I don't need anybody or any association to do anything for me. I don't wish to do anything for them, nor do I ask [1702] anybody to do anything for me. I wish to be left alone. If growers wish to associate, then they should form their own cooperatives, if they feel they're too small. And grow in direct competition with me, or I'll grow in competition with them.

I believe in the survival of the fittest and that's what this country was based on and that's what it was built on. Marketing Orders have become—are creating a breeding ground for the parasitical individuals that wish to feed upon it. And I don't wish to be part of them. Am I answering your question?

Q Yes. Let me ask a few more particular questions in that regard. Can you explain to her Honor, the term generic advertising as opposed to specific brand label advertising, as that term is used in the industry.

A Specific brand label advertising, of course, is what we do.

Q Your company does?

A Our company. We promote our own produce. I wish to use what I work for, what my endeavors go for, I wish to retain it. And I use it for my own endeavors and not for the endeavors of others. We are

fully capable of advertising our product and promoting our produce and being successful in that method.

We would be more successful and we would be—[1703] and we are fully capable of promoting our own product and advertising it.

Q So—

A And this is what we wish to do. I don't want to, nor have any desire to continue to put money into a fund that others feel that they wish to control and where it's—and certain individuals that come along and make claims that they are doing good for the industry, which in fact, it's basically their own selfish needs that are being served. And anybody's needs that are being served by themselves individually I have no qualm with or fight with. Any individual that wishes to enter into the arena of free enterprise, it's there to enter into, individually.

But to form an association under the guise of a Marketing Order or to use any tool that some social group has decided that is needed to bring into control product and enter into the destruction of one of the basic laws that we've had since time began, the law of supply and demand, and once that's tampered with, we've created a warped market.

And that's what we have done. I can recall some years ago when the cling peach people, working under a Marketing Order, decided that they wanted to enter in with certain control, so they created what they called a green drop. So they decided that according to the size of the [1704] crop that they would drop every seventh row. Percentage wise, one-seventh—I don't know what that comes to, but—my mathematics are not that highly educated. So that worked pretty well,

so they got a good price for the six—every, you know, the six rows that remained. So, but eventually, when they had to go to every fifth row and then they had to drop every fourth row, and then it started getting out of hand.

So then these brilliant people decided they were going to enter into—have a control to control the control. And then they came in with what they call tree credits. And somebody dreamt up some formulation where certain tree credits—you know, and so the it resulted—I don't know where the cling peach deal is right now.

You always have these things that come along to try to—they're created, for what, the benefit of humanity. We live in a world where whoever else wants to be here, we're taught it's all for one and one for all. I don't believe in that.

Q So what do you believe in?

A I believe I'm here for myself and nobody else. I'm not here for anybody else but myself. And I believe that—in a free system—I'm not here to promote any other grower. My intent is to run the other grower out of business. That's what the game's played; I mean that's [1705] part of the game. I mean—it's one big ring, you try and stay in the ring. If you get knocked out of the ring, well that's the way it is. And that's the way life is. And that's what I believe in.

Q Now you—you've mentioned something that I thought was kind of interesting. Is your type of packing house different than other types of packing houses that might wish generic advertising rather than specific brand label advertising?

A Well —

Q You said that certain individuals like it.

A Yeah, there are individuals. There are commercial packers—

Q And what's a commercial packer?

A A commercial packer is a packer that's packing for a grower, okay? And his main endeavor is to get packages in. He's after a package count, because the higher his package count, the more money he's going to make.

Q He wants a lot of outside growers?

A Definitely. He wants as many outside growers as he can bring in. And I think you'll find that within this system that's been created, this Marketing Order, that it's pretty much run by commercial packers. And for whatever—for my reasoning and of course this is an [1706] assumption on my part and I think it's pretty factual that all of a sudden, a grower is—he's being assessed—

Q By CTFA?

A —by CTFA for promotion, okay. And if you look at them in acreage, per acre basis, if there's a thousand packages produced an acre, which would be an average in tree fruit, and you put 10 or 11 cents to that, you're looking at \$100 per acre that's assessed for loading up produce.

Then he takes it into a commercial packer and then the commercial packer charges him eight to ten percent for marketing that product that he's promoting. Now, that doesn't make any sense to me. If the grower is going to promote the product and also pay

eight to ten percent to market it, shouldn't the guy that's marketing it, promote it? But yet, that assessment is there.

But we've entered into something here that is—that is starting to really get a stench to it. The Marketing Order came into effect, I think it was established in 1937. Well, it's gone through a couple of generations now where Marketing Orders have become a way of life. Growers I feel don't really understand what the—I mean, in other words, they've lived under this blanket for so long, they don't really understand what's really happening.

[1707] And as socialism continues to creep, it sort of starts to become a way of life. And there's something uncomfortable about it, but they don't really know what it is.

Q I see.

A And—but commercial packers—

Q Now is commercial packer—would be—as opposed to a family independent packer, as to yourself?

A That's correct. Right.

Q And you talked about you promote your own label. What is your label's name?

A Prima—Prima Label. We advertise it ourselves. We put a lot of money into it. We put money that we're paying into an association to promote our own product. I'm not—I don't want to go out there. There's another packer that there's a promotion being run on Red Jim Nectarines.

Q Jim Ito?

A Jim Ito, yes. We're paying, as a grower, I'm paying to promote Red Jim Nectarines, which is an exclusive variety of Mr. Ito's. I don't have the right to grow the Red Jim unless it's under his method, yet I'm paying to promote Red Jim Nectarines. I don't want anybody to promote Prima Red Nectarines. I wouldn't even allow it to go in there.

[1708]

Q Are you—are you telling me that generic advertising money that's assessed and taxed from your family is being spend by CTFA to promote varieties that the patents are exclusively proprietary?

A I'm not telling you that—it tells you right there in that chart.

Q Okay.

MR. CAMPAGNE: Your Honor, with you permission, I'd like to mark this document next in order, which I believe the next in order—

JUDGE BAKER: 256.

MR. CAMPAGNE: Is 256, yes.

(The document referred to was marked as Petitioner Wileman, et al.'s Exhibit No. 256 for identification.)

BY MR. CAMPAGNE:

Q Mr. Gerawan, I'd like to show you Exhibit No. 256. Mr. Gerawan, I believe the first time I ever saw this, you were storming in my office and screaming about this—

A I got pretty hot about that one.

Q Can you explain to the judge why you got so hot about this CTFA advertising document?

A What you see here is—this would be the— [1709] this is the nectarines and what you'll see here is this variety of Red Jim, okay. And you'll see it in dark red coloring here and above it you'll see Flamekist. It's presented in a lighter color. And you'll see Fairlane sort of presented in a lighter color. The colors that are used can be argued that they're really not trying to substantiate the color of the fruit, but yet there is variations there that are used. In particular—

JUDGE BAKER: There's no particular relationship to the colors of the fruit?

THE WITNESS: Not necessarily. Of course there—there—they used a color scheme here. And I don't know what, you know, what the purpose of the whole color scheme was. But what's really happening here, your Honor, is that Red Jim Nectarine is a—become an prominent variety by an individual, Jim Ito. And it's a very good variety. And he has every right in the world to grow as much of it as he wants to grow. And he has every right in the world to market it in any way he wants to market it.

BY MR. CAMPAGNE:

Q To advertise it?

A He can advertise it; he can do anything he wants with it.

Q But you don't want to—

A He has been very effective with the Red Jim [1710] Nectarine of—of—of—because it comes in the

same time season that we have Fairlanes and Flamekist and other varieties—

Q That you grow?

A —that we grow. And he has been very effective in marketing them. And he's done a tremendous job in promoting it and marketing it. And he's been a real competitor, because the varieties that we've had, we've taken a hind seat on him because he's done a tremendous job. And that's the way it should be. And I take my hat off to Mr. Ito. But I don't particular care to promote the Red Jim—

Q With your money?

A —with my money. And that's what's happening today. And this is the type of favoritism—or whatever you want to call it, and I don't want to get into that area. But I mean, we have a situation here and this is not healthy. The healthy part of it is that Mr. Ito came in with a variety—and I take my hat off to him—and done a tremendous job with it. And he has a tremendous volume of Red Jim Nectarines. Tremendous volume. And he has hurt us with our varieties.

Q He—

[1711]

A And that's the way the game's supposed to be played.

Q Competition.

A Right. But I want my money so I can promote Prima Red Nectarines. I don't want an association to promote my label. I want to promote it. I want to promote Prima Red. We launched our own program

last year in Prima Red Nectarines. But yet I get a bill, which I have no intention of paying, for—

Q An approximate \$700,000 bill.

A —\$700,000 to promote my competitor's fruit.

THE WITNESS: Help me to raise my voice, too.

I haven't cussed yet.

BY MR. CAMPAGNE:

Q I understand this is a little bit malicious. Mr. Gerawan, do you have an understanding where this exhibit was distributed by CFTA?

A Where it was distributed?

Q Yeah, did you talk to somebody at CTFA about it?

A Yes, I talked—

Q Or should I say did you scream at somebody at CTFA about it?

A Oh, I talked—I was very nice about it.

Q Where do you understand this was distributed by [1712] CTFA?

A This document was placed into the packer newspaper.

Q Is that a—is that a—

A It's a nationally distributed newspaper weekly that goes out to all produce buyers and handlers of product.

Q Okay.

A So there was complete national distribution of this.

Q Was it also given to like grocery stores and buyers for chain stores?

A I don't know the exact extent of its distribution. But I do see Red Jim on there and it was advertised. And I have no intention of paying for that advertisement.

Q Now you were talking about the colors and if I understood you correctly, you're assuming that the way the colors were set up gives the impression to the public that the Red Jim is redder in color than the Flamekist and the Fairlanes that you grow?

A Yeah, I mean, that would be—yeah, that kind of upsets me. But yet you look on up here and you'll see that Fantasia is given a higher color than Summer Grand, which is erroneous.

[1713]

Q And I take it—

A So that I've got both of these varieties and I have a lot of Fantasia's, you know. But —

Q And I understand that your company—if I understand what you've told me before, correctly, your company spends a little bit more money than some companies do to try to enhance the color on certain varieties by stripping the leaves off the trees when other farmers might not do that.

A Yes, we do. I feel that my sons have been instrumental in taking varieties and bringing them way above the standards that are even professed that we have to deal with, as far as color chips and all of that paraphernalia is concerned, because we're individuals. We're in a marketplace of our own—

Q With your own buyers—

A We don't recognize CTFA. We don't recognize their standards. We have no recognition. We feel that as individuals we're fully capable of understanding the market's needs. We're dealing with a one-to-one—it's on a one-to-one. We sell to a buyer. That transaction is strictly the business of myself, who we are and the buyer that buys it. It isn't nobody's business.

If I wish to grow 5 x 5 Red Beauts, that transaction is only my business and the buyer's. If he [1714] choses to buy them, that's his business.

Q Mr. Gerawan, changing the subject just a moment, you—you made a statement earlier that I would like you to elaborate on. You said that for some years, you've been promoting your own Prima Label. And spending your own money out of your own pocket.

Let me ask you a question. If you weren't spending money previously paying almost \$3 million from 1981 through 1988 to CTFA, would you have spent more money promoting your own label?

A Definitely.

THE REPORTER: Excuse me, your Honor. Go ahead.

MR. CAMPAGNE: Thank you.

BY MR. CAMPAGNE:

Q And also, Mr. Gerawan, I know you and I had a conversation about the First Amendment. Do you think that your ability to speak in the advertising market is being diminished by CTFA taking your money from you and promoting the generic, "Eat California Fruit"?

A Oh, there's no doubt about it, there's a definite burden placed on us by this huge amount of assessment.

Q Do you have budget limitations in your company?

A Definitely.

[1715]

Q And, as a result —

A We are —

Q — has your Prima specific brand label advertising program being diminished, as a result of the money that CTFA has taken from you?

A There's no doubt about it. Any, you know, any—\$700,000 is a lot of money.

Q And how much—

A It would allow us opportunities to go into more promotional programs and more advertising and we're interested strictly in Prima. We're not interested in Red Jim; we're not interested in anybody else. I have no desire to be interested in anything but Prima.

Q You don't think it helps your company to spend—for the industry through CTFA to spend \$5 million a year saying, "Eat California Fruits"?

A No.

Q Why not?

A It does no good whatsoever. And—

Q Do you think it would help the automobile industry to advertise to buy cars?

A No. I mean, everything —

Q Do you think it would help the beer industry to say, "Buy beer"?

A We're not Russia. We're in the United States. [1716] And we're independent; we're individualistic. And, you know, I think we need Gorbachov over here to get us straightened out.

Q How much money do you feel that—I understand that from what you've told the office before today that in 1986, just promoting the Prima Label through Gerawan advertising and newspapers and promotional documents, that in 1986, you spent approximately \$80,000 of your family's money promoting the Prima Label, is that true? Not counting your staff time and all that stuff?

A Yes.

Q Just hard money out of pocket for buying of tapes and materials and newspaper print, that type of thing. And I understand that in harvest season '87—I just said for harvest season 86—so for harvest season '87, you spent about 53, 54,000 of hard money out of pocket buying brochures, buying newspaper ads, not counting your own company's time and employee time, promoting the Prima Label? You have to answer yes or no.

A Yes.

Q You can't just nod your head. And I understand that in 1988, you spent approximately \$61,000 of hard money buying these hard items like brochures and posters?

A Yes, we have.

Q And in the last harvest season, you spent a [1717] little bit more, approximately 70 to \$75,000?

A Yes, we have.

Q Do you think if you weren't paying CTFA approximately \$700,000, that that personal family advertising budget for the Prima Label might increase?

A Very definitely. Very definitely. We launched a program of Prima Red Nectarines which we were successful with this year and I would like to, and intend to increase that and put more money into it. But I need money we're working for. I don't need to promote any other grower's product. Or, I'm not here for the good of the industry.

Q Now I understand that with—I understand that you attribute some of your success to your ability to promote Prima's Label?

A That's right.

Q And it's helped you grow?

A That's right.

Q And you don't think that CTFA "Buy California Fruits" has helped you at all?

A None whatsoever. I mean the market is strictly a supply and demand market. And even this last season, there are growers that quit harvesting certain varieties of fruit because the market didn't want it. It was glutted. The market has a way of finding and seeking its own level. We don't need people to come up with programs to start [1718] eliminating certain sizes. We don't need an association to advertise it. The market seeks its level. And it's—it's a man's game. It's—I don't know, I—

Q It's a tough business.

A I'm on the verge of starting to cuss. Slow down just a little bit.

Q Well, Mr. Gerawan, I understand that with some of this money that you've been spending, in addition to the money you've been paying CTFA up through the current harvest season, that you've done such things as produced tape—video tapes and movies?

A That's right, we have our own video tape going. We want to do more things. But it—advertising, individual advertising is what we want to do.

Q And, Mr. Gerawan, we've set up the demonstration of your video tape and—

A You have my permission to show it.

MR. CAMPAGNE: With your Honor's permission as well, your Honor, we would like to play the video tape as an example of what Mr. Gerawan has done to promote his own specific brand. And then we will provide with the exhibits, the tape amended to all the exhibits.

JUDGE BAKER: Very well, thank you.

MR. CAMPAGNE: Thank you.

MR. COOPER: Your Honor —

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UNITED STATES DEPARTMENT OF
AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

AMA DOCKET No. F&V 916-3

AMA DOCKET No. F&V 917-4

IN THE MATTER OF WILEMAN BROTHERS & ELLIOTT,
INC., A CALIFORNIA CORPORATION AND KASH, INC.,
A CALIFORNIA CORPORATION, PETITIONERS

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE,
RESPONDENT

Federal Building

1130 "O" Street

Room 2002

Fresno, California

Thursday, February 1, 1990

[Excerpts from testimony of Ray Gerawan]

The above-entitled matter came on for hearing, pursuant to Notice, before the Secretary of Agriculture, at 9:05 a.m.

Before:

HONORABLE DOROTHEA A. BAKER,
Administrative Law Judge
Room 1045 South Building
Washington, D.C. 20250
(202) 447-8305

[1735]

PROCEEDINGS

(9:05 a.m.)

JUDGE BAKER: We are now back in order after our evening recess. This is Thursday, February 1, 1990 and Mr. Campagne, do you wish to continue?

MR. CAMPAGNE: Yes, your Honor. Whereupon,

RAYMOND GERAWAN

having been previously duly sworn, the witness resumed the stand and was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. CAMPAGNE:

Q Mr. Gerawan, I believe you will recall that when we had recessed for evening recess last night, you had just finished speaking about Exhibit number 256 which is the CTFA advertising document and we had just played the music of the Prima label of the promotional tape that you produced which is Exhibit 258.

Now if I may Mr. Gerawan, I'd like to change the subject just a little bit and I would like you to describe a little bit more for her Honor what you feel you would do with the approximate seven hundred thousand dollars a year you are paying in assessments and of that about half of it would be advertising [1736] assessments.

In other words, I would like to ask you what would you do with the approximate three to four hundred thousand dollars of advertising money, if you didn't have to pay it each year to the CTFA? How would you use that with respect to your Prima label?

MR. COOPER: Objection, your Honor. He said yesterday that he's not paying the money, it's a little unclear.

MR. CAMPAGNE: He's testified that he's paid over two point million, almost three million dollars in the last year in assessments of which over fifty percent of that, actually five ninths of that is advertising assessments, so in the last eight years he spend a lot of money in advertising assessments being the largest shipper in the industry.

JUDGE BAKER: The objection is overruled. It's quite clear what the witness is being asked.

BY MR. CAMPAGNE:

Q What would you do with that advertising money, Mr. Gerawan, if you didn't have to give receipts to the CTFA? How would you put it into your Prima program that you were talking about yesterday?

A It would be similar to any other organization which has a product which is promoted.

Q Like Chrysler or—

A Whatever it may be whether it's donuts or whether it's cars or whatever it may be. In the Gerawan family we'd use this money to promote Prima label, not to promote California fruit. We're interested only in Prima label, as I stated earlier, we're not interested in promoting anybody else's fruit and we would put it into promotional programs and I think that you'll find that competition is really the essence in any business.

It's part of the free enterprise system and competition has come along and created as a result their own promotional programs which has hurt us in particular periods and that's the way it should be. So we would, in turn, use our money to promote Prima label.

Q Like for example, what would be an example of some competition you'd—

A For example, Mr. Ito has been very successful in promoting the Red Jim nectarine and its even gotten to the point where the Red Jim, being promoted, and in talking to certain chain store buyers, even though we have nectarines that are comparable color and quality, at the same time of the year the buyer would say, "yes, but they're not Red Jims." And the chain stores and the buyers have been very successful because of this promotion that Mr. Ito put out. So we, [1738] in turn, this last season put out a Prima Red nectarine.

Q This is a promotional trade mark name?

A It's promotional trade mark name and it is not a variety but the Prima Red is a program which we use several varieties that go into the Prima Red program. First of all, the Prima Red has to meet a criteria of seventy-five percent or more of color.

Q With your own internal standards?

A That's right, definitely. Everything, all of our standards are our own internal standards.

Q They're not CTFA standards?

A No, they are not.

Q And, for example, the inspectors I saw in the movie yesterday, those were your inspectors, not CTFA?

A That is correct, that is correct. So we put out what we call a Prima Red program. So we have to

promote this and you will find, and I think it's factual within—we're talking about items such as fruit—that a person that hears "buy California fruit" they won't all of a sudden stop their car and just go in and buy California fruit.

The greatest majority of fruit that is consumed and sold is done through promotional participation primarily by your chain stores and what a [1739] promotion is—

Q Excuse me, what do you mean by "participation with the chain stores," I don't understand that phrase?

A Well, here is a participation—participational promotions are for example, Prima Red nectarine. We will commit a price to a buyer—

Q In advance of the harvest?

A In advance of the harvest of so many packages of fruit, we will rebate back to that particular buyer a promotional allowance with proof of ad that they put out into their advertisements. We will rebate on a particular Prima Red program, we rebated two cents a pound which is a significant amount of money. Others—a price that is set and they want a promotion. They set up within their stores the amount of space and this is to use a tremendous volume of fruit. We have to meet, certainly, the criteria of what we're advertising and this is what is called a "promotion."

Mr. Ito has been very successful at it and that's not unique. There is nothing unique about what we're doing but the competition has forced us to also enter into that arena. And we're—our main goal is to promote Prima label, you know.

Q Let me ask you just a little bit more [1740] explanation with regard to this cooperation with the

chain stores in this rebate program. If I understand what you're saying then, sometime before the harvest, possibly even months before the harvest, you have an arrangement with the chain store?

A Yes.

Q That when you say Safeway has a full page ad in the newspaper, they'll use the Prima Red logo in the advertisement, is that it?

A That's right.

Q And certain displays are put up in the stores?

A That's right.

Q And they say "Prima Red"?

A That's right.

Q And then if they show you proof of having done all this, you give them the rebate?

A That's right.

Q And you consider that one of the most effective means of advertising?

A Definitely.

Q Do you think that a jingle on the TV or the radio that says "eat California fruit," is effective?

A No, it has no meaning whatsoever. [1741]

Q You think it's just an absolute waste of money?

A I absolutely,—yes. We're dealing with a supply and demand situation and I think it's up to free enterprise to step in, individuals such as Jim Ito or Gerawan or whatever company, or who wish to form our own cooperative, that's fine, but I think what we're really talking about here is the first amendment which allows us freedom of speech. Also allows us freedom not to speak. And we don't wish to speak, we don't wish to have our money used and being forced to speak when we don't want to speak.

Q On behalf of your competitors?

A On behalf of our competitors. I'm not interested in promoting any other grower. I'm only interested in promoting myself.

Q Can you think of any governmental interest whatsoever as to why the government would care whether or not the American public needs California nectarine peaches and plums?

A No, I can't think of any instance of why the government would even care if people eat donuts. I mean, maybe they'll come along with a donut marketing order where you can only have a certain size donuts and the centers of donuts—I don't—where does this [1742] whole thing go? I'm not here to feed anybody's alter ego—

Q What do you mean, "alter ego"?

A Alter ego in association with people that feel that they're do-gooders to the industry and all of a sudden they've taken something, served their own alter ego and their own self-interest in creating controls. Let them do it on their own. Let the free spirit of competition and free enterprise continue.

And I think Mr. Ito has done a tremendous job as a competitor and I take my hat off to him. And I think he's instigated something and I think the volume of fruit that is consumed is predicated upon the chain stores and advertising at their level and the ads and the promotions.

In general on TV or radio, "eat California fruit" is a pure waste of money and if people wish to do this, let them do it on their own. I don't want to be forced into putting any of my money into a program which I don't believe in at all.

Q So, if these people voluntarily contribute money to a cooperative plan to advertise, you don't care as long as you're not taxed to forcibly pay into that?

A That's right.

Q On this Jim Ito, Red Jim variety that's [1743] shown on this piece of paper which we've marked as Exhibit 257, I'm sorry, 256, is the patent on that nectarine different than the patent on other nectarines?

In other words—

A I don't believe it is.

Q Okay, let me rephrase the question. The Red Jim nectarine is patented by—but the owner of that patent is Mr. Ito, is that correct?

A Yes.

Q And he has not made that tree available for sale or to anybody who's willing to pay the royalties, isn't that correct? He's limited—

A I don't know what his total program is, I know that what variety is grown exclusively by Jim Ito and growers that Jim Ito—that grow for Jim Ito. I don't know what his arrangements are—

Q Is it fair to say that if I'm growing a Red Jim nectarine tree, that lawfully under my contractual arrangement with the patent owner, Mr. Ito, only Mr. Ito can pack and market that tree—

A If this is his arrangement and I'm not completely familiar with the laws that protect those owners patent rights, I know within our organization that we have our own patent varieties and we wish to promote those very similar to what Mr. Ito is doing. [1744]

Q Now your own patented varieties, do you sometimes make them available to other packing houses to market or did you just market them?

A No, we retained our own varieties exclusively. We have developed those varieties. Mike Gerawan

heads our breeding department. They are our exclusive varieties.

Q Just like Red Jim is for Mr. Ito?

A That's right.

Q And the—

A And the May is for Fowler packing, or very similar.

Q I see. Now, I guess we'll call those exclusively patented varieties. Do you also handle and ship some non exclusively patented varieties? Your company?

A Yes.

Q And can you explain to the judge the difference?

A Well, the difference is that there are varieties—a patent, I think the life of a patent is seventeen years. And once that seventeen years is up, well then it becomes open to anybody who wishes to grow that particular variety. Within that period of seventeen years, it can be exclusively held by a [1745] grower—

Q Or that grower can let someone else—

A —or nurseries who have developed these varieties will sell trees and have a royalty. Or that grower can make arrangements with a packer or whoever, the grower can make arrangements with others to grow that variety under exclusive contractual agreement.

Q Marketing agreement?

A Marketing agreement, packing agreement, whatever there may be that constitutes that agreement. This is not unique within our industry. I think that that's very similar, I believe, to other industries. I'm not sure exactly how its operated.

Q Well, I'd like you, Mr. Gerawan to look over this chart which is 256, Exhibit 256 and—the varieties that are listed there. And, can you tell me if there is any variety—you've already told us that Red Jim is a

variety of nectarines on there that was under exclusive ownership of, I'm sorry—

A That's right, the other variety is—is a patent held by Burchell nursery which is sold commercially, the Sparkle, I believe—

Q In other words, anybody can go buy that tree and—

A That's right.

[1746]

Q —and anybody can market it?

A That's right. Very similar to the Sparkle and the O'Henry, Cal Red, I believe is a variety that was developed by USDA.

Q So anybody can buy it and market it?

A Yes, anybody can buy any of these trees or varieties—

Q Except—

A —on this list—

Q Except for Red Jim?

A Except for Red Jim. Angelino was a variety that was held by Superior Farming but the patent has run out on it and it is open variety right now.

Q That's a variety of plums?

A That's a variety of plums, yes. Many of these varieties, such as Grand Rosa, that was a variety held by Reedley nursery at one time, but that's for anybody to buy. The only variety on here that I could not buy and participate in would be the Red Jim.

Q I see. And is that what is commonly referred, therefore, in the industry as a proprietary variety?

A Yes.

Q So there's no other proprietary varieties on there except the Red Jim?

[1747]

A That's correct.

Q Are any of your proprietary varieties on there?

A No, there are not.

Q Has CTFA ever included your proprietary varieties on any of their brochures?

A No.

Q Mr. Gerawan, you recently had a 15(A) hearing before Judge Palmer, correct?

A Yes.

Q And your Honor, I'll represent for the record that Mr. Gerawan's case Gerawan Company, Inc. as petitioner has AMA docket F&V 916-4 and 917-5. Mr. Gerawan, the last day of that hearing was May 31, 1989?

A I believe it was, yes.

Q Your Honor, may we have just a moment to confer—

JUDGE BAKER: Yes.

BY MR. CAMPAGNE:

Q Mr. Gerawan, is it fair to say that the document in front of you, the CTFA chart that we've marked as Exhibit 256 was issued and distributed and therefore you came running into my office screaming, just a few days after that hearing of May 31st?

[1748]

A Yes, that's right. Yes, that is.

Q Is it fair to say that you received it as being circulated in the industry the first week of June?

A I don't recall as to the exact timing of it, but it's fair to say that it was distributed within the season of 1989.

Q But do you recall it being shortly after your trial?

A Yes.

MR. CAMPAGNE: Your Honor, with the court's permission I am now going to hand Mr. Cooper and

Mr. Palmer a copy of a few pages out of the transcript of that court proceeding and I'll have a set for you as well.

JUDGE BAKER: You meant Ms. Boutrous?

MR. CAMPAGNE: I'm sorry, Ms. Boutrous and Mr. Cooper. And your Honor I want the record to reflect that I'm also handling you copies of pages 203, 204, 222, and 223 of the transcript of proceedings in the matter of Gerawan and Company, Inc., case number 916-4 and 917-5, from the transcript dated May 31, 1989. It was only a one day proceeding, your Honor. And these are pages exerted from the testimony of Mr. Jon Field, your Honor. The witness referred to Mr. Jon Field in these pages. And if I could possibly have these pages 203, 204, 222, [1749] and 223 marked next in order—

JUDGE BAKER: 258.

MR. CAMPAGNE: That's 258, thank you and the records should reflect that over the word "the witness" I'm just writing in the name Jon Field. Thank you your Honor.

(The document referred to was marked as Exhibit 258 for identification.)

(Witness proffered documents)

MR. COOPER: Is there something different you have there Mr. Campagne?

MR. CAMPAGNE: Pardon?

MR. COOPER: Is there something different that you handed us?

MR. CAMPAGNE: No, it the same thing—the same thing I just handed to you. For the record, your Honor, I'd like to move these documents into evidence later on but not right now. I would like to just ask a few questions about them with your permission.

BY MR. CAMPAGNE:

Q Do you recall Mr. Jon Field's testimony at the trial, Mr. Gerawan, to the effect that it was inappropriate of CTFA to advertise proprietary varieties [1750] and the CTFA had not done so?

A Yes, I do recall that briefly, yes.

Q And is that one of the reasons why shortly after the trial when Exhibit 256 came out you were particularly angry?

A That was one—might have been one of the minor reasons because of the statement that he made I think it's rather a blatant act of the CTFA to take the exclusive variety and spend my money advertising it. That is the act that I acted on.

MR. CAMPAGNE: Your Honor, I'd like to point out to you that on page 222 of the transcript—I should clarify something for the record, your Honor. That page is 203 and 204 of this exhibit, the transcript exhibit, that is where Ms. Boutrous is examining Mr. Fields. Mr. Jon Fields, And pages, 222 and 223 is where I'm examining Mr. Fields. And I would like to point out on line 16, page 222, I asked Mr. Fields as follows: quote, that you listed varieties that are particularly patented for other handlers, isn't that true? Answer Mr. Fields, "which ones, Red Jim has never been listed." Question, "Red Jim has never been advertised"? Answer, "it has not been listed in those programs." Question, "has it ever been advertised"? Answer, "not specifically by our programs, quite [1751] possibly the same as the Prima label where an individual retailer in our program might have advertised the Red Jim variety and got points because of the advertisement." Question, "what you're saying is, in these advertising brochures themselves, you never advertised any varieties that are patented

solely for other handlers"? Answer, "the proprietary independent varieties, not that I'm aware of." Question, "by me—" Answer, "handled by one individual, not that I'm aware of." Question by me, "okay, they have to be open varieties"? Answer, "yes, yeah." Question, "open patent varieties"? Answer, "we try to stick with that which becomes more and more difficult all the time."

Excuse me a moment, your Honor, Your Honor, just so the record is clear, at this time I'm showing Mr. Cooper and Ms. Boutrous a document which is the referred to a 203 and 204 of the transcript that was just identified as Exhibit 258. And this document being, your Honor, what was referred to therein in that transcript as Respondent USDA Exhibit 257, which with the court's permission I'd like to mark as Exhibit 259 in the interference.

(The document referred to was marked as Exhibit 259 for identification.)

[1752]

MR. CAMPAGNE: With respect to Exhibit 259 in this hearing, which was Exhibit 57 as referred to in the Gerawan transcript as Exhibit 258, I'd like to read this portion of the transcript. At pages 203 and 204, Ms. Boutrous is examining Mr. Jonathan Field as her witness and she is showing Mr. Field what was in that proceeding, USDA Exhibit 57 in which is in this proceeding Exhibit 258, and you will note your Honor that it is a similar type of advertising brochure as the instant one that is in front of Mr. Gerawan as 256. However, the brochure had been published some months earlier, not listing the Red Jim—

JUDGE BAKER: Mr. Champagne, may I inquire who is Mr. Flynn on pages 203 and 204?

MS. BOUTROUS: He is the attorney that was working with me, your Honor.

JUDGE BAKER: Oh, —thank you.

MR. CAMPAGNE: Your Honor, on page two and three, after the document is talked about being marked as Exhibit 57, Mr. Jonathan Field—where it says, the witness there on line 15 on page 203 of Exhibit 258 states: The witness, "actually what you have in your hand is a variety chart and a variety chart, if you open that up, it shows product availability as a major variety by timing and it also shows some pictures of [1835] program?"

A Yes, that's the basic thrust of my argument. It is not helping me and I don't want my dollars being spent for me by a committee or anybody else. I will spend my own dollars on what I created and what I produce. Because it is proven that fee enterprise and private industry is the essence of this whole thing.

They don't generically advertise cars. Generic advertisement, I'm not interested in. I'm interested in advertising that I, as an individual produce in my label. I'm not interested in putting my money in anybody else's advertising program. I have the right as a grower to grow what I wish to grow.

Q So you feel that the advertising dollar is not spent effectively. Do you feel that the advertising dollar—by CTFA is being expended to spread some sort of particular message that would be against your business.

A I see there is no point here. I don't care what CTFA does with their money. I just don't want any of my money in it. I just don't want any of my money used. It's—whether it's effective to them or not is of no concern to anybody. What I'm saying is if growers want to form their own coops and they want to be

[1836] competitive with Ito, then God bless them, go for it. If they want to be competitive with Prima, go for it. I guess we're really—its not a question whether CTFA is effective or not effective for anybody else. They're not effective for me, they're a hinderance to me. I'm not here to judge what they do for somebody else.

Q Well, would you say, you mean your advertising dollars—in the past you spent x sum of dollars that went to advertising, did any of that money go to advertising which would say directly be—for instance, let me phrase it another way. If I could characterize CTFA advertising, it's basically, eat fruit, eat a lot of fruit, fruit is good for you and CTFA in general pushes big fruit, high maturity fruit—

MR. CAMPAGNE: I'm going to object, your Honor. I think we've all been accepting the premise that CTFA advertising is quote California fruit close quote. And I think there is some mischaracterization going on in the phrasing of the question. In Mr. Gerawan's position, he's previously testified that he believes it violates his first amendment rights to take his money to promote his competitors fruit. He wants his money left alone so he can promote his own fruit. He [1876] Kashiki's fruit, it could be anyone—

A But if it was my—if it was my fruit and I'm retaining my money to promote my fruit, you will well know it was Prima fruit. And that's how industries are built. That's how—that's free enterprise. And that's how people become successful. We've got to get out of the area of mediocrity. Generic advertising throws everything into mediocrity. It keeps everything—wants to leave everybody common. It doesn't determine the best out of mediocrity. We want to promote Prima. I'm not concerned about

anybody else fruit. I'm not concerned whether they stay in business or whether they are successful or whether they sell another peach or not, that's of no concern of mine whatsoever. Whether they survive economically is no concern of mine.

Q Doesn't allowing a lower quality fruit on the store shelves hurt you in that the next time I go in there I won't look to see whether it's Prima, I won't look to see whether it's Topshelf, I won't look to see whether it's Kashiki, I'll just go, you know, to find some oranges or some apples, or something because I got burned the last time I was in there.

A That's because you listen to the California Tree Food ad—[1877]

Q I didn't listen to the ad, I just saw the peach that was on the counter without a name.

A You saw peaches from California.

Q I saw peaches and I assumed they were from California because it was the wrong season—

A If you'd bought some Prima fruit, you'd been back to buy more. That's the gist of the whole thing. I don't know what kind of car you drive, but if you like the last car you bought, you're going to buy another one.

MR. COOPER: Do you have anything else?

MS. BOUTROUS: Yes, I want to ask one quick question. I remember—

MR. COOPER: I have nothing further.

MS. BOUTROUS: Okay, one quick one, then we'll be done.

BY MS. BOUTROUS:

Q I think the variety is Fantasia, but you were mentioning at one time you were angry because the color chip was lowered. I think it was on Fantasias. Do you remember the time you were angry when the

went in and they lowered the color chip. Weren't you angry because now there is going to be fruit at a lot lower maturity coming in and flooding the market and dragging down the market and making everybody think now there— [1880] itself?

A Yes. One out of every five pieces of fruit I ship has that sticker, I believe.

Q And I take it then that kind of gets mixed up sometimes with fruit that doesn't have stickers.

A Yes.

Q Hopefully they can stick their noses to the Prima pile of fruit in the store, right?

A Right.

Q Mr. Gerawan, you in answer to one of Mr. Cooper's questions said that "eat California fruit," you said it was a lie that you philosophically—the jingle or the generic advertising phrase or the generic advertising theme of quote eat California nectarines, eat California plums, eat California peaches, you said it was a lie, that generic advertising was a lie that you philosophically disagreed with and you started to explain that a little bit. I think you got cut off, would you elaborate on that please?

A Well, actually the connotation of the generic advertising is that California fruit is all the same and it isn't all the same.

Q Is that the lie you're referring to?

A Yes.

Q Can you please explain why it's not all [1881]

A Well the reason it's not all the same is because there are differences in quality. All California fruit is not the same. And that's—to say it's all the same is—it just isn't. California fruit is not all the same.

Fantasia nectarines,—is—not all Fantasia nectarines are the same. Not all varieties are the same.

Q So not only are their differences between say a Fantasia nectarine and a LeGrand nectarine, but there's differences among different Fantasias and different LeGrand?

A Each variety has it's own characteristics and there's differences between qualities, between growers, and areas and all California is not the same.

Q As a matter of fact, Mr. Gerawan, don't you sell two levels of qualities? You sell a Prima Red-quality label and you sell a regular Prima label?

A That's correct.

Q So if I put a Fantasia and a Prima Red label of your company, that Fantasia is different than a Fantasia in a regular Prima label.

A That is correct.

Q So all Fantasia's are not the same?

A That is correct.

Q Now, Mr. Cooper asked you a question and

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[2267]

UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE

AMA No. 51
F & V 916-3
F & V 917-4

WILEMAN BROS & ELLIOTT, INC., A CALIFORNIA
CORPORATION, AND KASH, INC., A CALIFORNIA
CORPORATION, PETITIONER

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE,
RESPONDENT

[Excerpts from Testimony of David Parker, CTFA]

Room 2002
Federal Building
1130 O Street
Fresno, California
Monday,
February 5, 1990

The parties met, pursuant to the notice of the
Judge, at 9:05 a.m.

Before: HON. DOROTHY BAKER,
Administrative Law Judge

APPEARANCES:
For The Petitioner:

THOMAS E. CAMPAGNE, ESQ.
CLIFFORD C. KEMPER, ESQ.
5108 E. Clinton Way, Suite 122
Fresno, California 93727

Heritage Reporting Corporation
(202) 628-4888

* * * * *

[2280] different than some of the earlier years? Is that listed, a time chart listed varieties and had stripes across the page?

A No. The primary thing that was different was that it took the form of a free standing insert as these things are known as opposed to a printed page advertisement in a newspaper.

Q I don't know what free standing insert means. Do you mean that it just slips into the newspaper and can be taken out?

A Correct. So—

Q Like I might get an advertisement from Macy's or Nordstrom's that can be taken out of the newspaper and stored separately from the newspaper?

A Yes. That's a good way to put it. And the reason for that is that we hope to find these on retailer's office walls, which indeed we did.

Q I see.

A A reference tool for them.

Q So now, these things such as Exhibits 256, they went into newspapers as free standing—

A Inserts.

Q —inserts, and then mailed to the general public?

A They were inserted in the Packer and Produce News, and two principal trade newspapers.

Q Okay. I understand. So they were—the Packer [2281] and the Produce News, I take it, are newspapers. However, they're not newspapers of

general circulation. They're newspapers that are purchased by retailer, wholesalers, packing houses and shippers and that type of thing?

A Yes. People involved in the fresh produce industry.

Q Not necessarily the type of newspaper that a housewife might buy, but rather that a procurer or purchaser of goods might buy?

A Correct. I don't think too many housewives subscribe to either of those.

Q Okay. And had you ever done any free standing inserts into either the Packer or the Produce News before hand, before Exhibits—before the summer of 1989?

A Not during my tenure.

Q And are you aware of any before your tenure?

A It would have been sometime past. No, I'm not aware of anything beforehand. I'm just know. I don't know if this was a first, but it was a departure from the previous couple of years.

Q And in the previous couple of years, the ads were a part of the newspaper itself printed on the newspaper; is that it?

A Yes.

Q Okay. Now, pursuant to certain production [2282] requests, there's a big box underneath that table which is supposed to contain an example of various promotional documents and scripts and ads that have been used over the last few years. Would you be surprised if I told you that this was the only

document I could find that used the name Red Jim nectarine?

A I'm non plussed. I don't know if I'd be surprised or not.

Q Okay.

A I can say, however, that this was the—this may have been the first time that this variety achieved the kind of volume that would place it in this grouping of varieties. See, these varieties, for both of these charts, were chosen strictly on the basis of volume. Consideration was given to the fact that not many growers grow the Red Jim variety. But basically when we looked at the varieties to be included here, we looked at a chart. We had it in the wall in our Reedley office. We just have a sign that says these are the top 15 varieties in order of volume.

You looked at the top 15 varieties, and that's basically what we incorporated into this chart.

Q Okay. So to get on this chart you've got to be one of the top 15 sellers?

A We make decisions when it comes to pieces like this, you know, what variety shall we include based on [2283] volume and common sense. Volume might tell us, you know, we might take volume at face value and just say let's print the top 15. Common sense would tell us, let's say we were only producing a 12 variety chart. We'd still want to include, for instance, a Kelsey plum because it's a green plum. We try to promote the concept of color mixes when retailers display plums. So Kelsey is a valuable item in the mix.

Q And that's why Kelsey is shown with a green stripe in the middle of Exhibit 256, to get the color mix, to let the buyer know that it's a plum of a peculiar color, a green color?

A Right. In plums we have more ability to differentiate specifically each variety by its color characteristics. In peaches and nectarines we didn't really have the—you know, you don't have the leeway to do that in those commodities. They don't have that kind of color spectrum, shall we say.

Q They just have a color spectrum, but it's less broad than the color spectrum, or the increments are closer?

A All the varieties are variegated, shall we say, but variegated pretty much the same. Oranges, yellows, you know, dark reds, light reds.

Q I see, for example, on Exhibit 256, Summer Grand is a little bit more yellowish than Flavor Top, and Fantasia is a little bit more reddish than Flavor Top again. So in [2284] color of darkest to lightest, just looking at the chart, I'd go Fantasia would be the reddish. Then next in order would be Flavor Top and next in order would be Summer Grand. Is that basically what you're trying to tell me?

A In fact, in the case of peaches, we discussed this specifically before we produced these. We couldn't come up with a very good rational way of presenting each variety as it normally appears with an appropriate color representation. So very simply, we took—we have a bar across the top of each commodity that goes clear across the page.

Q And that's with the name of the commodity right in that bar?

A Right. So that's a commodity, you know, representation bar, shall we say. And now, in the case of plums, we try to put a color to each of—you know, we call our plums reds, blacks or purples or greens. There the color differentiation is far more specific.

But with nectarines and peaches, we just said let's start with a color below the bar that contrasts somewhat with the bar, and then just take three representative colors of that commodity, and we'll just go one, two, three, one, two, three, and that's what you see happening here.

Q I see. So it isn't so much that you try to match [2285] the fruit. You just try to put the fruit in one of three different categories of colors?

A Right.

Q So I guess, in looking at the nectarine graph, for example—well, is the same true of plums, or did it work with the three colors with respect to just peaches and nectarines?

A Peaches and nectarines in particular. We almost—in some cases you almost want to de-emphasize the color differentiation in nectarines because we want to promote, let's say, yellow—varieties that tend toward yellow or tend toward less red tone; in the late season, because it's difficult to achieve color in the late season, but you can have spectacular flavor, and we tell retailers that too. You know, don't forsake these varieties just because they don't have eye appeal dazzle..

Q And how would this chart be telling the retailer which one? Give me the varieties that would fall under that category that would be in the yellower category that had good flavor, but not so much reddish

on the outside. Is that what you're talking about, having three colors in the category?

A The three colors were just chosen to represent the commodity.

Q Okay.

[2286]

A So on a nectarine you might find a dark red color, you might find an orange color or a lighter orange background color. And these bars don't necessarily—you can't expect them to correlate with the characteristics of the variety. Like I say, we just arbitrarily said since we really didn't feel we could achieve that kind of representative color assignment, we said—you know, because some varieties vary from year to year and from grower to grower.

Q Sure.

Q You might have the same variety that will tend more toward a paler look, and another grower might produce—given the season, you might have a variety that will come out more red in a particular weather pattern, or yellow.

These are just whole mass of color. It was just a symbolic representation of the commodity. You know, nectarines are kind of darker and redder than peaches, so that's why the peach color bars are just, you know, are more peach like. But there again, they just go, you know, medium, dark, light, medium, dark, light, and the same in nectarines. It's medium, light, dark, first. For what reason, I don't know.

It was an appealing balance, you might say. We tried to balance the tones out.

Q When you picked the medium, light, dark for the [2287] nectarine grouping, did you try to match varieties with medium, light, dark that in your mind fit?

A No. We didn't have a specific design in mind for matching colors to varieties. we just went one, two, three, one, two, three.

Q Medium, light, dark, medium, light, dark, irrespective of what variety name was listed?

A Right, because we just didn't feel like we could. I guess we weren't up to it, you know, putting down the specific bars. They aren't as clear in their applicability as these green colors, say, for instance, are clearly applicable to a Kelsey.

Q Okay. But see, I'm looking at a plum. I'm sorry. Strike that.

A A peach.

Q I'm looking at a peach, and it looks, unless my eyes are different than yours, it looks like I'm going the first bar for Elegant Lady is medium, and then Sparkle is dark and then O'Henry is light, and then it looks like California Red is medium and Fair Time is dark and Autumn Gem is light and Carnival is medium. Is that a fair representation of what you're intending there?

A We didn't intend for those mediums, darks and lights to be symbolic of the medium color, dark color or light color of any given variety. We just laid them out [2288] one, two, three in order so that we get a splash representation of the various colors that are representative of the commodity, not of any specific variety.

We only did that in plums where we felt that there was more of a clear relationship between a specific color and a specific variety.

Q Okay. I draw your attention to the nectarine section. Is the same true there? With Flavor Top it shows a medium, and then Summer Grand a light and Fantasia a dark, Royal Giant a medium and Flamekist a light and Red Jim a dark, and Fairlane a medium. Again, you weren't trying to match a medium, light or dark to a variety name. It's just the luck of the draw as to what name came to what color; is that what you're saying?

A That's all. We started with a bar below the commodity bar that was different from the commodity bar color, and we just went from there and tried to make it look like a balanced, total impression.

Q Okay. Now, you're saying this one is what you called your mid to late season free standing insert. So 256 is the mid to late season free standing insert. I'd like to mark another one which I understand is your early season free standing insert. Your Honor—

JUDGE BAKER: 298.

BY MR. CAMPAGNE:

[2289]

Q The next in order, Mr. Parker, is Exhibit 298, and I'll represent to you that this is out of that box I was referring to you that Mr. Cooper produced for me of a representative sample of all the various advertising that's gone on for the last few years.

Let's look at Exhibit 298. Is this, in fact, the early season for 1989 insert you were referring to? That is the one that came out before Exhibit 256?

(The document referred to was marked as Exhibit 298 for identification.)

A Yes. It says at the top early mid season varieties, and it says May, June, July.

Q Okay.

A Whereas this other says mid late season, and it's July through October.

Q Now, what I'd like to do is have you—I want to ask you some questions about comparing the two documents, and that is I'd like you to compare Exhibit 298, the early to mid season one, the first one that went out, and I'd like you to compare it against Exhibit 256, which is the mid to late season one that came out.

Now, the first thing I wanted to point out to you and ask you for some explanation is that I'm looking at the early to mid season exhibit, which is 298. It lists Flavor [2290] Tops. So does the mid to late season one, correct?

A Correct.

Q Flavor Top is on both.

A Uh-huh.

Q The early to mid season one, 298, lists Summer Grand, and Summer Grand is also listed on the mid to late season one. It's on both, 256 and 298, correct?

A That's correct.

Q And Fantasia is on both, isn't that correct?

A True.

Q So we've got Flavor Top on both, Summer Grand on both, Fantasia on both. Do you see any others that are listed on both in the nectarine categories?

A No. I don't yet.

Q Now, looking at the color bars on the nectarines on the early to mid season one, that is Exhibit 298, they seem to me to follow a different pattern. In other words, the color bars there seem to me to try to be matched to the color groupings of the actual fruits.

A It was a spectacular coincidence if they did, because they go in order, one, two, three, one, two, three. There are nine of them under the nectarines, and they just go through three different—there are three different shades of red, if you will. I don't know if you'd call that red exactly.

[2291]

Q Okay. What would you refer to the shade for Maybelle as being on Exhibit 298?

A I don't really have a word for it. Let's say magenta, how's that?

Q Now the word for the color, but I mean you using the phrase here medium, light and dark when we were referring to 256. For 298, I guess you're saying they fall into medium, light and dark also?

A Either medium, light, dark, or light, medium, dark.

Q So it's got—as I understand it, 298 has got—Exhibit 298, the early to mid season chart has got four groupings of color?

A No. That's not what I said, I don't believe.

Q Okay. Repeat it then correctly.

A It's the same sequential—and I might add arbitrary sequence of one red shade, two red shade, three red shade, and then we go back to one, two and three, and one, two and three again. So out of nine varieties—

Q So it goes light, medium, dark, light, medium, dark of the nine varieties shown?

A Right, if indeed this is light and this is medium. I'm not sure, you know, looking at these shades of red. The first one might be medium and the second one might be dark.

Q And the third one dark?
[2292]

A The third one is definitely dark to my eye. But in essence, it's just a mix of colors that is symbolic and representative of the commodity, not of the specific varieties. If it were, then we would have gone to the same dark or the same medium on the cross over varieties.

Since we have an early mid chart and a mid late chart, in that mid area there are some repeaters. If we had intended to specifically represent individual varieties with a dark or a light, then we would have maintained the—you know, that light bar or that dark bar for the varieties that cross over, but I don't think that is the case.

Q If it were, it would be a coincidence, because that wasn't the intent?

A That wasn't the intent.

Q I see. Except with respect to plums?

A To plums, and I might add Bartlett pears. With Bartlett pears we had a yellow and a red, so that was pretty—you know, just for the sake of breaking up the monotony, if you will. We finished up with red Bartletts, which are really quite a minority, but in Bartletts you don't have too many varieties to represent, so we tried to give them a hit there at the end of that late chart.

Q Now, I can't remember the number. Did you say it had to be in the top producing number of variety of nectarines to get listed on Exhibit 256? In other words, [2293] one, two, three, four, five, six, seven. There's seven varieties of nectarines listed on 256, and there's one, two, three, four, five, six, seven, eight, nine varieties of nectarines listed on Exhibit 298. On 298 are those the nine highest producing volumes, and on Exhibit 256 those are the seven largest producing varieties for those times of years?

A I wouldn't say yes in the way that you asked the question.

Q How did you select what varieties to list on Exhibit 256 for nectarines and what varieties to list on Exhibit 298 for nectarines?

A We basically looked at a listing of the top 15, give them the numbers that we had available to us at the time, and, you know, as I say it was a mixture of volume and common sense. If Kelsey had been out of the running on the top 15 we probably would have

included it anyway, just because that color mix is an important thing to promote in the plum deal. It was basically volume.

Q Is it fair to note that there are green plums for sale?

A That there is a great variety of distinct colors within the plum commodity.

Q Okay. Is it pretty fair to say that there's a bit of arbitrariness or guess work, or just a glycan, so to speak, as to what varieties are chosen then?

[2294]

A Well, as I said, we start with volume considerations. I don't know if you've compared these to a list of top 15 varieties.

Q That's what I'm asking. Is that what governed you, pure volume?

A That was our basic consideration when we started putting these together.

Q Now, is it fair to say that in looking through the box of all the promotional brochures and fliers and advertisements in trade journals and magazines and that type of thing and these insert type things and brochures, I'm given a strong impression that the larger varieties are almost exclusively what's promoted. Is that a fair understanding?

A Well, I suppose that's where one would start, since when you want to be specific about varieties. We have a lot of varieties that's non-variety specific where we just talk about plums or nectarines or late season nectarines or whatever. We're not always variety specific but, you know, if you look at the top 15 varieties, you have an overwhelming percentage of

the volume included there, so we're serving as many people as possible, as many growers as possible.

Q It looks to me that most of the advertising dollars were going toward the top 15 varieties of peaches, [2295] plums and nectarines. Is that a pretty fair statement? I'm not talking about California Fruit.

A The dollars are going toward all varieties. As in the case of say these bar charts on these two season calendars, part of the motive here in presenting these varieties is just to show that there's a progression. We have complete coverage.

When we start in the early season, we start in mid May with significant volume, with enough volume to make for a continual supply, and we can go clear into the middle of October and even beyond. Well, in the case of Bartletts, but at least into mid October. So we're trying to show not so much specific variety as much as the continuity that we - the California Summer Fruit Industry can supply the retailers needs for the entire glorious summer season.

Q Okay. But, for example, I used to raise Red June nectarines and May Grand nectarines. And in 298 you don't mention Red Junes. You only mention May Grand. What happened to the Red Junes?

A How many Red Junes were produced at the time we put out these charts?

Q I don't know. I'd have to look it up in your brochures. But they come out at the same time as May Grands. There's an overlap. You're saying that would have been a volume determination?

[2296]

A In placing varieties on this chart, yes. But if a retailer merely knows that nectarines are available at this time, when he talks to a sales desk he's going to find out probably from the same person that handles May Grands that Red Junes are available too, so the stimulation is there.

Q But won't you admit I that if he's got a chart on his bulletin board sitting right in front of his face while he's making a phone call that's got the name May Grand on it, he's more likely to order May Grand than he is to order Red Junes if he's not familiar with the name Red June.

MR. COOPER: Objection, Your Honor. I think Mr. Campagne's mischaracterizing the chart there as to when May Grands and Red Jims come into production. I think they're showing different time periods on those charts.

MR. CAMPAGNE: Red Jim is not shown at all.

MR. COOPER: On the second chart it is for a certain time period.

MR. CAMPAGNE: No. Red Jim is shown, not Red June.

MR. COOPER: Did you say Red Jim?

MR. CAMPAGNE: Red June, J-u-n-e.

MR. COOPER: Oh, I'm sorry. Excuse me. I misunderstood what you said.

BY MR. CAMPAGNE:

Q Do you remember the question?

* * * * *

[2361]

explanation, Mr. Campagne. In view of that, Mr. Cooper, I think your objection has been met.

BY MR. CAMPAGNE:

Q I'm not holding you to the exact figures, but can you kind of draw the pie chart for us?

A Sure. Mr. Cooper saved me the trouble. I was going to refer to that too, because I recall Mr. Peterson describing each of the general line items on that budget. But just in the most basic terms, you could say that about half of last year's budget, that is the 1989 budget.

Q So about half of the approximate five million budget you're saying?

A Yes.

Q So 2.5?

A Was spent on media advertising. About 25 percent, or half of the remaining amount was spent—

Q One-fourth, in other words?

A About one-fourth of the total was spent on merchandising activities, and the remainder was spent on all other activities, including consumer education, publicity, food service and assorted other activities.

Q And when you say half went to media advertising of the five million bucks, that's T.V. and radio, correct?

A Correct. T.V. and radio and production, or there's another term for paying talent costs. That's

[2362] considered a separate cost from the direct buy of time.

Q It goes into the creation of the advertisement, in other words. Hiring the actor, making the film and playing the film on air is what you call media advertisement?

A Even in a year when no new ad is created you may have to pay residuals is the term I was searching for.

Q Yes. AFTRA union does require residuals. Okay. And regarding the fourth that goes for merchandising, what do you mean by the term merchandising? Is that your bailiwick where you're working directly with the retailers or the wholesalers?

A Yes.

Q And what falls into that broad word of merchandising?

A In general, we can start with an attempt to communicate directly with retailers, and then we can talk about an endeavor to work through retailers to communicate with consumers. So, a large area of activity there is hiring of the field staff. Many major commodity groups do the same thing. It's common practice to field a staff of representatives in territories that are districted by according to population or according to store representation. And of course, store representation just arises for population.

Q Now, when you send your field people out to the [2363] retailers, what kind of instruction do you give them? What are their duties?

A well, their duties are several. First of all, to—perhaps most important is to try to stimulate interest in building displays of California Summer Fruits and advertising California Summer Fruits more frequently and better.

Q Who owns those displays if and when they're built?

A All the displays are done within the produce department. So the retailers own the displays. We try to encourage them through building excitement and through offering incentives. We try to encourage them to do more than they already would. They're already going to display pretty well, because they see California Summer Fruits as their probably number one profit opportunity in the summer months.

Q You're just trying to get them to do more than they would do otherwise?

A Correct, or more than they would for, say, a display of Jersey or Georgia peaches.

Q And that's by giving them little incentives to if they sell so many California peaches as opposed to a Georgia peach, then they might win a radio or they might get a little gift on your promotion program?

A Well, not specifically in that way. That's not [2364] one of the ways in which we offer incentives, but we may offer incentives, for instance, if they produce—in the past if they had produced proof of advertising, then we would score the ads that they had presented to us according to a fixed system of incentive.

So, they would tend to advertise more, and by virtue of—if there's a feature ad in the newspaper, it follows

that there might be a feature display in the store at the same time.

Q Is it fair to say that that's—when Mr. Peterson was talking about the green stamp program where you give points to the retailer for putting in his ads, California Fruits are here in my store. Your goal in essence, I guess, is to try to get the retailer to push the California plums and peaches and nectarines more than the other states peaches, plums and nectarines, correct?

A That's correct, although we don't—we put it in a positive framework.

Q I don't understand.

A Well, in other words, we don't understand promote our product at the expense of some other product. We always talk about our product by itself.

Q So let's say if I owned a grocery store in New York, I could run two ads side by side that said dear ladies and gentlemen, I've got great California peaches for sale. [2365] Come in and buy them, and then right next to it I could have an ad that said I've got great Georgia peaches for sale, come in and buy them. And if I showed you proof of ad, I would still qualify for your no contest contest point system to win a trip somewhere, win a television or a radio or something like that?

A If the California ad were specifically designed California fresh whatever, fresh peaches, nectarines or plums, absolutely.

Q Even though side by side I was running a Georgia peach ad?

A That's a free market, and that's good competition. I mentioned retailers who would display both at the same time, and that's healthy. That's fine. We just would like to see them promote California. A retailer can't very well advertise California peaches if he doesn't have them on display. That's the separator. That's the fall out.

Q Okay. Is that primarily what your field representatives that you supervise do?

A well, that's one of the things. More fundamental even than that is to establish a relationship of trust for each field person to establish a relationship of trust so that the retailer looks to that representative as being a source of good, sound information about what's happening with the crop, what varieties are available in total, all [2366] 500 of them.

Q You mean like if I was a grocery store owner and I just wanted to know next week what the plums are going to look like from California, I would trust my field representative to be truthful, to say it's a good crop or it's kind of a poor crop, or it's tasty, it's not so tasty, that type of thing?

A Any general information. If the variety hasn't arrived, perhaps the field rep can't say how tasty it is. But we try to give them information even in advance of when they might see the fruit itself.

For instance, every Friday for the last couple of seasons we have informed the field representatives via a FAX transmittal each Friday. I said Friday already, but we give them a forecast for—a forecast to inform them of which varieties are going to be in the process of harvest and shipment the following week, and we also refresh their memories by giving them

varietal characteristics and any varietal idiosyncracies that might be attributable to this particular season, whether conditions, timing, harvest interruptions, so that they can be informed when they go to a retailer on the Wednesday of the following week. They can kind of—they can just about know on Wednesday of the following week after they receive that FAX what's happening on that day without having to call in to find out.

[2367]

Q Let me see if I'm understanding this correctly. So that approximately the Friday before Mr. Elliott picks his Tom Grand nectarines, there is a FAX sent out that Tom Grand nectarines are coming?

A In general terms, yes, that's true.

Q On all varieties, or just the major varieties?

A No. The FAX is a one pager, and it highlights the varieties that are of the most interest during that particular period.

Q And does that mean, by most interest you mean varieties that have a larger volume than other varieties?

A Sometimes it may be volume, other times—well, we start by looking at volume within that given period.

Q Well, you wouldn't include Tom Grand nectarines when Mr. Elliott is the only grower of Tom Grand nectarines of any size in the state, would you?

A We may include—now, as I recall, Tom Grand is an example of a yell-ower type variety, or a less red variety, shall we say?

Q Yes.

A We will at times make an effort to point out that these less red varieties are available. So I don't recall specifically if we included Tom Grand, but we may in one of those Friday transmittals.

Q You said that Friday transmittal also has kind of [2368] a general statement as to the characteristics of that fruit. Is that like taste or—

A Taste, color, size, all the characteristics of the fruit, whether it's a new—sometimes we'll put in a new variety. For instance, a Catalina plum hasn't achieved the status of being in the top 15 varieties, but I'm positive that we mentioned the Catalina either in '88 or '89 simply because it fills a gap of black plums. People seem to like black plums and it makes for a good color mix with the reds and the greens and so forth. So Catalina was specifically mentioned as bridging a gap between two other black skin varieties, and also having great flavor.

Q I see.

A So, these are just—

Q Who makes those decisions? For example, the decision to put the Catalina on the Friday FAX machine? Is that you or someone who works for you who makes those decisions?

The field staff in Reedley generates the information.

Q Mr. Van Sickle's office?

A Mr. Van Sickle's office. You know, I could have some input there too. In fact, if I were to eat a Catalina and say wow, this tastes great. Let's highlight this, or if there's some other thing that's unusual or noteworthy about [2369] it. What we're trying to do is provide a currency, a parlance for the field staffers so that when they walk in to a man's office, they can say yeah, I'm aware of what's happening today. This is it.

In the meantime, pre-season, we prepare the field staff by going over the entire pre-season estimate of varieties.

Q Volume and that type of thing?

A The pre-season estimates, yes.

Q By estimate, you mean estimate of volume or estimate of prices?

A No, estimate of volume.

Q I see.

A Far be it from us to estimate price.

Q Okay.

A We'd always try to estimate on the high side, I would think. But we don't get into that. just talk about how any packages are anticipated for the season.

Q Why do you care about that? To me it would seem like you would end up lowering prices by telling buyers that there's a big crop out there. Why is it in your bailiwick to tell buyers what the volume is of a particular variety? Why do you care to express that to a buyer?

A It's a point of information so that they know what's available to them.

[2370]

Q But why tell him whether it's a medium size crop or a big size crop? Why does he need to know that?

A Retailers may not even be willing to get involved in advertising a commodity unless they know that there's a sufficient and consistent continual supply so that they can do repeat business. It's important in retailer's minds to—it's important to retailers that they have a sufficient supply to feature the product.

Q Say like peaches. You can pick up a report and read that there's 14 million packages on the tree before the season starts. What does a retailer really care how many packages per variety are coming on? He knows he's going to have peaches all summer long, doesn't he? If he doesn't get them from California, he's going to get them from somewhere else. He knows that California has got 14 million hanging on the tree at the commencement of the season, so why is it important for your field people to tell him how many packages per variety?

A So that he can see the whole season supply laid out before him. If one variety a fickle bearer perhaps, or if one—there may be a gap in varieties. If there were a gap, and I'm not aware of this situation occurring necessarily, but let's suppose that we have a two week gap in our peach supply, we wouldn't want to lose the retailer's interest. We'd want to say we'll make you aware that this [2371] gap is here, but we'll

make every effort to maintain his interest when the production comes back in.

Now, that's a purely hypothetical situation. I don't know if it's occurred.

Q What was the name of the new plum you were telling us about just a second ago?

A Catalina.

Q Catalina. So when you announce like a new variety like that, you would then give an estimate of how many lugs of Catalina are going to be available the following week?

A When we FAX this information to the field staffers, we include the pre-season estimate in terms of millions of packages or thousand, I forget how we put it, and we also would show a—for the whole commodity, number of packages packed to date so they can see where we are in the progress of the harvest.

Q I see. Now, what if I'm producing the variety of, I don't know, let's say I have a variety of plums that competes with the Catalina. Do you think it's fair that you're not mentioning my variety of plums?

A Well, there are many varieties that wouldn't be mentioned in one of these weekly reports. We try to first address volume, as I talked about in relation to the early and mid late season variety charts, and stimulate interest. By stimulating interest, we're drawing attention to all of [2372] the varieties that are available.

Q But what do you say to the grower who says you drew more attention to the one variety than you did my variety. I wish you would have mentioned my new patented variety or my new—or my old variety of

plum rather than the Catalina. I mean, how do you deal with that problem?

A I'd have to talk to the grower. He may be marketing through someone who has Catalinas and the fellow who gets the call about the Catalina variety specifically will say you need some red plums to go along with that black one, if it's a red plum that he has.

If it's—if he's growing another black variety and it's a good, sound variety, other growers will notice and before long we'll see a growing trend, as we saw in the Catalina. The Catalina is on the rise.

Q More growers planting more trees of Catalina?

A Yes. More trees are being planted, the volume is going up, because the growers recognize it's a good variety.

Q But hypothetically, if I invented the Catalina and I just wanted to keep it for myself and not let my neighbors grow it, then you wouldn't mention it to anybody, would you?

A well, it depends. If there's something remarkable to tell the field staff about, that they might wish to talk to retailers about, they can talk about any other varieties that they wish. And we may tell them about a proprietary [237.3] variety, for instance, the Tom Grand. We may tell them that that's available.

That may be the biggest volume item during that period. As a rule, now some big grower may come along and prove something to the contrary, but it's unusual when a single individual has the wherewithal

in terms of harvest logistics and packing capacity to achieve the kind of volume with his own proprietary variety to, you know, rise into the major variety kind of category. There are a couple of exceptions.

Maybelle nectarines, for instance, which I think appear on—well, maybe they didn't.

Q Is that a proprietary variety of nectarines?

A Yeah.

Q Fowler Packing owns it? That's the Parnagian family?

A It is on this chart here. Maybelle nectarines.

Q Is that the Parnagian family?

A Yes, I believe so. Maybelle nectarine appears on this chart, but that variety, you know, it's immaterial to me who owns it or who packs it and ships it. But it so happened that an individual had the capacity in his facilities to achieve the volume with that variety that put it just barely, but put it on the list of the top 15 within that commodity.

[2374]

Q But why should someone's assessments—

MR. COOPER: Your Honor, before we go on, could we just indicate for the record what exhibit you are talking to there? You didn't say which exhibit.

THE WITNESS: Oh. It's Exhibit No. 298.

MR. COOPER: Thank you. I'm sorry, Tom.

BY MR. CAMPAGNE:

Q But you've never put minor varieties on exhibits such as that, have you? You've got to have significant volume?

A Yes. When we're representing the whole of the season we're looking for significant volume, correct.

Q So if I'm a grower and all I grow are varieties that are in small production rather than large production, in essence my advertising assessment is going to promote on those types of exhibits varieties other than what I'm growing, correct?

A Well, we've only been talking—we focused on our attentions on these kinds of charts, and we've been talking about specifics, but there are many other kinds of promotion that we don't that don't address varieties whatsoever.

Q Right. Like the things we marked there, the television ads that say eat California plums or eat California nectarines?

A Right. And as I mentioned in our communication to [2375] the retailers we do mention other varieties. But for choices, for instance, for these bar charts you have to have some consistent criteria. We start with volume and then use common sense to supplement it.

Q Who approves these bar chart exhibits that you've got in front of you, the early to mid and mid to late exhibits? Who signs off before they go to the printer? Is that you or Mr. Field or someone else?

A No. I signed off on these. We make it a staff—you know, I check with other people on staff

and try to get a reasonable—we try to develop a rationale from what we do, but I signed off on this.

Q Okay. I know that Mr. Cooper is preparing some exhibits that will get more to the penny and more to the actual week of how this money is spent, but can you take Her Honor through on the one half that's spent for media advertisement, the one-fourth of the five million is spent for merchandising, and the one-fourth that's spent for all other things, such as consumer education publicity, food service and assorted other items. Can you, for those three categorical areas, you know, the one-half—let's start with the one-half for media advertising.

Can you basically cash flow that for us through the months of how that money is spent?

A Well, I'd rather say that Mr. Field—I know that [2376] over the weekend Mr. Field prepared a chart like that as you requested, and I would be speculating at some point if I were to define a cash flow for you in the media side of things, because I don't look at those billings.

Q I see. You just have a general understanding that it more or less follows the crop?

A I have a general understanding that there is usually a significant pre-season commitment to buy media time or to pay for media time. You get to a point where you have to pay for time.

Q Even before the harvest?

A Even before the harvest, so there is some commitment there, but I am not—you know, I would be speculating if I were to define exactly how much

that was. That's been changing over the past few years also as our media.

Q They require their money up front earlier, I take it, as television time becomes more significant?

A I'm not certain that's the case, but I just know that there are some changes taking place in the way those buys were affected. Mr. Fields', chart may show you how that's happening.

MR. CAMPAGNE: Do you have those for us, Greg?

MR. COOPER: We don't have them for you today. We'll have them for you first thing tomorrow. Mr. Field

* * * * *

[2388]

A Well, there is a slice of the budget that is devoted to expert activities, merchandising activities primarily. For instance, in Pacific rim countries. I can't grab a number off the top of my head, but I'm sure it appears in those budgets.

Q You mean promote in Japan, eat California fruit?

A Japan has been a minor factor because of trade barriers and so forth, but Taiwan, Singapore, Hong Kong have been areas of export activity with some positive results in terms of level of shipment.

Q Do you personally believe that the import of Chilean fruit hurts or helps California fruit sales?

A I don't know if I have the wherewithal to make statement like that.

Q Just your personal belief?

A Since the seasons oppose each other and they don't overlap. If they were to overlap I might have a comment. But with no overlap, it neither hurts nor helps.

Q Okay. Now, Your Honor, might the witness be shown Exhibit 239?

JUDGE BAKER: Yes.

BY MR. CAMPAGNE:

Q I'll just show it to you here. Here I want to ask a couple of questions. You talked about these tours, you take retailers on tours in the production areas to help [2389] educate them. Here's one that occurred—was given to me as a sample by Mr. Cooper of a Lucky tour that occurred on June 1st and—I'm sorry.

A June 21st.

Q June 21st and June 22nd of 1989.

MR. COOPER: What number is that?

MR. CAMPAGNE: The exhibit number is Exhibit 239.

BY MR. CAMPAGNE:

Q Now, what I'm interested in knowing here—

MR. COOPER: I think for the record, you indicated this was given to you as a sample. This is the one you specifically requested.

BY MR. CAMPAGNE:

Q This was produced from Mr. Cooper pursuant to our request for production. It's kind of like a

general outline agenda, and then a more specific agenda.

Are these the type of tours that you're talking about where you try to get a chain to get more and more interest in California, so you give people a tour?

A This is the type of tour that I referred to, yes.

Q On this one, for example, who went on it? These are Lucky representatives or Lucky buyers?

A In this instance.

Q I take it Lucky is a grocery store of some sort?

A Yes. Lucky is a chain store with divisions in [2390] various parts of the country.

Q And so on this one, for example, who did you take on your tour?

A I took Mr. Ed Odron, who is the vice president in charge of produce for Lucky stores, and he is in charge of the northern division.

Q That would be a northern group of states?

A No. This is northern California.

Q Lucky is a California store, or is it in other states as well?

A It's associated with stores in other states. I couldn't say if it's strictly California or not.

Q It's kind of a small regional chain then?

A In terms of this tour. The people involved in this tour were California merchandisers.

Q Okay. So in other words, they would be buyers of fruit to be sold in California?

A Yes, in this instance.

Q Okay. And did this gentleman bring associates of his with him?

A He, as I recall, has—he supervises seven merchandising supervisors who in turn each have responsibility for 25 to 30 stores.

Q I see. So did he bring those seven gentlemen with him also then?

[2391]

A He brought six. One was unable to make it at the last minute.

Q So it would be he and six others, so there was approximately seven Lucky buyers?

A No, they're not buyers. The buyer was unable to come on this tour.

Q What are they if they don't buy plums and nectarines?

A Well, merchandisers aren't direct buyers of the fruit.

Q You've lost me. Can you explain that difference?

A Sure. The buyer, whose last name I'll probably mangle if I try to repeat it, but his first name is Roy. The buyer is the fellow who is based on their East Bay office who actually is on the phone buying the quantity of fruit that Lucky requires for a given period of time.

Q But in East Bay you mean the Oakland area of California?

A Yes. I think it's Danville.

Q Okay. It's a little east of Oakland?

A Yes.

Q Okay. He buys the fruit, and these people are supposed to sell it for him?

A They merchandise it.

Q Sell it, display it, sell it?

[2392]

A Move it.

Q Move it.

A Somehow move it.

Q He buys it and they move it for him?

A They move it, and they move it by—

Q And hopefully they talk to each other.

A They certainly talk to Mr. Odron, and I'm sure there's some intercommunication among them.

Q So these are the merchandisers, not the buyers you had on tour?

A That's correct.

Q Okay. Now, was there a strategy there as to why you chose to take merchandisers rather than buyers?

A Well, we're, as I said much earlier, our field of endeavor has to do with the merchandisers in the stores. Now, we may find we are talking to buyers from time to time, especially in a smaller chain, when the buyer is actually the fellow who sets the ads. But usually a merchandiser will set the ads.

Or you might have a separate fellow in charge of advertising.

Q I see.

A But our job is to, in general, I would say is to communicate with merchandisers, because they build the displays. They groom the appearance of the produce [2393] department, and they're actually, when you get down to the next level in the store, they're actually the people communicating in the store. There is the ultimate hit. That's what we're after.

Q So you took these merchandisers on this tour?

A Yes.

MR. CAMPAGNE: Can we go off for a second?

(A discussion was had off the record.)

JUDGE BAKER: We shall recess for one hour until 2:00 then.

(Whereupon, at 12:58 p.m., the hearing was recessed, to reconvene at 2:00 the same day, Monday, February 5, 1990.)

[2394] AFTERNOON SESSION

2:01 p.m.

JUDGE BAKER: On the record. Mr. Parker is still on the stand.

BY MR. CAMPAGNE:

Q Just a few quick questions, Mr. Parker. A few quick questions with respect to this exhibit that we were using as example, the tour Exhibit No. 239.

On this particular one, who made out the schedule as to what packing houses are visited? Would that be you, or would that have been Mr. Van Sickle?

A There was a joint effort. We passed information back and forth and developed it, shall we say?

Q Okay. So the tour of the Lucky people started off at Wawona. That's Mr. Al Peterson's company, correct?

A It's not his company, but he works there.

Q He works there. And then it went into LTD Packing and Orchard facility. That's a Reedley packing house, correct?

A LTD is an organization of ranch packers. Ranch packers deliver to a central cold storage. They're standard all over.

Q For a Reedley broker named Mr. Jost?

A Jost—

Q Mr. Don Jost?

[2395]

A Yes, and it's a Guimmara company.

Q And Guimmara sells the fruit for the LTD label people?

A I think that's how it's set up, yes.

Q Okay. And then the next one they went to is George Brothers. Mickey George is chairman of the nectarine committee I understand, is that true?

A Correct.

Q And the next one they went to is Mineral King. Do you know who owns Mineral King?

A I'm not sure if he's an owner, but the fellow in charge that I know is Jim Wanzer.

A Whose on the committee?

A He may be an alternate on the plum committee. I don't recall exactly.

Q Okay. And apparently there was a meal at the—there was an evening dinner and reception and whatnot at the hotel, and then he next day—

A I don't see a reception there, but we had dinner at the Holiday Inn, yeah.

Q Well, apparently there was a cocktail hour and then a dinner, and then just lodging at the hotel?

A Well, in conjunction with dinner there was a cocktail hour.

Q Okay.

[2396]

A We didn't exactly have a reception, but it was kind of a place a little more formal. It doesn't matter.

Q Okay. Then the next morning they went somewhere called the Kingsburg Apple Packers. What's that?

A Well, if I may, all of these stops that we made on the tour were at Mr. Odron's request, some more specifically than others.

For instance, he asked—do you want me to get into a general explanation of how we chose these spots here, or should I just talk about this one?

Q I was just trying to figure out who Kingsburg Apple Packers is. I just never heard of it before.

A Sure. It's a big concern that packs Asian pears, and Granny Smith and I believe some other varieties of apples. Fujis, for instance, Galas. I can't name their whole variety list. I know they're involved

with some Granny Smiths and several varieties of Asian pears.

Q And are these pears that are under the pear zone order or under the federal order?

A It just so happened, the front that they handled wasn't covered under any of the orders.

Q I see. And then the next one they went to was Ito Packing, and I take it he's on one of the commodity committees also. That's the Red Jim Mr. Ito that we've been talking about?

[2397]

A He might be involved in a couple of them.

Q Okay. And then the next one they went to is Royal Valley, and I take it that's the company that in the minutes Mr. Wyckoff was formerly associated with before his death?

A I happen to know that he was associated with them, yes. I don't know if he was ever on a committee.

Q Okay. And then the next one they went to was Ballantine Produce. That's Mr. Virgil Rasmussen's company, correct?

A Correct.

Q And then Metzler and Sons, is that a packing facility near the Modesto Airport where they left from?

A Well, it's on the way home, as a matter of fact.

Q Or on the way back?

A Right.

Q Okay.

MR. CAMPAGNE: No further questions,
Your Honor.

JUDGE BAKER: Very well. Thank you.
Mr. Cooper?

MR. COOPER: Yes.

MR. CAMPAGNE: Excuse me. I would just
move 239 into evidence Your Honor is all.

JUDGE BAKER: Is there any objection?

MR. COOPER: No, Your Honor.

JUDGE BAKER: 239 is hereby admitted
and received into evidence.

* * * * *

UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE

AMA No. 51
F & V 916-3
F & V 917-4

WILEMAN BROS & ELLIOTT, INC., A CALIFORNIA
CORPORATION, AND KASH, INC., A CALIFORNIA
CORPORATION, PETITIONER

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE,
RESPONDENT

[Excerpts from Testimony of Karen Tully]

Room 2002
Federal Building
1130 O Street
Fresno, California
Monday,
February 5, 1990

The parties met, pursuant to the notice of the
Judge, at 9:05 a.m.

Before: HON. DOROTHY BAKER
Administrative Law Judge

APPEARANCES:**For The Petitioner:**

THOMAS E. CAMPAGNE, ESQ.
 CLIFFORD C. KEMPER, ESQ.
 5108 E. Clinton Way, Suite 122
 Fresno, California 93727

Heritage Reporting Corporation
 (202) 628-4888

[2529]

A Exactly, Mr. Ito was sitting to my right at this meeting. We had a huge block table. It was a hollow square was the way it was set up, and there were probably—you've got the minutes here, so it shows everybody that was there. I would say 25 to 30 people were there. Mr. Ito was sitting to my right.

When he looked at the flight and saw that there was not going to be any media advertising during the time his Red Jims were coming off, got a little upset.

Q How did you know that? How did you know he got a little upset?

A He started yelling. He said—I honestly thought he was going to take his shoe off and bang it on the table, he was so upset. I was sitting right next to him, and he said that if they don't advertise, change the flight and advertise during the time his Red Jims are coming off, he refuses to pay his advertising assessments.

People tried to reason with him and explain to him that he as getting more bang for his money at the beginning, that it would carry through, and just because they were taking a week off during the time his nectarines were coming out didn't mean that people weren't going to remember the Red Jim nectarine, and he would not be pacified. He insisted he would not pay his—only the promotion assessment part of it. He didn't refuse to pay [2530] the inspection. Just the promotion part of it.

Q I see.

A And just for the Red Jims, not for any of his other varieties. I don't want it to sound like Mr. Gianini's letter, because Mr. Ito did not say everything.

Q I see.

A He just said promotion assessment for the Red Jims.

Q I see.

A They then had some discussion quickly with the ad agency and changed the flight to accommodate Mr. Ito's Red Jim so that there would be television advertising during the Red Jim harvest.

Q Okay. I'd like to change the subject just a little bit, Mrs. Tully, with respect to the Lucky tour?

A Okay.

Q Did you have any conversations with anybody, Wileman Brothers and Elliott and/or Kash, Inc., one of the companies to be visited?

A On June 16, 1989 I asked Dale Janzen, who worked hand in hand with Mr. Parker in setting up the tour and who they would visit, and I asked him why Wileman Brothers and Elliott and Kash, Inc. weren't on the tour since they were customers. And I said something to the effect of it doesn't seem quite fair to take them around to eight select packing [2531] houses when probably everybody in the valley sells to Lucky at one time or another, and this doesn't look too good.

Q Did you also bring out the fact that their packing houses are located very close to some of the packing houses that were shown?

A I don't know if I talked logistics or not, because that's common knowledge with us. We know where everyone was.

Q I see.

A But Dale got a little upset, and told me that he wouldn't take anybody to see Tokkie Elliott, because Tokkie Elliott doesn't like us, and he doesn't know what Tokkie would say to people, so he wouldn't take anybody to see him. That was the end of the conversation.

Q I'd like to change the subject again and show you Exhibit 238 with regarding the charter flight to Mr. Sanderson's funeral. I understand that you're familiar with this, because some of your handwriting is on these documents?

A Yes, it is.

Q Does this exhibit indicate to you who paid for the charter flight?

A Well, it's a copy of a California Tree Fruit agreement check. It's not the cancelled check. Their checks are carboned, NCR carbon.

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UNITED STATES DEPARTMENT OF
AGRICULTURE

Case No. F&V 916-3

AMA: F&V 917-4

IN THE MATTER OF: WILEMAN BROTHERS & ELLIOTT,
INC., A CALIFORNIA CORPORATION, AND KASH, INC.,
A CALIFORNIA CORPORATIONS, PETITIONER

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE,
RESPONDENT

[Excerpts from Testimony of Rodney Chang]

Room 2002
1130 "O" Street Federal Bldg.
Fresno, California
Wednesday,
February 7, 1990

The hearing in the above-entitled matter commenced, pursuant to notice, at 9:01 a.m.

Before: HON. DOROTHY BAKER
Administrative Law Judge

APPEARANCES:

On behalf of the Petitioners:

THOMAS E. CAMPAGNE, ESQ.
5108 E. Clinton Way, Suite 122
Fresno, California 93727

On behalf of the Respondent:

GREGORY COOPER, ESQ.
U.S. Department of Agriculture
Office of General Counsel
Washington, D.C.

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(202) 628-4888

[2912] and I have go [sic] two sets of stickers here that I would like to mark, Your Honor, as Exhibits 316 and 317. I am marking the little stickers Alshir Red Kash, Inc. stickers as 316. And I am marking the stickers for the Sweetheart Kash, Inc. situation as Exhibits 317.

(The documents referred to were marked for identification as Petitioner's Exhibits 316 and 317.)

MR. COOPER: Excuse me, Your Honor. What is 315?

JUDGE BAKER: The brown folder.

MR. CAMPAGNE: 315 is these brown folders which I have not started examining yet.

MR. COOPER: Oh, okay fine. And the little stickers are 6 or 7?

MR. CAMPAGNE: 316 is the Alshir Red Kash, Inc. sticker. And 317 is the Sweetheart Kash, Inc.

MR. COOPER: Okay.

BY MR. CAMPAGNE

Q I would like to show these to the Judge and yourself. Are those the stickers you are referring to, Mr. Chang?

A Yes it is.

JUDGE BAKER: Do you put those on the fruit?

THE WITNESS: Well actually we don't really put [2913] them on the fruit. What we do is—that's the reason we have them in these little packets and there are 36 and we put the packet in the box and they do it at the store level.

JUDGE BAKER: Oh, the store then puts these on?

THE WITNESS: Yes.

JUDGE BAKER: Okay.

BY MR. CAMPAGNE

Q So you do it a little different than Mr. Gerawan whose own plant puts it on, I think he said, every fourth piece or every third of [sic] fifth piece, whatever he testified?

A Yes. We can't af—we don't have enough budget money for the machinery. It would take an awful lot of people.

Q Okay. And so you have worked out some arrangement with your stores for your advertising promotion of the name Kash that deal with them on the pieces of fruit on the displays?

A Yes.

Q And that is 316 and 317 Exhibits that you are talking about? These little stickers?

A Yes.

Q Okay. Now, I am marking in another set of stickers as 318, Your Honor. Mr. Chang, I am showing you another group of stickers that I have marked

318, and they appear to be similar except they do not have a variety [2914] name with the label Kash. They just show Kash plus a little bowel [sic] of fruit.

(The document referred to was marked for identification as Petitioner's Exhibit 318.)

A Yes.

Q And I would like to show you those stickers and can you explain to me what they are and how they are different from 316 and 317, how is 318 different?

A Well originally we had these plain Kash ones made up because we've had a lot of requests from chain stores. If we had stickers or something for label identification of our fruit. And so we had these designed up for that specific purpose and so the people that request labels for our fruit then we will include it with them.

What we will do is rather than putting in the box at the time. We don't know ahead of time if they are going to order or when they are going to order so once we get the order we will include a stack of stickers with their order so that when the fruit is delivered the packet of stickers is delivered too.

Q And now as I understand the company's practice you will assist, sometimes, the chains in going ad to promote your Kash label. For example, in the Wileman-Kash-1 Trial, you put into evidence various newspaper ads where say a chain [2915] store such as Safeway or Kroger or such thing would say "Dear Customers, Come into my store and buy Kash, Inc. fruit."

A Yes we do.

Q And do you help them pay for those ads?

A Well, actually no we don't on that.

Q You do it a little different than Mr. Gerawan does then.

A We do it a little bit different. They kind of do this on their own accord. We will help them set up the ad and—

Q Do you give them a little price break on the fruit?

A Sometimes we will give them price break on the fruit. Like they will say "We want to come out with this kind of price." And we work it backwards.

Q Okay. Explain that. Mr. Gerawan talked about the 2 cent rebate program and that type of thing.

A Yes.

Q You do it a little different. You work it out right in the price of the fruit?

A Yes we do. Sometimes it's not even a discount. It is—they want to be able to come out with an ad—like let's say 79 cents a pound. And so they have certain markups and everything, and in and out costs, warehousing, [2916] transportation costs and so we kind of work it backwards as to what these costs are as to what we would end up having to sell it to them for to make this ad work.

And sometimes it's a—there are concessions made because they want to go on a red hot ad and we are figuring that the price is going to be at this level, you know, at a certain price and at this level you can't get this price on the ad. So then it ends up where they will take—we will kind of split the loss. Like there

might be a, you know, couple cent loss on their end and we will have to take a couple cents less a pound on our end.

Q To pay for this special ad?

A To pay for this special ad, yes.

Q And then the store, for example, will put the little Kash, Inc. stickers on the fruits and display Kash, Inc. banners in the store?

A Yes. Yes. And in other cases we have stores that want to go on ad, and they are going to do displays. And so they want our—we have a 35 pound, which is an eight inch high box, and so they like to use those boxes as front end panels on their display.

Unfortunately, what they want is the empty boxes rather than buying boxes with fruit in it, so— but in cases like that, you know, they will say "Can we have like 50 or 60 boxes." We will make them up and we will seal them [2917] empty and then, you know, hopefully with the order that they have, we will take the empty boxes and stick them on top of the fruit, whatever room there is between for the truck and the top of the food and stick it in there so that when it goes into the warehouse, then they can use them.

Q And those large boxes like that they have Kash emblems and Kash label on them?

A Yes. I don't know if you took any of those pictures that we had.

Q I thought I did, it appears that what I ended up with, however, is some pictures of your Kash-Chilean labeled boxes and some of your promotion activities in—with the Kash label in—Oh, maybe this is it.

Your Honor, I want to show the witness a picture. Is that what you are referring to? If so I will mark it.

A No, this isn't. This is another display that they had in Singapore. But what they would be, is if you had fruit on here, Your Honor, they would have these boxes stacked up, and then they would have the fruit going on top of the boxes so that it would look like just a mass display. And then you would just see the whole front end just being all Kash.

We had the director of merchandising in Kroger send us pictures of ads they did. It is not this one but it is just like if you had these boxes stacked up in front of [2918] this, and then you just had the fruit coming off the boxes.

MR. COOPER: That one is not in English is it?

THE WITNESS: No, this is an ad that was done in Singapore.

MR. COOPER: I was trying to read it.

BY MR. CAMPAGNE

Q I will mark that and—

A It's even better if you look at the prices.

Q I will mark that next in order which is 319. So if I understand what you are saying with respect say for Kroger going on ad, Kroger will call you up and say "Look, we want to go on ad in about three weeks." And then you will work a deal with them that if they push your label, you will help them out a little bit on the ad costs.

(The document referred to was marked for identification as Petitioner's Exhibit 319.)

A Well, basically on Kroger we—they never asked that.

Q Okay. There are other stores—

A What we did for like Kroger, and I think it was Albertsons, is that they ask for boxes.

Q With your name on it?

A Display boxes. So we provided display boxes at no charge.

[2919] Q Okay. And as I understand it they then built an area in their store where the fruit stands out as being Kash, Inc. fruit?

A Yes.

Q And it—the way I envision it from your testimony it that it got the fruit sitting there in their air conditioned areas and then they have got stacks and stacks of your boxes right there so it glares out as Kash, Inc. fruit.

A yeah. Basically, if this was a produce section and this was a wall and this is where you had your fruit, the Kash box would be stacked in front of this to the height of the table, then the fruit would be coming off of here, and go up to the top of the boxes for their display. So all you see is the fruit on—a cascade of fruit and then you just see the front end of the Kash box. And it will just say Kash across the whole table.

Q I see.

A Wherever the section is.

Q Okay. Now, with regard to this Singapore picture, I see that you are displaying the name Kash on the boxes and I take it that caricature means Kash?

A I am not Chinese and I'm still having trouble learning English. I really couldn't tell you what the Chinese characters say.

[2920]

Q You father-in-law told me that that is the caricature. Do you have any understanding with respect to that caricature? Or I'd have to ask him?

A You'd have to ask him.

Q You are Korean?

A Yes, but I was born here.

Q Okay. And I have another picture here that I would like to mark as 320. And is this a picture of your label from Chile?

A Yes. That's our—this is the label used out of Chile, South America.

(The document referred to was marked for identification as Petitioner's Exhibit 320.)

Q Will you show the Judge that? And again it's got the fruit bowl logo of yours?

A Yes it does.

Q The same little fruit bowl that—

A That is on the little stickers.

Q So on all these little stickers 317, 316 and 318. Why do you spend money promoting the name Kash that little logo of the fruit bowl with the red, white and blue design?

A Well, we are very proud of our company and we are very proud of the quality of the product we put out. And we feel that—Well, put it this way. If generic advertising [2921] did the job it was suppose [sic] to do, I shouldn't have to do what I am doing today.

But, I just don't see where it is really selling our product, and so this is something that we felt we had to do in order to stay competitive and stay viable in the market place.

There advertising part, the generic advertising is—

MR. COOPER: Your Honor, just for the record, and I do not want in [sic] interrupt Mr. Chang from telling his story, but we do want to pose an objection this type of testimony. He is going to the effectiveness in the marketing order and beyond the scope of what a 15a proceeding is suppose [sic] to be about under the decisions of the judicial officer. And I just thought the record should reflect that.

MR. CAMPAGNE: Same exceptions like you raised with Mr. Gerawan that type of objection?

MR. COOPER: I—It is [sic] been so long since Mr. Gerawan was here, I do not recall exactly what the objections were. But the objections are to the fact that the effectiveness in the marketing order is not at issue in a 15a proceeding, and therefore Mr. Chang testifying as to the effectiveness of generic advertising versus his type of advertising is something that should be outside the scope of the proceeding.

[2922] JUDGE BAKER: Do you want to respond to that? I believe you already have, Mr. Campagne.

MR. CAMPAGNE: Yes Your Honor. One of the First Amendment issues is of course—there is a

large number of subdivisions in the First Amendment issue, Your Honor. The first, of course, being whether or not the government has any real interest in caring whether or not Americans eat peaches, plums and nectarines as opposed to bananas and casabas.

The second issue being, with respect to the First Amendment in particular, the whole issue of association or non association—the right to—freedom to associate and/or not to associate. That is the right to refrain from helping your competitor in this state and other states, and other countries.

Also, the philosophical issues in that respect. Obviously this type of testimony gets into some of the issues that were discussed in the *Frame* decision, in the *Abood* decision and in many of the other decisions that we have talked about in our opening pretrial brief.

That is Mr. Chang's, Kash, Inc.'s problems with generic advertising and why they feel it does not work. And more importantly, if to any extent it works, it aids their competitors, it does not aid them. And it promulgates messages either expressly and/or implicitly that they [2923] believe lies to the public if it works to the detriment of their product.

JUDGE BAKER: Very well. Thank you. In view of the issues which have been made in this proceeding, as well as the additional challenge to the Secretary's promulgation of the Regulation with respect to whether he—There was a recent decision with respect to the publishing [sic] certain regulations, and the consideration of all the aspects of the order, the objection is overruled.

MS. BOUTROUS: Your Honor, I would just like to add for objection that 1) Effectiveness is not an issue in the First Amendment challenge, not in *Abood* or any of the First Amendment cases, not effectiveness, is not an issue.

Government interests, yes. Government interest is laid out by congress.

Nextly, as far as the other challenges go as to the promulgation of [sic] advertising program, that could only be—The only thing that can be considered there is the record that was before the Secretary at the time of his decision to promulgate the provision. Not by new evidence gathered at a 15a proceeding, so it would be irrelevant to that purpose also.

JUDGE BAKER: Very Well. Thank you Mrs. Boutrous. However the objections are overruled. And Mr. Chang, it is refreshing to have a witness who wants to come and tell the [2924] story of his company and how it operates.

THE WITNESS: Thank you.

JUDGE BAKER: Your welcome.

BY MR. CAMPAGNE

Q Just detracting for one second. There was one more exhibit that I would like to mark. You had mentioned that you prepared various posters, that type of thing and I have one document here that, I believe, is a sample of a poster which I have marked in as Exhibit 321. It says "Fall in love with a Sweet-heart plum." And below is [sic] says Kash, Inc. with the fruit bowl [sic] logo, red, white and blue. And then it shows a lot of plums with the little Kash, Inc. little stickers on it.

(The document referred to was marked for identification as Petitioner's Exhibit 321.)

A Yes.

Q Is this type of posters [sic] you are talking about having spent money on?

A Yes it is.

Q Why does it have this little perforation on the bottom of the poster?

A Well, the reason we have this is that a lot of times on a display you are going to have a box of fruit sitting down. And the perforations is so that it can sit in [2925] the back of the box as a little bulletin board background for the fruit.

Q So that if the store owner were to place your Kash, Inc. boxes on this table for example, he could then bend these little perforations and it would hook on to the back of the box and stick up nice and tall—

A Yes.

Q —so that the lady or man at the grocery store would note that's Kash Sweetheart plum.

A Yes.

Q You have a similar poster, I take it, with other commodities in Kash names?

A Yes, we do. Also there is a, you can probably see it better from the backside, there is a little thing so that you can hang it.

Q Oh, there is a little hole at the top of the poster.

A Yes.

Q So the grocery store man can mount it.

A Yes.

Q In the Kash area where the Kash fruit is.

A Yes. Or you can do banners with it, you know.

Q Put a string through it and hang it up?

A Yes.

Q I see. I had not noticed that before.

[2926] JUDGE BAKER: You could almost put it up for Valentines Day.

THE WITNESS: Yes, that was one of the suggestions about making this heart shaped.

JUDGE BAKER: Thank you.

BY MR. CAMPAGNE

Q Do you know approximately how much money a year Kash, Inc. is paying to CTFA in all the assessment [sic] in total?

A No, I really couldn't tell you. I know it is over \$100,000, I believe.

Q Okay. I have the records here, so maybe we can enter a stipulation later. So, you are spending over \$100,000 a year in CTFA assessments of which I will represent approximately five ninths of that goes to generic advertising and for generic promotion. If all that money is being spent on generic advertising and genetic promotion, why are you spending money promoting the Kash, Inc. label?

A For two reasons. One is so people know who we are. And the other reason of spending the money on the Kash, Inc. label is that when California does their promotions and prices the fruit as the last two seasons in probably around the third week in June the

price goes down to \$4 or \$5 and you have to beg people to take product. You start wearing out knee pads, you wonder how effective our advertising really is. And if we didn't have advertising, [2927] would the price go any lower, I mean would conditions get any worse?

It is almost like we hit rock bottom to start with, you know, and so at least by having the label recognition, you get the customer's kind of in gear to take your product.

Q You try to get ahead of the pack?

A Pardon?

Q In sort of speaking, you are saying that you are—you want to get ahead of the pack? You want to get above the rest of the people?

A Yes. It is kind of what you want to do, is you want to lock your customers into you.

Q Not into your competitors?

A Not into my competitors. They kind of get into calling you for product irregardless of every Tom, Dick and Harry banging on their door trying to supply them with product, you know, the same varieties, the same commodities, or other competitive commodities, that he becomes very comfortable with what you are giving him, and then he relies on you as his major supplier.

So that when situations get into a supply exceeds demand, he is still pulling from you for what he needs rather than going shopping to one of my competitors.

Q Do you believe your fruit is better than your [2928] competitor's fruit?

A If I didn't believe that I wouldn't be here. I think everybody—it's like nobody has ugly children. Everybody believes they have the best, you know, and I believe our fruit is as good or better than anybody else.

Q Well then, do you resent you [sic] advertising assessment moneys being spent to help your competitors sell fruit?

A Yes I do and I think it is unfair as a producer in several ways. One of the ways is that as a producer we are spending money for advertising. But one of the people in this chain [sic] probably reaps one of the biggest profits is the retailer. Because when we advertise generic "buy California" and the customer hears it and goes to the store to buy California, who makes the money from that? And who pays for that advertising for them to go into that person's store?

Q You are saying the grocery store makes the money but California producers are paying for his advertisement?

A Right. He is kind of getting a free ride off of our advertising.

Q Okay.

A And I don't think that is fair. You know, yes sell the product at a price, but out of that price I still have to—all my cost factors have to come out of it. You know, if I sold product for 20 cents a pound and that was my [2929] profit, that would be great, you know. But it doesn't quite work that way.

Q So the grocery store is getting a free ride on your advertising dollar?

A Right. And I also—

Q Now, do you resent—Please continue.

A And I also feel that a lot of times when we go into—how do you want to say—national network advertising for generic product—

Q By that you mean when CTFA spends money advertising in other states?

A Yes. That I think we are helping my competitors in other states.

Q Can you give me an example?

A Well, as a good example to make an analogy last spring when they had the Chilean recall because of the cyanide on two grapes that was found —

Q Two berries?

A Two berries.

Q So they recalled all Chilean grapes?

A They recalled all Chilean fruit.

Q Including tree fruit?

A Including peaches, plums, nectarines and grapes from Chile. Excuse me apples and pears from Chile.

Q Because some weirdo had put cyanide on two berries [2930] of grapes?

A Yes. But if you saw in the movie clips and the news, there were some chain stores that took all fresh fruit off their store shelves.

Q Even produced in California and other states?

A They didn't know where it was produced. I mean the apples, the oranges, I mean, everything was off. They didn't want to take a chance. Now,—

Q You mean you are telling me some grocery stores did not know easily where the fruit had come from?

A No, they didn't. And if the people in the chains don't know where that product's from since each box has to be identified with a statement of origin.

Q Was a statement of origin on the box label itself?

A Yes. On, how you want to call it, the main end or the label end of the box. There has to be a statement of origin. Now, on our fruit from Chile, it has from Santiago, Chile. The stuff from California has California.

And so the person that is putting that—the fruit or product whatever it may be on the shelf from the master container or the box that it was shipped in, if he doesn't know where it come from, how do you expect the consumer to know where it comes from?

And so unfortunately never having the opportunity to go to other states during our season to see what [2931] "Colorado peaches" look like, peaches from Illinois, Michigan, many times they don't come into Fresno, so you never get to see what our competitor's crops varieties look like. You never know exactly what they are putting, as far as when they display peaches, if they just have the peaches there or are they advertising California peaches? And if they do advertise California peaches are they really California peaches? But just like when I was talking about the retailer, I don't know, you know, when we do an ad on buy California peaches—

Q You mean when CTFA does a generic ad on "Buy California Peaches?"

A When CTFA does a generic ad on "Buy California Peaches" in Illinois, and the person hears that jingle and goes to the store, you don't know exactly what that chain is promoting.

I mean, because the generic ads are not in conjunction with the chain store ads. And so if they are promoting Illinois peaches more than likely that is going to have high visibility. In other words, when you walk into the produce section, the first thing you are going to see is Illinois peaches, and unless it says Illinois peaches and you've got peaches on your mind, you're going to buy the first peach you see, especially if it looks good and appealing. And they may not be California.

[2932] But we are paying for that ad, you are hearing that ad, the idea of wanting to buy peaches would be created from *[sic]* this generic ad, but are they really buying California peaches? Who knows?

Looking at some of the Market News Surveys, I think they are not.

Q Okay. I would like to show you a Market News Survey that was painlessly put into evidence, and that is Exhibit 299, which looks like it is September of '89. First of all, I take it you get a Market News Survey at your company?

A Yes we do. We subscribe to it.

Q It comes to you, I take it, everyday?

A It is suppose *[sic]* to come everyday, however, sometimes you—Let me put it this way, they are in separate envelopes. Sometimes you will get three envelopes in one day.

Q So much for the U.S. Postal Service. Okay. And now what are these things?

A Well, basically what this does is it gives us an idea of what our products and competitive products are sell *[sic]* in different market areas in the major cities in the United States. We also we get these Market News Reports like out of New York, terminal market from various other terminal markets because this is the one that is produced by

* * * * *

[2941] Q Commission?

A Yeah, or a flat rate per package. And that won't be reflected in here because you might end up selling three loads to Your Honor through me, that is never going to reflect into this, because it never went to the terminal market.

Q Because the title went from me directly to Her Honor, in that example. Whereas, if I shipped to you, the owner of the New York terminal, then you took title and you sent me paycheck or a check for that purchase, and you got title, you got the bill of lading to that load, now it is your fruit. You own it.

A And then I report it.

Q And then you report it on this document down at Exhibit 299. You took direct title.

A Yes.

Q And you report it when you resell it, so these are the resell prices?

A Yes.

JUDGE BAKER: To the extent there are these private contracts and what influence, if any, would generic advertising have?

THE WITNESS: On the private contacts [sic]?

JUDGE BAKER: Yes.

THE WITNESS: They won't have any. In other [2942] words, if a chain store, major chain store is not going to stick its neck out and advertise nectarines when he doesn't know if he is going to be able to get the supply for one; and what kind of price is he going to get to supply. And so usually the two things that he looks for before he puts out an ad, and not end up with egg on his face and sued by his customers when the ad breaks and he has no nectarines, is that he wants a guarantee of supply from his customers, and usually he wants some kind of a "price lid."

BY MR. CAMPAGNE

Q Price what?

A A price lid. In other words, you are looking into your crystal ball of what is going to happen to the market three weeks down the road. I mean, it can go up it can come down. He's got to send an ad in the paper. And so what he wants to do is he's got a range and he can set that ad. And usually he has that range until about the week before the ad breaks. In other words the only times the fruit section where you have all the advertisements is on Thursday. So tomorrow would be the last day to change an ad to [sic] that comes out next Thursday. Friday it's too late.

Q So you make sure you have a lot of pull. So somehow you get your ad in seven days before it runs in the newspaper?

A Minor changes. As far as the layout and [2943] everything, it's three weeks ahead.

Q Oh, so for how much space you want, you order that three weeks in advance, but minor language changes have got to be submitted in [sic] final seven days before the newspaper runs?

A Yes. So anyway, he has a range that he can play with but still you are talking about seven days out. You still don't know what is going to happen to that price. What he needs is a protection that if he is going to go out at 79 cents a pound, and basically—I don't have a calculator so I am a little bit slower. But it is at 25 pounds—what is that? About \$12, \$10?

You are probably looking at a \$12 FOB in order for him to go out at the 79 cents, roughly.

Q FOB point of shipment?

A Point of shipment. And let's just say that in the interim the market just goes crazy, and the market goes up to \$16 or \$18 for the same product, he's committed. Now it says 79 cents a pound irregardless of what that product costs him. He can lose a small fortune. So usually he wants some kind of protection that if —

Q That's why you call us up?

A Yes. That at a certain point we won't charge him anymore than that, you know, so he might say give me a \$14 lid or something like that. So, if it goes above \$14 the [2944] maximum we will charge him is \$14.

Q And that is what you call a private contract arrangement?

A Yes.

Q And is that what you are referring [*sic*] that you told the Judge that generic advertising does not affect that at all?

A Those aren't going to affect it because, unless he has a couple of these criteria that [*sic*] just talked about, he is not going to stick his neck out a lot of times. Because, why should he take that chance and end up with mud in his face?

You know, being in—if you are in New York, Chicago or whatever, you never know what is going to happen, the weather conditions, what's happening to the crop, you know, because you might be advertising large size nectarines, and we have a draught and all the nectarines that have been harvesting are coming off small. Now, where does he find large size nectarines and especially if he's got 300 stores that he's got to supply?

It's things like this, you know, if there's a chain store in Denver, I don't know exactly how many stores they have now, but I mean on an ad just this one chain store, they are not a Safeway, they will pull 40-50 truck loads of product in a week.

[2945] Q They will do that by private contact. They are not going to buy from the terminal markets.

A They will do it by private contact with three or four packing houses.

Q They will call Kash, or Gerawan.

A What they will do is like they may take five or six loads from me, maybe from Gerawan 10-15 load, and part of the thing that the [*sic*] do is they are looking at protecting themselves. Because if they

just go to one supplier, and let's say the price goes up and the supplier is having problems, I mean he is legitimately having quality problems, pack out the bags, getting a lot of colorage, and he tells the guy, I can only give you half of what you need. You know, he ends up with all his eggs in one basket and where does he go to, to get the supply?

Q Well, let's say—

A And so that is why he'll, a lot of time to spread out his risks, will go with several people.

Q Now, what makes that large private contract buyer seeking the lid to go on [*sic*] ad, what makes him call say Kash and Gerawan as opposed to your competitors?

A Well, a lot of times it's not so much that he calls us, we call him. And we tell him—because we are looking at what our situation is. And we see based on historical records and during the season how the fruit [2946] sizing is, we know we are going to have a lot of volume in four weeks, and that you are not going to move it all selling on a day to day.

So you will go out to maybe a couple of people, and you will promote yourself. And say, you know, we are going to have good supplies of you know, large size nectarines or whatever it may be. And you know, and we will tell them the variety of whatever and basically what we do is we get them interested in promoting our ads.

Q How do you get them interested in Kash rather than one of your competitors?

A How we get them interested in Kash is basically, these are customers that we have been dealing

with on a long term basis. And so it is not really having to promote Kash, it is having the promote our fruit. Basically, it is having them promote fruit and hoping that with the rapport that he will promote our fruit.

Q Okay. And have trust in the quality of your fruit and the consistency of your fruit and that sort of thing?

A Yes.

Q Now, changing the subject from these large lid private contract buyers who do not go through a terminal market, but then again, in other words, getting the subject to the terminal market, say the New York terminal market buyer?

[2954] Q In California?

A In California, and it seems like it's really helping my competitors in other states.

Q Okay.

A And the biggest problem is my competitor in other states aren't contributing to the promotion that I'm having to—that I am forced to pay.

Q Okay. And I take it you are testifying in response to Her Honor's question with regard to these large private contract "lid" buyers. You do not think generic advertising affects them at all, they are looking for calling Kash directly.

A Yes. The main problem on generic advertising is that the advertising many times is done way before the product is going to be there. In other words, if the time I heard California Tree Fruit advertised, I went out to look for peaches, it would be highly doubtful you will find any California peaches on the market

place. You might find some Chilean peaches. But it is just the way generic advertising is set up. It has got to be set up in advance.

And it doesn't necessarily coincide with when you [sic] peaks are. And when I have peak volume it doesn't necessarily mean Mr. Elliott or Mr. Gerawan is going to be a peak volume the same time I am. You know, we have the same varieties and the same proportional amount of acreage [2955] of that variety, then yes it may hold true. But you know, being basically like Mr. Gerawan said, a free enterprise, he plants what he feels is good varieties, and I plant what I feel is good varieties to fit my program and so you are going to get different times where you are going to have an abundant amount of fruit.

And when it peaks where California may be different then [sic] when it peaks for ourselves. A lot of people—

Q You mean for Kash?

A For Kash, Inc. A lot of people have always traditionally kind of stereotyped the Fourth of July as always being a bad time to have product because the market always seems to go in the dumps. And a lot of growers have pulled fruit out that normally comes off before the Fourth of July. And that goes through the first 10 days of July.

The last three years that has been one of our better market places as far as price per pound has been right after the Fourth of July. And so consequently, I mean, there are going to be farmers that are not going to have anything in production whereas the State of California may still have, you know, accord-

ing to their estimates and where it has actually happen [sic], fairly large production in California.

And so it doesn't fit everybody's needs, the [2956] generic advertising. It tries to tailor it to everybody as much as it can, but then it lumps everybody into one category of being the same.

Q Does that hurt you as Kash, Inc.?

A And it hurts me as Kash, Inc. because—and for the same reason that Mr. Gerawan testified, that his fruit is the best. I feel my fruit is the best.

Q You do not want to be the same.

A You don't want to be lumped the same, and I mean impact [sic] do you have on a buyer when you go him and say "Well, my fruit is pretty good."

Q It is the same as everybody else.

A It is the same as everybody else. And I mean it goes over real good and you have a very short visit with that customer.

Q But my color is just about the same as everybody else [sic] color.

A Exactly.

Q That same customer is not going to buy.

A And so, you know, it—the generic advertising does a couple of things. One, philosophically for me it perpetuates a lie in the fact that it does put everybody in same [sic]. And everybody is not the same. Every variety—it puts all peaches being the same, all nectarines being the same, and I think in earlier testimony it was brought up [2957] that there was a peach that was beautiful, that was totally uneatable. And I know some plums that were developed that were

beautiful but totally uneatable and they have never been named.

Q Let us say I grow Flamekist nectarines, and you grow Flamekist nectarines. Are they the same?

A Well, that's the other part. No it is not. And—

Q And you think that is a lie too?

A Part of what the generic promotion does do is not only is everything the same, but "red tastes better." And red doesn't taste better. It's only—it's like "beauty is only skin deep."

One of the things that we've done on our new variety is as far as like the Sweetheart, we've only done—we've only had small production of the Sweethearts. We were suppose [sic] to have fairly good production last year but we got hit by two hails. And so we did an ad on Sweethearts in Cincinnati two years ago.

Q Using the Kash, Inc. label. It was not generic I take it.

A Using Kash, Inc. label, and what we did is we took—I think we had a total of like eight boxes. It was the first year of production, I mean we weren't going out like gang busters. And we took the culls and we gave the [sic] to the chain store, and had them take the culls and slice them [2958] up. And it was a regional chain that do [sic] a lot of this kind of thing. I was very impressed with it.

And what they do, is they will take [sic] plate with little pieces of fruit cut up and they will have tooth picks in it and they will go through the store and they will tell, you know, we have it on special in the produce section. And it went over like gang busters. When I first saw this when I visited the chain about

three years ago, and it was on a marketing trip and it was the latter part of April like this pineapples [sic]. And they had this tray and you [sic] around and you taste it.

And one of the other things they did is they had this corp. They took the pineapple and they cut [sic] the top off, and they have this machine that is like a plunger and it just cuts just on the inside of the skin and it cuts the center out. The [sic] leave it all back together and they put it on a little styrofoam tray and they shrink wrap it. And they were selling these things like for \$2.99 a piece.

You know, the gal that has these samples, she doesn't tell you what the price is, but she does tell you, you know, that we have it on special. They are promoting this in the produce section, you know. And you eat it and the pineapple taste like candy. And you know, you take it home and you just take it out, and you just cut and all you have to do is slice it up and it is ready to eat.

[2959]I was talking to the buyer about it, the produce buyer. He was taking us around so we could see one of his newer stores when they were doing this. And he said that in 10 days they sold like 40 container loads of these pineapples.

Q What does a container [sic]? About 1,000 boxes?

A A contain of—fully filled container, I don't know exactly what it holds in pineapples but it should hold about roughly 40,000 pounds per container.

Q In one store?

A They had 26 stores. It just kind of blew my mind that you can move that many. One of the things that makes it very attractive is that I never knew how to

pick a ripe pineapple. The way you see it whole, you know, you cut it well should I or shouldn't I. Most of the time I don't. But when you can taste it like that it is really an added incentive. Hey this tastes great, you know, I want to buy some.

And to me that is the best promotion there is, is that you try it, you like it, you buy it. And it's like that in anything, I mean you buy peaches, nectarines, plums whatever, you take it home, you eat it, it's good, you are going to go back and buy more. And that is the repeat business that we want, that's what is going to move product.

Q And that is why you are spending money promoting [2960] Kash's label and trying to direct consumer—solicit that way?

A Yes.

Q Do you think that is effective for Kash without affecting or helping your competitors I take it?

A Yes, exactly.

Q You do not want to help your competitors ?

A I don't want to help my competitors. I don't want to help Ray Gerawan. You're the one that wanted me to testify at this hearing, you know, more power to him. But it's like you said, it's everyone for himself.

Q Okay.

A But the one thing that—because we are promoting kind of like a sameness, of everything being the same—

Q You mean CTFA is promoting that?

A CTFA and the their generic promotion, I mean they are promoting "red tastes better"—

Q You think that is a lie?

A These are things we don't believe in. We feel it's a lie. And philosophically, I mean, we really don't believe in lying. And by having to like a "forced taxation" and paying the assessment, actually we are promulgating the lie.

Q You are being forced to participate in the lies or the innuendos that are not correct.

[2961] A That's right.

Q From the generic advertising program.

A From the generic advertising program, correct.

Q And I guess you are saying that all plums do not taste the same, all California plums do not taste the same. Different varieties taste different, and the same variety grown by different growers taste different.

A This is the problem the generic advertising is [sic] that this is what you are promoting. All nectarines taste the same, or all plums taste the same. So this becomes kind of stereo typed and ingrained into the consumer and you buy a plum or a nectarine and you don't like it. If you have the "mentality" of well "all nectarines are the same" and you taste a nectarine and you don't like it, you are doing to feel that all nectarines taste crummy like that. So why every [sic] buy anymore. I'm sure everybody's had something that they didn't like, be it an orange, or an apple, or whatever. And I mean, if you have that kind of mentality you would never buy anymore of that commodity.

Where would that put this industry or any produce industry? Get your own industry.

Q Would you agree with Mr. Gerawan's testimony to the effect that—something to the effect that if you are growing a Red Beaut plum and I am growing a Red Beaut plum, and we are on two separate farms a few miles apart, my Red [2962] Beaut plums might have different amount of soluble solids than your Red Beaut plums and therefore taste different?

A That's true. And it's also in color. I mean we have blocks that sometimes the product is almost like day and night.

Q I do not understand.

A It depends on soil condition. When you have sandy soil the trees are weaker so they don't develop. They are not as healthy as in other places where you have richer soil, where you have a lot of vegetated growth. And so on weaker trees you have a tendency to have smaller sizes. If you don't have smaller sizes then you have less of a crop, so that you can get the bigger size, but also you will have lesser foliage and higher color. When you get into—

Q Does that mean it will taste better because you have higher color?

A Not so much it will taste better but that's what's implied. That's what's implied by the California advertising. When you get into richer soil and you get a lot more vegetated growth—

Q More leaves?

A More leaves you are going to get less color on the fruit. Not so much that where color I am referring to, the red blush, usually you can load a heavier

crop on a tree, and still get the desirable size that you wanted.

[2963] Q Mr. Chang, I would like to place in front of you Exhibit 301 which is a booklet which says "989 Advertising Promotion Guide." This is the one that shows the four television ads marked at 301a, which is page 8; 301b which is page 9; 301c which is page 10; and 301d which is page 11. And I would like to ask you if you have any other philosophical differences with respect to the CTFA generic advertising program?

A I don't know if you would actually call it philosophical more than morally.

Q There's a moral difference you mean?

A There is [sic] are some things in this that I don't personally agree with. Being a father of young children some of these ads, I guess it depends on how you look at them, but I see it with—how do you want to say it—subliminal sexual connotations. And the rule of the way it has been with all the weird people and the things that have been in the news for the last couple years, it seems like it is getting worse and worse.

It kind of bothers me, in fact, and a lot of it is just the connotations of them. When you use a thing like you have a picture like this and the fruit is there but it's—three quarters of it is—

Q Mr. Chang, when you say a picture like this you have to tell which page.

[2964] A 301a.

Q Which is page?

A Page 8.

Q And which picture are you referring to? I guess it would be for the record Your Honor—

A In the middle, third down.

Q It is a picture, I will state for the record, it shows two children, and then underneath it says taste them and see so cool and juicy. And then let us look at 301b for example. Are you referring to 301b on page 9 as well?

A Yes, you know, you have so cool and juicy.

Q We have to point out what you are referring to.

A It will be in the middle, second picture from the top.

Q And here you have a young girl in a bathing suit, getting wet in a sprinkler and again no fruit, and just saying so cool and juicy, cool, calm and juicy?

A Yes.

Q And then the picture below it. What does it say?

A Taste them and see.

Q And it has a young girl.

A One of the things is that I know advertising does a lot of subliminal stuff and they use a lot of sex in advertising but one of the advertisements that I can remember that impacted me, that stayed with me was one of [2965] the Pepsi ads. With this guy laying in the sun, he was on the beach, and you know, it gives the impression of being hot. There is no music, it is just totally quiet. And he takes this can of Pepsi, and he pops it, and you hear the fizz, and then you can hear him gulping it.

Now, you know, to me that was an impressive ad. Because one, you saw it and it looked good. It was

cold, it was refreshing, and you wanted to have a Pepsi. I mean there are no sexual connotations or anything in there. I mean, to me that was a good effective ad. And it stayed with you, I mean, you remembered the Pepsi.

Q Without some subliminal message that you disagree with morally.

A Yeah, I mean, you hear about like the McMartin case, and all these other things that are happening.

Q Where people abuse children you mean?

A Yes. And it seems like newspapers more and more are coming out with teachers with children.

Q Teachers abusing young children you mean?

A Yes. And so why give anybody any ideas. It is just like which came first the chicken or the egg, you know. You start advertising, or the news picks hijacking, and they make movies of hijacking, and it glamorizes hijacking, and more hijackings occur. Which actually came first, I don't know. But you know, why perpetuate an idea.

[2966] Q You do not use children and subliminal messages regarding children in your advertising of Kash, Inc., do you?

A We don't use people. We just use the fruit.

Q I take it that is the point you are trying to make. You do not think they need to use children.

A Well, I don't know what we are trying to sell. You know, what is our generic advertising trying to sell? My idea was it was suppose [sic] to sell fruit, so why not highlight the fruit?

Q Instead of having children in their wet bathing suits running around.

A Exactly.

Q Mr. Chang, can you think of any valid Federal Governmental interest that the Federal Government would have in promoting peach, plum and nectarine consumption in the United States of America?

A If you are referring to California peach, plum and nectarine, I see none. I think these Market News Reports verify that if it does have an impact on us, it is a negative impact as far as I am concerned. They should go advertise New Jersey peaches so we can get a higher price.

Q And let the New Jersey growers pay for it?

A And let the New Jersey growers pay for it. But I think it is more of a hinderance in more than one way. I [2967] know since the out come [sic] of "Wileman 1" I've had small packers come and express interest in what can they do like what we are doing? Because of the problems that they are having. And they are small packers, they have, you know, they grow and they pack their own fruit and they have like 40 acres and they may do a neighbor to make it a little more economical. But they don't have the money or the economic resources to go through a 15a. And they are also afraid of retribution of harassment by the government.

Now, if that is what our generic advertising is making all the growers afraid. But I've tried to talk to some of the people even to come and possibly testify. A lot of them are afraid.

Q Why do you think that is?

A Well, it is a combination of things. One is that they don't have the economic resources to fight, and because they are so small. I mean, a couple incidents [sic] could probably put them out of business. One season would probably be enough to put a real economic hardship on them.

Q I have a few other of these Market Reports to tag, Your Honor, just further examples in the record, not that it requires a bunch of testimony or anything.

You have been testifying with the Market Report that has been marked Exhibit 299. Your Honor, what is the next exhibit number?

* * * * *

UNITED STATES DEPARTMENT OF
AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

AMA DOCKET No. F&V 916-3
AMA DOCKET No. F&V 917-4

IN THE MATTER OF:
WILEMAN BROTHERS & ELLIOTT, INC.,
A CALIFORNIA CORPORATION AND
KASH, INC., A CALIFORNIA
CORPORATION, PETITIONERS

v.

CLAYTON YUETTER,
SECRETARY OF AGRICULTURE, RESPONDENT

[Excerpts from Testimony of Frank T. Elliott, III]

Fresno County Courthouse
1100 Van Ness
Fresno, California
Tuesday, February 13, 1990

The above mentioned matter came on for hearing, before the Secretary of Agriculture, pursuant to Notice at 9:00 a.m.

Before: DOROTHEA A. BAKER, Administrative Law
Judge

APPEARANCES:

For the Government:

GREGORY COOPER, ESQ.

Ms. HELEN BOUTROUS, ESQ.

U.S. Department of Agriculture

Office of General Counsel

Marketing Division

14th & Independence Avenue

Washington, DC 20250

[3879]

Q Okay. Now do you resent your assessments being spent on generic advertising?

A Yes.

Q And let me ask you a few questions about that. First I wanted to ask you, can you think of any governmental interest whatsoever that the Federal Government has in asking the public to eat California nectarines or peaches or plums?

A I'd like to break this down. I don't see a reason that the Department of Agriculture has. Maybe it might be of interest for the Department of HEW to promote people eating fruit for their good health. But, one, for them to tax me to promote peaches, plums and nectarines and they're not taxing people in other states to do the same thing and the housewife when she goes into the store, in that bin, doesn't know where the fruit came from. Very rarely is there a sticker on there. Even in California, you go into a store today and you won't see a thing that says "nectarines from Chile".

You see oranges, you go to the mid-west and they don't tell you whether they're Florida oranges or they're California oranges. They don't tell you if the bananas came from Nicaragua or Honduras or Guatemala. They're bananas; they're oranges; they're plums; they're nectarines. And there's no designation to the housewife, so [3880] she doesn't know what she's getting.

So basically what the Department of Agriculture's doing is taxing me to help everybody. I think that's kind of unfair taxation.

Some of the other problems that I have with specifically the generic advertising that's being done is most of it is a big fraud.

Q Are you saying that the scripts on the TV and the radio scripts are frauds?

A Well, from the publications that I get at the office and we get—periodically CTFA in trying to promote its own welfare to the shippers sends out little samplers of what they're doing. They're trying, you know, to maintain an image and we do get some advertising—here locally on the local radio stations. This is so that CTFA can prove that they're doing something to the growers which is even more ridiculous, to spend my money for them to advertise themselves to me. Do I see that right?

Q I think I understood your point.

A I mean for them to tax me, to tell me how good they are, is extremely ludicrous. Then they come out with these things about red is great; you know, how wonderful the red nectarines are. While, in fact, if you take somebody like Bear Creek Orchards, which is probably the pickiest buyer in the produce industry, where they're getting an [3881] outrageous amount of money for this little tiny box of fruit and they want an extremely premium piece of fruit; they don't care what it looks like. They're only interested in what it tastes like.

Q For the Fruit of the Month dealers?

A Yes. And they don't take any red varieties. They're only yellow varieties or what we would consider yellow varieties.

Q So you're saying that generic advertising promotes a lie that red is better than yellow?

A Well, yes, among other things. It also says that California fruit is better. Well, now the housewife, she doesn't know the difference. And I don't think anybody has ever proved that there's any difference.

Q You say that—are you saying that in your opinion, do you think that the advertising or the implication of the advertising, eat California fruit, is a lie because California fruit is no better, no worse than fruit grown in other states?

A Well, I don't know if it. It might be; it might not be. I don't think that anybody has ever come up and proven that. But I can't see what interest it is of the Department of Agriculture to tax me to go out and promote this stuff and then not tax somebody else or force them to do the same thing. It's a lie; it's unfair competition for [3882] me by being taxed to promote this other guy's product and the housewife doesn't know the difference.

Q Do you—I guess you're saying, therefore, that you resent your advertising assessments being used to promote Georgia peach growers, Georgia nectarine growers, et cetera.

A Another thing is that the target of their advertising isn't even to the people that I normally sell to.

Q Now wait a minute; that's an interesting point. I don't think we've heard much testimony about that before. What do you mean the "target of their advertising", of CTFA advertising assessments, is not the same people you sell to?

A Well, there's—in running a produce operation like ours, a grower, packer, shipper, there's basically two different theories of how you sell and move your produce. If you take just the people that have testified here so far, we'll take Mr. Chang and Mr. Gerawan. Mr. Gerawan has a sales force of, I don't know, twenty, twenty-five people. And I'm not sure how big Mr. Kashiki's is, but I think it's probably three people, somewhere in that neighborhood. In the case of Mr. Gerawan he's more than likely, and again

I'm—I'm kind of speculating—is selling directly to chain stores. All right? And probably [3883] in the case of Kash, does a pretty good chain store business. He has all of his three people selling out of the same pool.

Q Give me that—Gerawan and Kash are selling to retailers?

A It's called direct—yes, selling direct to the retailers.

Q Okay.

A We, on the other hand—

Q You don't deal that?

A No. We deal primarily with brokers and jobbers. So instead of us putting together loads and then sending them on to the chain stores, we deal with the broker who then would consolidate the chain store—

Q Is a layman word for broker that I might use would be a wholesaler?

A Well, he could be a wholesaler. Some brokers are just brokers; they consolidate loads for different wholesalers. And for that, we pay this man a fee. He gets anywhere from ten to fifteen cents a package that we pay him commission for doing this.

Q So do you have less salesman?

A We have one salesman.

Q He's just selling to wholesalers or brokers, I take it? [3884]

A Yes. We do very little chain store direct business.

Q Let me see if I understand this in my mind. You don't take what I call LTD loads, less than truckloads; you don't take a big truck and say put two pallets on it for Safeway and two pallets for Kroger and two pallets on it for Lucky, and tell the truck

driver to drive across the country and drop these things off at various retail stores? Instead you just fill up the truck and you tell them to take it to one broker's place and dump it all. And then he resells it and then moves it through his clients?

A That would be what maybe the jobber would do. In some cases, we'll get a call from a man and he wants half a load. We'll put half a load of fruit on there.

Q Okay.

A Of plums or nectarines, "x" number of pallets or "x" number of boxes, depending on whether he's buying it palletized or not palletized. That truck then will go somewhere else and pick up maybe a half a load of strawberries or half a load of some other compatible product to—

Q To fit in the refrigeration—

A —to fill in the truck. And then that truck will go to the buyer and this one man, see there are several large brokers in this country like C. H. Robinson or Tom [3885] Lange or somebody like that. We're dealing maybe with C. H. Robinson, Minneapolis, and they will be putting together loads for small regional chain store operations.

Some guy that has ten stores, it doesn't pay for him to have national buyers on the West Coast. Okay?

Q And they'll use people like this to help?

A They'll use somebody like this to actually do their purchasing. And our philosophy is to do business with them for a number of reasons, one of which is, we like the pay and if you start dealing too much with large chain stores, they have a tendency to want to run your business, to dictate to you what you're going to do.

Q And what you're going to sell it to them for?

A Yeah. And we tend to like to run our own business; we don't like other people telling us how to run our business.

Q Okay.

A Which is hard for CTFA to understand; I understand that.

Q Now if I understand what you're saying then, you're saying that not only do you think the message that the generic advertising is giving is a lie in certain instances, but you're thinking it's being communicated to people that are different than the people you sell to?

A Yes. The guy who is buying our nectarine is [3886] buying a nectarine. He's not buying our nectarine because it's a California nectarine. He's buying our nectarine because he happens to like the Mr. Sunshine brand of nectarine and he'll know that it will arrive in a quality that will make it to his customers.

Q What is Mr. Sunshine?

A That's our brand of—

Q Label?

A Our produce, what we ship; our primary label is Mr. Sunshine. Our second quality label in plums, nectarines—well, you don't have a second in plums, but is Look.

Q Excuse me, I didn't hear that.

A Look. L-O-O-K.

Q Okay.

A And we have another label we use citrus fruit, which is a different thing, but if you're going into two markets with citrus, like in two—two people shipping into the same export market, we can give them a different label, which is Stop. And these labels were developed back in the 20's; they're not new.

Q They've been around a while?

A Yes. They've been around a while. Our grape label is Bluebird. We also have a label called Sunshine To Go, which we use in consumer packs of oranges, which is an [3887] icicle with the wheels of orange slices.

Q I see. And so if I understand what you're saying, these jobbers or brokers that you sell to, they're buying from you because of identity of you—

A Yes.

Q —rather than because you're in California?

A They can buy the nectarines or the plums anywhere. They can buy it from any state. I don't know how many states produce nectarines but they're not grown only in California. And the same thing with plums.

Q Okay. Why do you think they're buying your plums rather than plums grown in another state or plums grown by one of your competitors in California? Are you saying it has identity with your label and they know your company?

A Well, that and salesmanship. We obviously have spent a lot of time and energy promoting our product to them and trying to convince them that we put out a good product. Right now this week my sales manager is back in San Antonio at the United Fresh Fruit and Vegetable convention. And he is meeting with these people this week.

Q These are the brokers and the jobbers—

A Yes.

Q —that you sell to?

A In the fall, we go to the PMA, which is [3888] another Product Market Association, a big convention. And then usually we send the sales manager in or myself makes two trips back to the East to contact

these people face to face. The object is to put a face on the end of a voice on a telephone, so you know who you're talking to.

They see in the—if you go into these markets, terminal markets, like Hunts Point, New York; the fruits displayed. The people see what they're buying. They have bird-dogs that come around to your packing house here in the Valley; they're not buying a pig in a poke; they know exactly what you're putting out, what it looks like, whether it's got legs or not. Legs, being green enough to make arrival. So if it's overripe fruit and you send it to the East Coast, they don't want it if it won't make arrival for what they want.

And, again, it goes back to who we're selling to. You've got different—it if goes from the packing house directly to a chain store warehouse, from there it is trans-shipped out to trucks, on to trucks to go out to their stores. They want a little higher maturity. If it goes from here into a truck, goes back and sits on a dock in New York City in the middle of summer for twenty-four to forty-eight hours, from there is put into a non-refrigerated truck, taken to a little "Mom and Pop" store, where it is then displayed outside in Brooklyn, they want a product that [3889] will get there.

And they come and look at ours, make that determination. They don't care where it comes from as long as it's something that will make arrival. So to sit there and advertise, California, "Eat California nectarines; they're the best", these people don't care about that. They don't call us up and say, "We want one load of California nectarines and we want one load of Georgia peaches". They call us up, "We want, you know, five hundred boxes of Sunshine"—Mr. Sun-

shine—usually it's just called Sunshine, we drop the "Mr."—"We want Sunshine Tom Grands, size such and such; the truck will be there such and such a date". And that's it.

Q Now when you say "terminal markets", is that a jobber market or a wholesale market?

A Yes. This is primarily where you'd see the jobbers do it. Most large cities have them. It's a produce district.

Q All right. Can you explain that?

A Well, let's back up a little bit. If you have one or two or three grocery stores, it would be extremely or even a little tiny hole in the wall like you have in some of the large Eastern cities, what we would call maybe a convenience market here, little neighborhood market; it's extremely difficult for them to employ a full-time buyer to [3890] buy their produce. Produce has to be bought fresh. So these districts in the city have been established to, basically, allow a market—and probably grow out of a Farmer's Market—a marketplace where these people can acquire fresh produce.

Q And is that what's the so-called "terminal markets" are located at?

A Yes. Like there's one in Los Angeles.

Q New York?

A Yeah, New York; most large Eastern—well, most large cities have them, where the produce people have either by Statute or by custom come together. And this is where the—

Q So if I'm a terminal market owner in New York, let's say, or Minneapolis or Philadelphia, I would call you up, buy Mr. Sunshine, for example; it would be delivered to my terminal market in New York. I'd

break that pallet out and then I would sell smaller amounts to the little stores?

A Say if you bought ten pallets, all right, you know this store sold "x" number of boxes a day in plums, you'd put ten or nine of them in the back of the warehouse; you'd take one pallet, set it up in front of your business establishment and display it. Open boxes up, so people can come buy and look at the product, see what you're selling. I mean, you're basically—

[3891]

Q The little chain—the little store owners can come up?

A Yeah, the little store owners or it might be a guy that has a van, you know, a sixteen foot bed on it with a box and he is buying for seven or eight little grocery stores. And he will come by and he will buy from the guy in the terminal market, load up his truck, not only with plums—he might only buy two boxes for each little store, not only for the—not only plums, but he'll buy bananas and every other kind of produce that this guy needs in his little store.

Q Now you were here during Rodney Chang's testimony and Ray Gerawan's testimony, correct?

A Yes.

Q And you heard them, or one of them, talking about the market news reports—

A Yes.

Q —I think Exhibit 229, et cetera, other exhibits about market news reports. Are those terminal market news reports?

A They are the—the market—is one of the sources of the market news is the terminal market. What people are selling for on the street. Now I think that because it's operated by the USDA, each guy in

each market has his different sources. And without knowing—talking [3892] to specifically the man that reports the market in each place, you don't know what the man's sources are. But in most cases that office is near the terminal market because that's where the greatest volume of fruit goes through in some months.

Q I see.

A It's easiest to find out because it's there. You don't know what business is transacted with chain stores. I mean that is direct, bypasses this area, the large chain stores, but the small chain stores buy a lot of fruit in the terminal market.

Q And it bypasses the large chain stores—

A Also, the large chain stores use the terminal market, say all of a sudden they find out it's Thursday and they have—they've got a special coming out on oranges or bananas or whatever on Friday, and all of a sudden they decide, "God, we need one more"—well, terminal markets is where they go get it. You know, it's—they don't have time—

Q To do it themselves?

A To do it themselves.

Q I see. Now in addition to the large amount of money that you, yourself, have been paying in CTFA assessments to our trust account here, you, yourself, spend money advertising your own labels, don't you? [3893]

A Yes.

Q And how much money do you assume that your company spent advertising your own label or labels?

A Travel expense—I can't remember because it was on the—on our financial statement—but I'm going to say it's thirty or forty thousand dollars a year.

MR. COOPER: I couldn't hear that answer.

THE WITNESS: Thirty to forty thousand dollars a year.

BY MR. CAMPAGNE:

Q For just the travel expense?

A Yeah, travel and entertainment, which is primarily to buyers.

Q That's when you go to the buyers—

A Market tours. You go to conventions.

Q These are to these jobbers and brokers that you had been talking about?

A Yeah. See that's—

Q Do you also have materials?

A We have printed material, which I gave you a copy of that brochure that we had which was sent through the industry.

MR. CAMPAGNE: Your Honor, may I mark that next in order?

JUDGE BAKER: Yes. 341.

[3894]

MR CAMPAGNE: Thank you.

BY MR. CAMPAGNE:

Q Let me hand you Exhibit 341, Mr. Elliott. Is this some of the material you hand out to brokers and jobbers that you deal with?

A Yes.

(The document referred to was marked for purposes of identification as Petitioner's Exhibit No. 341.)

Q Is that what you mean by throughout the industry?

A This on the first page shows some of our historic labels; the Bluebird, Flash—

Q This is a sampling of some of your labels?

A Yes.

Q On the first page.

A And then second page is a painting of my father and myself and a little history of both of us.

Q Looks like you're pushing the fact that your company has been existence for a number of years.

A Family company; family-owned business. Then the middle page shows oranges and pictures of Mr. Sunshine label, with a little verbiage. And then you get to the next page which shows the—

Q Mr. Nectarine?

A Mr. Nectarine, Mr. Peach, and Mr. Plum, which [3895] were out—when we were in wooden boxes, were our labels. And then as you get towards the end it shows more of the current labels of Look and Mr. Sunshine, both in citrus and tree fruit.

Q Why is it important for you to have the jobbers and wholesalers know your label?

A They're very label conscious in the terminal markets.

Q I don't understand; why?

A Well, they don't know—you could walk up to anybody in the terminal market and tell them "Wileman Brothers and Elliott" and they wouldn't know who you were. But if you tell them, you know, "Mr. Sunshine" they would be very familiar with the label. They would recognize the label. It's—I'm quite sure that you wouldn't know "Dan Drackett"; have you ever heard the name?

Q No.

A Have you ever heard of "Drano"?

Q Yes.

A Well, you know their label. You don't know their name, same thing. We promote our label. This is one of the things that has been very disturbing to me as I listened to Dan (Sic) Gerawan and Rodney Chang talk about how—

Q Ray Gerawan?

[3896]

A Ray Gerawan, rather, and Rodney Chang talk about how great their fruit is. And they've lied. Ours is better.

Q I take it that you're their competitors and you're saying your fruit is better?

A Yeah. That's the thing. We're all kind of—to say that we're competitors basically in sales only, because we don't have a lot of outside growers. Ray Gerawan doesn't have any outside growers. In the case of Mr. Kashiki he has few family friends as outside growers. We're not big—we're not big commercial houses.

Q You don't have outside growers?

A We've got about five small and, again, they're family friends who are outside growers.

Q What I'd call second hand relative type?

A Yeah. Primarily we're growing, packing, shipping, selling our own produce.

Q So you're not interested in taxing your clients to use their money to promote sales?

A No.

Q Because it's your money?

A I heard in the testimony—I can't remember who said it, the fact that the grower of these commercial houses is paying somebody like Ballantine ten percent to sell their fruit and then Ballantine turns around and [3897] charges them another twenty cents to do the same thing. It seems like—plus they're taxing me to do it for them too, I think is really outrageous.

Q Are you saying that you think it's outrageous that your tax assessments are being spent to promote Balentine's label?

A It appears to be. They're not promoting mine.

Q It's not helping you at all?

A No. I mean, just a straight example; when this started, I was informed about the great benefit of these guys going around to the marketplace, all right, and how they're helping me. I've called —

Q You mean Gary Van Sickle going around—

A No, these guys in the East that are supposed to go around and promote California fruit. I haven't been able to find anybody that we've done business with that's ever seen one. I don't know what they do.

Q They've never met a CTFA person?

A Well, no, they don't even know what California Tree Fruit Agreement is.

Q Is that because you're assuming these CTFA folks are going out to primarily the retailers whereas you're selling to the terminal markets, the jobbers and the wholesalers?

A They're going out to the big chain stores who [3898] I don't do business with. In other words, they're taxing me to promote somebody else's produce.

Q To help these large commercial people?

A That's right.

Q Or commercial packers, I should say.

(Pause.)

Q Mr. Elliott, I'd like to show you three Exhibits that we've stipulated into evidence. The first Exhibit is Exhibit 301, which—page eight, 301A, is a television ad that we've had testimony; it's been running for a few years; 301B is another television ad, is page nine; 301C on page ten; 301D, another television ad. Are those the television ads that you were testifying about a moment ago that you think is kind of ridiculous to be running in California?

A Yes, especially in the San Joaquin Valley.

Q Okay. I'd like to also show you Exhibit 303, which has been stipulated into evidence, as the radio scripts that have been used in the '86 harvest season and the '87 harvest season.

And I'd like to show you Exhibit 302, which is the radio scripts which have been stipulated in as the radio scripts for the harvest season '88 and '89.

Are these the radio scripts that you were referring to that you think is silly to be running in [3899] California?

A Yes. On the KMJ, on the Farm News. Again, it goes back to, they're taxing me to promote their own welfare, which I think maybe, you know, people like Gary Van Sickle out to cough up the money for that.

Q Now Mr. Field, do you think that—excuse me one second.

Now with respect to these Exhibits, 301, 302 and 303, are these the types of scripts of advertising that you were previously testifying you think promotes some lies?

A Yes.

Q Okay. And I take it that you're saying they have an implication that red is better and that California fruit is better and you think that's a lie?

A Well, I think that—first off, red is not better. Red may have more eye appeal to some people, but as I said what's considered by farmers to be the—and by Bear Creek Orchards to be the tastiest nectarine is the Le Grand nectarine. The peach that is supposed to be the tastiest peach is called a Nectar Peach. And there's a great bit white blob that is so tender that when you pick it you leave five little brown marks on it.

Q From your fingers?

A Only from your fingers, all right? Now I have one tree in my backyard, my mother has a tree in her [3900] backyard, Leonard Wileman has a tree in his backyard, my grandmother has a tree in her backyard, my sister has a tree in her backyard; everybody has one tree in their backyard, because when these things ripen, it's not commercially feasible to pick them. These red hard varieties are the ones that, you know, because of their maturity standard they can get red and they can ship them as hard as billy clubs (phonetic) and get away with it. But they're not necessarily the best eating piece of fruit. And to tell people that red is wonderful is a great lie. I mean, that is—

Q And you have a philosophical difference in lies?

A Yes.

Q You don't believe in lies?

A I'd probably like to get away with them but my mother won't let me. I tried a couple of times when I was a kid.

Q Now you touched upon another subject that I kind of want to turn to and that is you were talking about some of these red varieties get nice and red but they're hard as rocks when they're shipped. Let me change the subject a bit and—

A I'm reading this while you're talking. Here's something—the fourth time—here's this music, "when you [3901] bit into a big juicy peach that memories come to mind summer—the first time you danced with a girl, one fourth of July, or the last summer before you went to college"; does this mean that if you didn't go to college, you can't eat your peaches? I mean, here in the center in the world, what's this twenty percent of the world? Or the Americans go to college? And the rest of them—so

this is a guy working a punch press in Pittsburgh. Maybe it's very strong but I missed the point.

They seem not to really go out and—somebody in an advertising agency is selling them something that's not really doing me a bit of good. You know, as I pointed out, I'm selling into those terminal markets, which are selling into those small grocery stores in the inner city and what have you, and they're definitely not—if they're talking about a college graduate, they're definitely not targeting to the people that I want to target my produce to. I would think that most people who are non-college graduates and stuck behind a punch press the last three years, would resent the guy in the pin-striped suit with a necktie that comes walking through the plant telling him his hole's out of place.

Q Now do you think that color chips discriminate against the yellow varieties in favor of the red varieties?

A Yes.

[3902]

Q Why?

A Well, because in some of these things, they talk about, you know, red is better and not being that familiar with these things I can't just go through them. Here's a girl, the little girl in the wet T-shirt contest.

Q Looking at Exhibit 301?

A Yes.

(Pause.)

A I can't specifically find—but in that folder that shows the—in the red—and what have you—

Q Those Exhibits in those big advertising folders—

A Yes. And then they—

Q —in evidence?

A —send out weekly or monthly little sheets to the industry. And in there it talks about the red varieties.

Q Now I want to change the subject once again, Mr. Elliott, and talk about the size eliminations.

A The volume control?

Q Yes. With respect to—can you tell us about the size elimination and how that's affected your company?

A Well, to start with, they forced us not to sell a product that was saleable. Obviously, other states are selling, you know, smaller sizes than we're allowed to.

* * * * *

[3909]

A Well, basically they're helping their competitors and I agree that I have no desire to help my competitors. In the bottom drawer of my desk is a faded yellow telegram that was sent to my father in about 1962 by—I can't remember the name of the group—but it was a—primarily a group of professional growers that got together and the price of plums at that point was hitting about two dollars, which back then was money losing pretty even point and this is the growers' demand you hold for a price of like two sixty-five, which is what they considered a break even. And so my father, who at that point was handling sales, held for two sixty-five while all the people in Fresno sold them for like two and a half and two twenty-five, underneath him.

So the lesson is, they don't care what happens to us.

Q Now you learn and you don't care what happens to them and—

A —cooperative effort and they just—went out of business. You read these Minutes from, you know, our alleged friends in the industry and because we filed this 15A, they discussed ways to put us out of business right there. Why should I care what happens to them? All right. I mean, I don't—we're not—we're not even selling to the same people. We have to be—grow the same commodity, but they're not interested in my welfare by any stretch of [3910] the imagination. I don't see any reason why I ought to be concerned about their's. You know, we're competitors.

In any other industry, if the competitors got together like they do in the tree fruit thing, you'd go to prison. I mean, I can use the paper industry as a prime example. What has happened there. If the President of General Motors got this in there and tried to fix the price of cars, what would happen?

Q Or generically advertise the price of cars?

A Yeah, buying cars—the Government forcing you to buy cars. It's not unlike the Fuller Brush man being required to come into your living room.

Q Periodically.

A And I might also, this is kind of a—this is a personal thing that upsets me about this whole program for years. The program was put in to be—the Marketing Order Programs were put into being by the same guy that sent that man to a concentration camp because he had slanted little eyes.

Q You mean Mr. Kashiki?

A Yeah. Had slanted little eyes; they throw him in a concentration camp. And a little bit after they came up with this whole program—in Eastern Europe, they're finding it doesn't work.

And here we are in a Courtroom in the United [3911] States, arguing about whether or not I have the right to grow a crop and sell it where I want to. And to me, that's ludicrous.

Q Without spending money to benefit your—

A And I'm being taxed by my competitors for trying to do it and then badmouthed by the same people who salaries I pay because I question it.

Q And the same people you're fighting with, judging whether or not a color chip with their eyeball meets the skin color they think is appropriate?

A Yes. Because—and you read the Minutes, you know, of Mr. Giannini arbitrarily changing the color chips because his crops weren't ready. You know, it's—the whole thing smacks of this, you know, what the people in Eastern Europe are trying to get away from. And it frankly upsets me that I'm forced to go through this.

Q Let's talk about Mr. Giannini and the Kingsburg growing area. Is that where most of his growing operations are?

A I think so; I'm not really that familiar with Giannini because I don't associate with him. We are a little family business out in the country; we stay away from everybody, like to mind our own business and I'm not really worried about what a lot of other people are doing. I don't know whose orchard is what. [3912]

Q Let's talk about in general. If I'm a grower of "x" variety of nectarines; do my nectarines get ready for harvest at the same time as every other growers who have that same variety?

A No. There's different growing areas in the San Joaquin Valley.

Q Can you explain that to me?

A Well, and example in the Cutler [illegible] area, where we exist, and—

Q How far away is that from this Courtroom?

A Thirty miles.

Q East?

A Southeast. There's an area there that things are a little earlier; that's where the Cūmmer (phonetic) tomato industry for years had a little niche. It's just not quite as cold there as it is further out into the valley.

Q South of here?

A Yes. And in this little—

Q Or Southwest of here?

A —it's kind of like a cove and our fruits a little earlier. Another place that we grow is west of Visalia. Now there's a large area east of Visalia, where Mr. Pinkham and his group reside. And my father and a couple of other people are the only ones that ever grew tree fruit down in this other area.

[3913]

Q In other words, Pinkham's group was on the east and your father's group was on the west?

A No, just the—yeah, my father—maybe another eighty or ninety acres. We don't necessarily grow—and our idea is to get the crop planted where it's early, get it off early, get it out; get it into the market place, and go on to the next one. And this is a little upsetting to people that have maybe some ground that is later and maybe produces heavier tonnage.

Q That's their business?

A Yeah. If what we were producing was not acceptable to the market, we wouldn't be in business. And everybody tries to develop their own market niche. All right? I mean, this is how the world of business is done. You don't try to go on head to head

with, you know, General Motors. You make something that they don't. Well, this has kind of been our attitude. We, again, don't care what they do. We have established our own little market niche. We want to maintain it and we want to be left alone. We don't need their help.

If, in the case of this advertising, if a bunch of them want to group together and advertise their overripe fruit and however they want to do it; that's fine. I have no problems with whatever association they want to form.

[3914]

An example of an association is Mr. Kashiki and Mr. Chang and myself forming an association to try and maintain our rights. You know, we'll join in when it's to our benefit, any association that we feel is beneficial to ourselves.

Q Voluntary and mandatory?

A Voluntary and not mandatory. And I don't have problems with people banding together to promote their mutual benefit. And I think there are provisions for that.

Q But you want to be—you don't want to involuntarily contribute to that?

A No. I don't want to help them pay for their sport. I mean—when we found out about the Tree Fruit Reserve giving I think it was sixty thousand dollars to the California Grape and Tree Fruit League, now this is where they're taking my tax money and giving it to Virgil Rasmussen's private club. I mean, the next thing they're going to do is they're going to give it to the Rotary Club and the Lion's Club and the Moose and the Elk and everybody else. That's all the Grape and Tree Fruit League is, is a private club of produce people.

Q Commercial?

A Yeah. And they're using my tax dollars—

Q Your assessment money?

A My tax; it's a tax, to promote their private [3915] club. I don't understand it.

MS. BOUTROUS: Objection, your Honor. I means that's a slight—you first said it was the Tree Fruit Reserve that did it and I don't know if he's switching now and he's saying it's his assessment money, but you know we would obviously disagree with that characterization.

BY MR. CAMPAGNE:

Q Do you disagree with that characterization?

A I sure do. I mean, when they raise the rent so they can give—and they say in the Minutes they're doing it.

JUDGE BAKER: With reference to the objection, the objection is overruled.

BY MR. CAMPAGNE:

Q Do you think Tree Fruit Reserve is spending your assessment money, Mr. Elliott?

A Sure.

Q Why?

A They in joint meetings, you look at the things, they raised the rent so they can have more money to give to the, you know, to their private club. They're one and the same thing. Anybody that can't see that has got to be blind and Jim Louis (phonetic) can see it.

Q And he's blind?

A And he's blind.

* * * * *

UNITED STATES DEPARTMENT OF
AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

AMA DOCKET No. F&V 916-3

AMA DOCKET No. F&V 917-4

IN THE MATTER OF: WILEMAN BROTHERS & ELLIOTT,
INC., A CALIFORNIA CORPORATION AND KASH, INC.,
A CALIFORNIA CORPORATION, PETITIONERS

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE,
RESPONDENT

[Excerpts from Testimony of Jonathan Field]

Fresno County Courthouse
1100 Van Ness
Fresno, California
Tuesday, February 13, 1990

The above mentioned matter came on for hearing,
before the Secretary of Agriculture, pursuant to
Notice at 9:00 a.m.

Before: DOROTHEA A. BAKER, Administrative
Law Judge

APPEARANCES:

For The Government:

GREGORY COOPER, Esq.
Ms. HELEN BOUTROUS, Esq.
U.S. Department of Agriculture
Office of General Counsel
Marketing Division
14th & Independence Avenue
Washington, D.C. 20250

[4034] And then we have the next group of three documents which are the same similarly documents but they are with regard to '88 harvest season, your Honor. So we'd like to mark them next in order as well. So 351 would be the "1988 Market Development Budget Five Million Five Hundred and Twenty Eight Thousand" is how it reads on the top. 352, Exhibit 352, is the pie chart, which reads "1988 Spot Markets and National Media" parens "(Radio and TV)". And Exhibit 353 is another what I call time chart with weeks of the bottom and percentage of money on the top, on the side, which reads at the top. "1988 Media Expense Charts". (The documents referred to were marked for purposes of identification as Petitioner's Exhibit Nos. 348, 349, 350, 351, 352, and 353.)

Whereupon,

JONATHAN FIELD

having been previously duly sworn, the witness resumed the stand, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. CAMPAGNE:

Q And Mr. Field, if we can talk about these right here in the middle so the Judge, she can look at them while you talk about them.

What I'd like to do is show you Mr. Field—well, first of all, Mr. Field, I think the record already [4035] reflects that these are the charts which you put together pursuant to the request that we have made on the record of Mr. Cooper and Ms. Boutrous pursuant to our request and Order for Production

number 45, I believe, don't hold me to the exact number, but to get some data regarding the advertising and promotion budget; is that correct?

A Yes, it is. I should also point out on some of the circular graphs they are—the percentages are right but it might not reflect—they're not accurate. I did not have a protractor when I did these.

Q You're saying your art —

A They're free hand.

Q Your art might not be perfect, yeah. So if we can go through these charts one at a time; maybe if you can turn your chair the way it is comfortable for you and then we'll place it here and Mr. Cooper and I can kind of look.

Let's, for the record, I think you're indicating we go by the numbers in the slices rather than the size of the slices.

A Right, correct.

Q Okay. Let's take them exhibit by exhibit. The first exhibit—the first exhibit I would like you to explain to us is Exhibit number 348 which, for the record, is captioned "1989 Market Development Budgeted Five Million Eighty Thousand Dollars". What does this Exhibit represent, [4036] Mr. Field?

A This is a representation of the total Market Development Budget in 1989.

Q Let me stop you one second. Does the word "Market Development" mean both advertising and promotion, all sorts of market development?

A Every market development activity as opposed to strictly advertising or strictly public relations or strictly food service, so it's all portions of the Market

Development program. That's not including—no export; export marketing would be separate. This is just our domestic, along with a bit in Canada.

Q So Canada is show here as if it was a domestic—your export would be a different—something different that's not included in any of these exhibits that we're talking about today?

A Right.

Q Okay. Is it far to say that it varies a little bit from year to year but approximately nine million dollars is collected in total assessments, of which approximately five to five and a half million is spent in various forms of market development?

A Yes. That's pretty close, yes.

Q Okay. And, okay, so this is the 1989, Exhibit 348, regarding Market Development for '89, correct?

[4037] A Correct.

Q Now can you explain for Mr. Cooper and myself and her Honor what the pie chart there is to represent?

A And I don't know if you've introduced it as an exhibit, but —

Q Well, yes —

A — but in some of the other exhibits—in some of the Minutes we will have a California Summer Fruits, the breakout by commodity, of the individual programs or promotion programs. I took those numbers, compared them to the total budgeted figure of a little over five million and so that is the total figure in each of the sections of the pie. For example —

Q Let's go through it section by section.

A Yeah.

Q Very slowly. For the record. But now let me just stop you for none second. We're looking at the section of the pie, which is what I would call the northeast quadrant of the pie, and what does that say? Can you just read what's written in that quadrant?

A The total—that quadrant is, "The National Network and Cable TV and Production" production being what it cost you to run—the fees that you pay for actors and actresses and music that you have to pay.

Q Then it says twenty-eight percent underneath [4038] that.

A That total is one million four hundred and forty-one thousand was budgeted; one million four hundred and forty on thousand compared to the five million dollars is roughly twenty-eight percent. So twenty-eight percent of the our budget went into National Network Cable TV and Production.

Q So that, again, this is with regard to the domestic market development budget?

A Right.

Q Okay. And can you go then to the southeast quadrant, immediately below that, and read it to us and tell us what it represents?

A The next quadrant is the "National Network and Spot Radio" so that would be our radio, which is highlighted. The top one had TV highlighted; on the next one we have radio highlighted.

Q Okay. For the record, I'll circle the TV, the word, in the northeast quadrant and I'll circle a radio word in the southeast quadrant, because the yellow may not come through on the xerox machine.

A The total we spent on radio was one million one hundred and fifty-nine thousand. And that divided by the five million eighty thousand gives you a twenty-three percent of our budget went into our radio, total radio [4039] program. Beneath that figure, we did have some spot market radio and I listed the spot markets for radio; Boston, Chicago, Dallas, San Francisco and Washington, DC.

Q And then it says to the right of it, approximately two hundred and sixty thousand dollars.

A I think that's the—oh, two sixty, yeah; approximately two hundred and sixty thousand of the one million one hundred and fifty-nine thousand, was devoted as extra into these particular spot markets. So Boston, Chicago, Dallas, San Francisco, Washington, got a little more than their share because of the extra advertising in the amount of two hundred and sixty thousand.

Q Now you've used some words in the northeast quadrant, on the southeast quadrant of this pie on Exhibit 348, that I would just like to have you elaborate on. And is that, let's look at the northeast quadrant of the pie. You're talking about National Network and, there's a little "and" sign, and Cable TV and production. I take it these are like CBS, NBC and ABC national broadcasting stations, as well as cable advertising dollars, where the cable plays nationally, throughout the domestic market.

A Cable, such as the Turner Broadcasting station, and that would be kind of an example; the national cable programming.

Q Rather than a small town, local cable?

[4040] A And rather than your local station; you might have a local KDIE in Sacramento, Channel 6, is the educational channel, but it is only a Sacramento channel.

Q Okay. So these are the type of advertisements in the northeast quadrants that would run either on a network television station or a cable television station that is broadcast throughout the domestic community of the United States of America including Canada?

A Yes. It —

Q Now below—

A —would overlap into Canada but it is not specifically directed to Canada. There's a little bit of money in our Canadian promotion program which is more specifically directed toward Canada.

Q I see. Now turning your attention to the southeast quadrant on the chart. At the top part you refer to total expenditures of approximately one million one hundred and fifty-nine thousand dollars for National Network and Spot Radio. Now, again, the word "National Network Radio" Versus "Spot Radio", is that the same sort of distinction? You've got radio channels that are like CBS radio, NBC radio, ABC radio versus spot radios which are just your little local stations; is that it?

A Yes. A good example would be like Paul Harvey. You're listening to your local station and

they [4041] might have a national affiliate and all of a sudden you hear the Paul Harvey section, which is a nationally— national program, so that's how—and that'll be kind of our national network, would be—pick up on all of the networks that are affiliated with a national network.

Q Okay. And so, therefore, whereas sometimes, because I represent some TV stations, we use the word "spots" to just mean either a local or a national advertising spot on the station, you know, fill in an advertisement. You, in your business, you use the business "spot" to be a "spot market", in other words. a local—

A Strategic market area.

Q Yes.

A In which they can break out and advertise with an additional emphasis on that particular market, such as stations which you may get only in Los Angeles.

Q That would be a spot—

A Los Angeles would be a spot market, so that strategic are becomes a spot market as opposed to what you're considering as a spot, being the thirty second segment that's available to sell to an advertiser by your radio station.

Q Either on a national or a local station?

A Right.

Q Okay. Good. Let's kind of keep going [4042] clockwise now. So that would then be the southwest quadrant, continuing in a clockwise direction, which

says, "merchandising twenty-three percent" and then it has some other words.

A Merchandising has a total budget of approximately one point one five five million dollars; that would include our field staff activities, the incentive programs, the contest programs, retail center projects, retail projects which are special projects with retail, and our point of sale material, which is supplied. And so the total budget for those activities is one point one five five million, which comprises of about twenty-three percent of the total budget.

Q And by point of sales, you've abbreviated that as "POS"?

A Yes.

Q Okay. And can we continue going clockwise to the next one which says, "Publicity and Education, five point five percent"?

A Right.

Q That publicity and education totals approximately two hundred and eighty thousand dollars, which is approximately five point five percent. Those would be our activities with food editors, encouraging them to write these major releases that you see on your food page ads, [4043] using our photographs and some of our material. Also work with the Department of Extension; it's a non paid for advertising, which a lot of newspapers and magazines will use when you read an article—recipe development of a magazine. The magazines don't develop them; usually it's from an organization such as ours.

Q I see. And continuing clockwise, again, the next one says "Canada six percent".

A The Canadian program is—we're on a cooperative basis with the State of California on our export market development program, so that is one of the reasons it is broken out specifically. And that includes some French and English advertisements in the major markets, Toronto, Montreal, Vancouver. The three major markets in Canada.

Q Those are about three hundred thousand bucks?

A Yeah. There's about three hundred thousand dollars for that. It includes basically an overlap of their point of sale material, some French material, also some PR work; a lot of work with the Canadian wholesalers as far as their conventions.

Q Is that so that the scripts or the television scripts and the radio scripts that we have in evidence would be basically the identical scripts but they would be in the French language?

A Yeah, they're pretty close. I'm not—I [4044] don't speak French but they told me they're—

Q They're about as close a translation as you could do in the French language, I take it?

A Yes. And those are in the Montreal—because Montreal and Quebec are a French-speaking area.

Q I understand. And the next one in the clockwise directions says, I think it says "Trade, five percent".

A Trade activities include direct promotions such as those inserts in the packer, an advertising promotion guide which we send out to retailers to let them know what kind of a program that we're going to have in place during our coming season; attending

some of the trade shows, PMB, United, which Mr. Elliott talked about earlier on, and those are all included in that trade package, as far as our trade awareness package, or trade awareness section of our Market Development Program.

Q So it's going to various—it's written materials given out say, as inserts, like Mr. Parker testified about the inserts in the packer newspaper or inserts into various trade papers and actually going to various trade shows; that type of thing?

A Yes.

Q That's the five percent, two hundred and forty thousand dollar figure? Okay, and then the last one?

[4045] A Okay. The last one, you can see how my graphic have kind of fallen apart; as you see, it's nearly three times as big as trade and it's much smaller percent.

Q So what you're saying is the size of the pie that you've drawn on this chart is just free hand, and it doesn't actually reflect the percentage? We should be looking at the numbers?

A The numbers are accurate but the actual configuration is, obviously, off.

Q Yes. And the last slice of the pie, so to speak, reads "Research, two percent"—I can't read—

A "Food service, two point five percent".

Q That's an "F", the first letter is an "F", okay. I'm going to write over that a little bit. Food Service, two point five percent.

A Yes. Two point five percent.

Q I'm going to make the point a little darker. And then miscellaneous, two-percent—

A A lot of the miscellaneous is the—some of the photography that we do, like for during the 1989 season, if we're doing photography for new materials for the 1990—we have to do them during '89. You wouldn't have fruit available if you waited until 1990 to do it.

Q I see.

A The turn around time would be too short; we're [4046] just not able to do that. So that's some program development that the money would be included in "miscellaneous".

Q So "miscellaneous food service and research" adds up to about nine point five percent. And that would be of the five million eighty thousand dollar figure?

A Yes.

Q Okay. That concludes—oh, there was one notation you had made on the chart; you have a little asterisk or footnote alongside the word "miscellaneous" in the last quadrant we talked about. And there's a little footnote at the bottom. And it just says, "See note number 1; artwork has not improve". What do you mean by that?

A I think when the first—it refers back to 351. The note on the bottom of your Exhibit 351, the asterisk, not proportionate to the pie chart.

Q Oh, okay.

A That's all that means; I was trying to explain that these are not proportional.

Q Okay. So the little footnote was there just to remind us that these pie charts aren't—aren't proportional to the percentages being discussed within the pie chart?

A Right. And the asterisk is consistent—because the 351 and 348 are different numbers but fairly [4047] much the same chart.

Q I see. That makes sense. Let's put that one there so we don't get confused with that one.

Let's turn this one down so we don't get confused and then go the next 1989 Exhibit, which is Exhibit 349, that we tagged in the right hand corner.

This appears to be a different pie chart and this pie chart, again, it seems to have on, two, three, four, time zone quadrants. And then there's little sub-quadrants within that. Now can you take us through the major types of quadrants first?

A Exhibit 349 is the 1989 Spot Radio Markets and National Media. And the assumption you have to make is with a national program is that it's pretty much very similar to the population or the demographics of the U.S.

Q Let me interrupt you one second. And I just want to make the record clear, again, with respect to Exhibit 349, I'm now looking at the top of Exhibit 348, where you've put the 1989 Market Development—I should say, Domestic Market Development is budgeted five million eighty thousand dollars; is it fair to say that Exhibit 349 is just another way of looking at how the money was spent?

A Only the portions that you've talked about being in the northeast quadrant and southeast quadrant. The rest of the money is—

[4048] Q Is not—

A —on a different, you know, basically we've looked at them as national programs so they're spent nationally, except for Canada.

Q The point I'm trying to make is that, is it fair to say—is it fair to say that the right half of the pie that's shown on Exhibit 348, only the right half, that is your television and radio expenditures, are exhibited on 349?

A Yes.

Q Okay.

A You get by implication there are things that—or by inference, you could use the data on 349 and come up with the answer—with the rest of the chart but it's specific to those two areas.

Q Okay

A That's what I thought you were requesting.

Q Exactly. Now I understand that you've broken down the TV and radio monies by time zone, as I requested, in these four major quadrants?

A Basically the national program are going to go where the population is. So these are just broken up into the time zones. Obviously, there is more population on the East Coast than there is in the South area, so because there's more people in that area there are more radio [4049] stations, there's more opportunity for them to hear. They have more people to hear those spots and it cost you more money based on the number of people who happen to hear a particular spot.

Q So is the—when you say and I'll call it the right hand quadrant of the pie—

A We're just talking about now, the big black numbers on this; I'm just talking about the big black numbers.

Q So where its says, "fifty-three percent East Coast", "twenty-six percent Central", "three percent Mountain" and eighteen percent, West Coast", those are the four quadrants we're talking about?

A Basically, yes.

Q Okay. Now we're talking about percentage of money, again, here aren't we?

A Yes.

Q And that would be—

A We're talking—

Q —money that was spent and referred to in the Northeast and Southeast quadrant of Exhibit 348? In other words, if we added the one million four hundred and forty one thousand dollars from the Northeast quadrant of Exhibit 348 to the one million one hundred and forty-nine thousand—one million one hundred and fifty nine thousand dollars [4050] of the Southeast quadrant of Exhibit 348, that TV time and radio time was then spent in these approximate percentages in the East, Central, Mountain and West Coast time zones as shown on Exhibit 349? Am I understanding that correctly?

A Not exactly. For example, fifty-three percent is on the East Coast, based on population.

Q That's on Exhibit 349?

A On 349, fifty-three percent. So if you would look at our national network and cable, all of our TV in 1989 was national. So from it, you could infer that fifty-three percent of the one point four million dollars is approximately how much money was earmarked into the East Coast for national media programs. You could, by the same token if you went on the radio, you could take this fifty-three percent times—you'd have to take the total radio spot, network radio, one million one hundred and fifty-nine thousand dollars, deduct that that was specifically for spot, because spot is indicated differently on 349, and so you take that, you'd have roughly nine hundred thousand times the fifty-three percent, so that would give you how much was spent in that particular market.

Q Okay. SO the major quadrants then of fifty-three percent East Coast, twenty-six percent Central, three percent Mountain, and eighteen percent West Coast, as shown on 349 Exhibit number, do not include the very small spot [4051] market entry on the bottom southeast quadrant of Exhibit 348? Those are shown separately on Exhibit 349?

A Right

Q Okay.

A This is where it becomes a bit more confusing. On 349 we were in spot market radio in Boston, Chicago, Dallas, San Francisco and Washington, DC. Those particular markets, San Francisco, Boston, Washington, Dallas and Chicago, the numbers indicated in their section of the pie is their proportionate share of the U.S. population. Intuitively, if you look at 49—

Q 349

A I mean, 349. To look at this table intuitively, you can see that we had additional—additional advertising on the East Coast in these two markets, which is in the East Coast Boston and Washington, DC, which means that you actually end up with more dollars because you did more work in those particular markets.

Q Because you gave them a little particular spot here?

A You gave them a little kick with some spot radio.

Q Okay.

A The same thing in the West Coast. We had a little in the San Francisco Bay Area because our statistics [4052] and some of the studies have shown that that's a good market for our product so we give a little and the population is there, so we gave an extra kick there.

If you wanted to determine how much of this two hundred and sixty thousand dollars was spent in each of those spot markets, then the way—you would accumulate the percentage of the population in each of these areas, say the percentage is going to be a relative number, take the San Francisco Bay Area, Boston, Washington, Chicago and Dallas, and you end up with roughly nine point four percent of the population. You divided by the individual, you can say, well approximately ten to fifteen percent was in the Bay Area, ten to fifteen percent in Boston, twenty to twenty-five percent in Washington, DC, of the two hundred and sixty thousand. Twenty to twenty-five percent in Chicago, and ten to fifteen percent in

Dallas, Fort Worth of that two hundred and sixty thousand.

That would then allow you to come up with a specific figure and then you could calculate roughly the exact amount of money that went into those particular large areas, East Coast, West Coast.

Q I see, you would just do a proration of those little spots that are shown—

A Yes.

Q —against a spot market of two hundred and [4053] sixty thousand that's shown on Exhibit 348?

A Yes. I would have done that; I ran out of time.

Q That's all right.

A But it can be accomplished.

Q Yeah, that's understandable; thank you. Let me turn to the next one, then, which I understand is our last chart for the 1989 harvest season, which is marked as Exhibit 350, what I called the time chart. And it says at the top, for the record, "1989 Percent of Budget By Item and Timing". And can you explain this graph, please?

A One of the problems with this graph is that I was requested to do it on a percentage basis; well, a hundred percent of a small number, if you look at the hundred percent looks like alot-a hundred percent of five thousand dollars if five thousand; whereas ten percent of a million is a hundred thousand. Now some people would rather have a hundred percent of something; I would rather have ten percent—

Q Of a larger—

A Of the larger number. So the numbers here are distorted.

Q That's why you wrote in the numbers beside?

A So then what I did along the top of things was to—I added some numbers to—so it would not be [4054] distorted or provided the numbers so someone could figure out exactly. And as a good example of that—

Q Well, first of all, just for the record, just to go through the steps. I take it, the bottom has some numbers and those are weeks?

A The bottom is the weeks; we have an eighteen week radio program.

Q So it goes for radio and television?

A Radio and television but our radio program is constant for the eighteen week and so the TV or spot radio, you can see what weeks that we ran spot radio or spot TV and what time period we would use to increase the amounts of advertising. But our total program is eighteen weeks.

Q I see.

A Our total media program is eighteen weeks.

Q Or at least was in that particular season, starting with May 22nd?

A Yeah. And you'll find it was the same in the following year.

Q I see.

A Or the preceding year also; eighteen weeks.

Q Again, just so the record is real clear, I think you've probably said it once already but just to make

sure that we're understanding this correctly, if I look at Exhibit 348 and I look at Exhibit 350, you are only graphing [4055] on Exhibit 350 the expenditures of the Northeast and Southeast quadrants of Exhibit 348.

In other words, you are only graphing on Exhibit 350, the monies spent on TV and radio market development, rather than the monies spent on other types of domestic market development?

A That's true.

Q Thank you. Now can you please proceed with your explanation of Exhibit 350?

A This also will explain some of the reasons on our percentage. The national network radio runs the complete eighteen weeks but our research has shown that the earlier a buyer starts, the more opportunities they will have during the season and the more purchases they will make.

Q Excuse me. Time out one second. Can you show her Honor and I and Mr. Cooper how, by looking at this chart, we can see that the radio ran for the full eighteen weeks? I notice you have little boxes here and yellow markings?

A Radio and then radio.

Q Okay. Just so I can describe it for the record, if we look at the bottom left hand—I'm sorry. If we look at Exhibit 350, on its southwest corner of the graph, you see a little box where you've marked the word [4056] "radio" in yellow. And then if we look to the southeast box, you've also marked in a "radio" trying to show us that radio advertisements ran the full length of the eighteen weeks?

A Yes.

Q And why are those in two separate boxes? You have a southwest box marked "radio" and you have a southeast box marked "radio"?

A The comments made in the first radio box says, "radio eighteen weeks, a hundred and fifty points per week" and a hundred and fifty points per week has to do with how many times you reach a person in a target market audience in the market. So the more the points, the more obnoxious the ads become, the more times you have to hear them. And there are some that have the—I think the—some of the radio ads that you hear every morning, and they're probably cute for a week and then they get old. We hope we don't get to that level but that's what these points mean. And so what we're saying here is —

Q It's an advertisement point system?

A Yes. It's what they call rating points; gross rating points. It has to do with the number of—the number or people you reach and the number of times you reach them.

Q I see.

[4057] A In our target market audience.

Q Okay.

A Approximately ten percent per week of the radio budget goes into the first six weeks of the season, which I've got ten percent per week, which is approximately on a national radio during that year, was approximately ninety thousand dollars per week.

Q Okay. Let me—yeah, let me—after the ninety, let me put a comma and three zeroes; they didn't come through. Let me make them a little darker. Let me put a point zero zero for the cents. So you're

referring to ninety thousand dollars a week being spent for eighteen weeks?

A No. For the first six weeks to purchase these hundred and fifty points. See this—if you notice the line, it only goes over to right opposite the—that says six weeks.

Q Oh, I see. So let me just kind of circle the six weeks on to that line. So it's ninety thousand dollars a week for those radio spots for six weeks?

A And after those six weeks have been completed on their national radio, we reduce the coverage to fifty points per week, the same kind of ads. We do change the ads, but basically now we go down to fifty points per week.

Q You run them a little less often?

[4058] A Less often. It might not specifically equate to a third, but it would be—I mean, that gives you an idea.

Q I see.

A And that works out for the remaining of about three to four percent per week of the total budget. So we spend approximately forty thousand dollars per week from week six through week eight—or the end of week six or the day beginning week seven through the end of week eighteen.

Q Okay. And I'll circle the week eighteen onto the last line of that box to indicate what you've just said.

A That'll be national network radio.

Q National radio? Okay.

A Now the next part of the graph is basically—is the—see where it goes from ten percent to the twenty-five percent.

Q That's because the ten percent is what you're saying is basically spent on radio?

A Of the radio budget? It was trying to put everything on one table.

Q Yes.

A And when I get to the final, I think the final—once we get through that, I will—the figures up here that are the most significant are along the top—

Q Yes.

[4059] A—and I'll explain those. Okay, the next thing on our National Radio which we started at the very beginning was Network TV. We had six weeks of that beginning with the first week, May 22nd and going through the end of the six week period. A hundred and twenty five points per week, approximately fifteen to eighteen percent of the budget per week, which is roughly—it's an expenditure of two hundred thousand dollars per week beginning with the first through the six weeks. And that went on for six weeks.

Q I see. And then it—did it continue—did network TV continue after the six weeks or it just died then?

A National Network TV, instead of being on the major stations, then shifted from the end of the six weeks, week seven through week fifteen, to a cable TV national programming.

Q With your permission then, I'll draw a little arrow—I'll draw a little arrow proceeding from the

national TV box that ends in week six into the cable TV that begins at week seven?

A Yes.

[4060] Q Okay. And I'll draw the similar arrow from the radio that you've just been talking about so that the boxes will flow?

A Okay. And that lasts until the end of the fifteenth week.

Q Okay. So on cable television, if I'm understanding your system here, at the beginning of the seventh week and ending on the fifteenth—at the end of the fifteenth week, or the beginning of the sixteenth week, in other words, you're spending about twenty-one thousand dollars a week?

A Yes.

Q Okay. I guess that takes us up to about twenty-five percent through thirty percent, which you've marked as cable TV.

A We also had cable going during the same time we had our national network. So our total TV, you might want to bracket here, Tom, just put a bracket like this, total TV —

Q Okay. Let me have you do that, so it's done right.

A I think that's — and I'm marking on the left side, all TV, I've bracketed "cable TV and network TV" together so that you can see that TV is the next cornerstone of the program.

Q I see.

A During the same first six week period, our cable TV was run at fifty points per week at roughly

twenty-[4061] one thousand dollars per week for six weeks. That level stayed—actually the level was constant during our full fifteen week period. What we eliminated was national network TV, which is only for that first six week block.

Q I see. Okay. And then going up the percentage chart, again, from thirty to forty of forty-two or three, whatever that line's at, I see another box. What does that represent? I can't read that.

A The next—the next—actually it's—the other line kind of distorts that — the next real block is for our spot radio program.

Q Okay. Let me—

A Let me draw the arrow from this spot radio to this spot radio and then down to this spot radio.

Q Yeah. And would like to bracket this area here then as all being spot radio?

A I'm going to circle the first spot radio if that's all right.

Q Yeah.

A I'll circle spot radio and it's all highlighted as spot radio.

Q Okay.

A So that's the first one and then I'm going to put an arrow from the first one that lasted for three weeks, so then the next three week period, spot radio went for [4062] another three week period and then I'm going to draw an arrow down to the third three week period of spot radio, for a total of nine weeks of spot radio.

Q Okay. And why did you take the spot radio and put them in these three separate boxes like that?

A The emphasis on the program, again, is the heavy upfront, that people in the market is buying early on.

Q I see.

A So you emphasize that it's available; it's here; it's summer again; let's you know by fruit.

Q Let me see if I understand the chart then. For the first three weeks of the program from May 22nd, for the first three weeks, you're spending about fifty-two thousand a week in spot radio and from about the third week to the sixth week, you're spending about twenty-six thousand dollars a week.

A Roughly half as much as spot radio.

Q And it drops down again from the sixth week through the eighth week, through—

A For about twenty-one thousand a week. It drops down a little bit, yes.

Q Then the spot radio stops?

A Yes.

Q Okay. And then what is the next lines above the fifty mark there?

[4063] A Each of the basic promotion periods, which are—in this particular graph you have a period of where you're doing, you change things after three weeks. The first three weeks you've got a heavy spot radio, heavy cable TV, heavy network TV and heavy radio advertising during that three week period.

Approximately forty-two percent of our budget would be spent during that three week period. And that's the top number on the table.

Q That's a two—

A Forty-two.

Q Okay. I'll circle the forty-two there. And, again, just to make the record clear, I don't mean to keep you repeating it, but that would be forty-two percent within three weeks, starting May 22nd, as shown on Exhibit 350, of the total monies spent on the right half of the pie on Exhibit 348?

A Yes, that's true.

Q Thank you.

A And then the next three week period, the end of week three until the end of week six, in that particular period we have a reduced spot radio for that three week period. We reduced the amount of spot radio; we still have cable TV; we still have national network TV and we still have national radio. So although it's a reduced spot radio, [4064] we still have the full components of the program. During that time period we spend approximately thirty-eight percent of the budget.

Q Okay. Let me circle the thirty-eight. And then I take it that you've—on the next line you've added forty-two and thirty-eight and you've come up with eighty percent.

A Yes.

Q And I'll circle that eighty percent.

A Which says that during the first six weeks of the program, we've now spent eighty percent of our media budget.

Q Okay.

A During the next—

Q Is media budget another word for—that I keep referring to as the Northeast?

A Radio and TV.

Q —and Southeast quadrants on Exhibit 348?

A Media is commonly radio and TV. But it could also be magazine ads.

Q But when you say "media" you're talking about broadcast media?

A Yes.

Q And television and radio?

A Yes.

[4065] Q I see. Okay.

A During the next period which is week six to week eight, we had a two week flight of spot radio; we then had a—we still had our cable TV, but we started on our reduced network radio program. During that particular period, we spent about six point three percent of the budget.

Q And I'll circle the six point three again. And I take it, on the cumulative line, you're now up to eighty-six point three percent and we have the word "cumulative" there again. And I'll circle the eighty-six point three. I take it that's getting us to week eight?

A Yes.

Q That eighty-six point three percent? And I'll make the point on the point three of the eighty-six point three a little darker.

A Then from the end of week eight through the end of week fifteen, where we only have cable TV and national network at the reduced rate, we spent approximately thirteen percent of our budget.

Q Oh, that's a three, okay? Yeah.

A Eighty-six and—

Q Okay. Let me make the three a little clearer, so it doesn't look like an eight. And then I'll circle the thirteen. And then, again, cumulatively we come up to [4066] ninety-nine percent. Now I'll circle the ninety-nine percent.

A The numbers ought to be considered guides. It could be thirty percent or forty percent or forty-five and thirty-five, but it should be a guide to show pretty much how the spending occurs. Then the last remaining part of our—is the approximately one percent, which goes up to the end of the eighteen week period. Approximately one percent in that last period of week sixteen, seventeen and eighteen, that last three week period, which will then give you the hundred percent of your budget.

Q Which is your cumulative amount?

A Yes. And also I have listed on the upper right hand corner of this table how much was spent; network radio, approximately nine hundred thousand; spot radio, approximately two hundred and sixty thousand; cable TV, approximately three hundred thousand; network TV, approximately one point one million. So that's how you can from those figures

come up with my weekly figures or check with my weekly figures.

Q Okay. Let me put those in a separate box so they can kind of stand out. And, again, these figures you've just read here, that was the radio spot, radio and cable TV, and network TV; those, again, are domestic expenditures?

A Yes.

MR. CAMPAGNE: Your Honor, did you have any questions of Mr. Field regarding 348, 349 or 350, before I turn to the next three regarding the prior season?

JUDGE BAKER: Thank you, no. It's quite clear.

MR. CAMPAGNE: Okay. Mr. Field, let's take those one at a time. I'll stack these in little stacks so we don't get them confused.

BY MR. CAMPAGNE:

Q It's my understanding that you used exactly the same system for the next three exhibits which are Exhibits 351, 352, and 353, regarding the 1988 Market Development.

[4067] A Yes.

Q The same system as you used for exhibits 348, 349, and 350, which were the three exhibits regarding the 1989 Market Development?

A Yes. So they should be statistically comparable and the numbers are comparable.

Q So basically the charts are on the same methodology?

A I used the same can lid to draw a circle.

* * * * *

[4071] their radio spots, almost all the radio and TV spots for peaches, plums and nectarines have already been spent?

A The heavy money has been spent, yes.

Q For example, I'm looking at Exhibit 353 and it looks like eighty-six points five percent has already been spent anyway. And that's what you saw—

A Of the media budget, yes.

Q Yes, of the media budget. And that's why you saw no reason to carve out the pears because this really doesn't overlap.

A I didn't feel it would distort the relative numbers, knock a point off here and there.

Q Okay. Oh, there was one question, I'm sorry, I wanted to go back because we roughly looked at it before.

On the '89 Market Development Exhibit regarding—Exhibit number 349, where you've got these spot inclusions for Boston, Washington DC, San Francisco Bay Area, Dallas, Fort Worth and Chicago, were those just radio spots?

A Just radio.

Q Okay. So with your permission, I'll just put a little R by each one of those, or a little r-a-d-i-o, radio.

A It's also—it also mentions that on the other table.

[4072] Q So it will—I just wanted it to jive with that— with that table because I notice for harvest

season '88, you had written radio and TV there, so I thought I would make it consistent by adding the word "radio".

All right. So for the record, I've added the little word "radio" by Mr. Field's spot inclusions on Exhibit 349, so to match up with the Southeast quadrant of Exhibit 348. Okay. We'll put aside the Exhibits 348, 349 and 350, regarding 1989 Market Development Budget and get you back to where we were and that is the 1988 Market Development, three charts of Exhibits 351, 352 and 353.

Again, can you take us through these chart by chart, understanding that you can go a little bit quicker because I think we've got a little understanding of your system on that we've done it once for '89.

This is Exhibit 351 in front of you now and it says, "1988 Market Development Budget Five Million Five Hundred and Twenty-eight Thousand Dollars". And, again, I take it that that's the domestic market development program?

A Yes. The upper right hand quadrant of the Northeast quadrant, as Tom referred to before; total spent, TV highlighted, total spent two point four million divided by the five point five million, roughly forty-three percent of the budget was in all the TV programs, and TV advertising effort.

[4073] Q This would be both spot TV—

A Right.

Q —or what you would call local spot TV and national network TV, including cable?

A Yes.

Q Okay. Let me write the little word including cable.

A I'm not sure if we had cable at that time.

Q Oh, all right. I won't add it then, if you're not sure. But it does include the production costs, the filming costs?

A The production is the royalties you pay for the performers every time it runs.

Q Okay.

A Every time you run an ad you have to pay the performers a royalty for being part of that ad.

Q It's what some people would call script fees?

A I guess.

Q Or after fees for the union.

A Residuals, I think.

Q They're after residual fees.

A In the TV for 1988, if you compared this to the 1989, we were involved in spot television markets.

Q Okay. Now just to make the record clear, in the—on the Northeast quadrant where it says "TV forty-[4074] three percent", you've shown us that the TV budget of forty-three percent was approximately two point four million, but it's two million three hundred eighty-five thousand dollars. And then you've got a little notation underneath that, that of that the spot markets were —

A The listing of the spot markets—

Q Okay.

A Then the cumulative total of those spot markets was roughly two million one hundred and eighty thousand.

Q Okay. Let me make the one a little darker since it doesn't look like it's going to show up when it's xeroxed. So two million one hundred eighty thousand [4075] dollars of the two million three hundred eighty-five thousand dollar TV budget was spot markets?

A Yes. Devoted to these specific markets.

Q Those specific towns or areas or markets? Boston, Chicago, Fresno, Los Angeles, Minneapolis, New York, Sacramento, San Francisco and Washington, DC?

A Yes.

Q And I'll make the dollar sign a little darker because it doesn't look like it might—so it will come out when we xerox it.

Okay. With your permission then, I'll kind of circle the two million one hundred and eighty thousand dollars; make the brackets a little higher so it shows that it's referring to the spot market. And that's out of the two point four million figure?

A Right.

Q Now let's go clockwise again to the next one.

A Following in the same order, the next one is our radio.

Q And this would be both national and local spot radio?

A Yes.

Q Being twenty percent.

A Total spent, one point one million; one million, one hundred and fifteen thousand is the total spent on radio markets, which comprised approximately twenty percent of our project. We also had spot radio. We spent about two hundred and fifty thousand dollars in the spot radio markets of Boston, Chicago, Dallas, Los Angeles, and New York and San Francisco.

Q Okay. Again, if you allow me to bracket that, so it will match the prior quadrant. And I take it, that was—that two hundred and fifty thousand dollars is out of the one million one hundred and fifteen thousand?

A Yes.

Q I see, yes. Next quadrant, please.

A Merchandising similar to before; approximately [4076] one million seventy thousand for merchandising, comprising about nineteen percent of the budget.

Q Okay. And then what did you—what were you intending to mean by the "including" language there, the same as the prior chart?

A Same as in the prior chart; field staff, incentive, no contest contest program, retail projects and point of sale.

Q P-O-S?

A Yes, P-O-S-

Q And that what you mean by the "includes" I'll draw a little arrow; you're giving a definition to the word "merchandising"?

A Yes.

Q I see. Next quadrant please?

A The Canadian program which was similar to the prior year, two hundred and seventy thousand dollars, five percent.

Q Okay. Next quadrant, please.

A Trade activities. Again, the inserts and direct mailings to retail trade, to the trade factors; two hundred and fifteen thousand dollars, approximately four percent.

Q Okay. I'm going to circle the four, Mr. Field, because the percent sign almost looks like a forty, so [4077] I'm going to just circle the four and make the percent sign kind of tie up.

A The public relations and education activities, two hundred and twenty-five thousand, approximately four percent.

Q Okay. I'll circle the four of that PR or public relations column, so that the four doesn't look like a forty.

A Miscellaneous, research one percent; food service, two percent and then just the miscellaneous which is future year development photographs about two percent. So that totals approximately five percent for those

Q Thank you very much. Let me turn your attention then to the next chart in order, which is Exhibit 252 (sic) and, for the record, I understand that the number 252 was done in a manner similar to Exhibit—

JUDGE BAKER: 352.

MR. CAMPAGNE: I'm sorry.

BY MR. CAMPAGNE:

Q I understand that Exhibit 352, which I've just placed in front of you regarding '88, is similarly done as was 349 with respect to '89?

A Yes, very similar. It was done in the same manner.

Q Okay. Can you quickly take us through this [4078] one?

A The national—

Q And "by this one" I'm referring to 352.

A 352, the numbers, the big black numbers are for the national media program, network radio, network TV.

Q Time out; one second. So just for the record, I know it's probably obvious, but just to make it clear, if I look at Exhibit 351 and I look at the Northeast quadrant regarding TV, forty-three percent, and I look at the southerly quadrant which is radio, twenty percent; it's just those two quadrants which are being divided up and divided on Exhibit 352?

A Yes.

Q Okay. Please continue. I'm sorry.

A And then if you notice in the 1988 program we had a much stronger spot market program. We had more spot markets in both TV and radio. The spot markets are indicated with the percentages in high brackets by area, West Coast or East Coast et cetera. There's also like San Francisco Bay Area in brackets has TV dash R, that was both the TV and radio market. Sacramento, Fresno Area, TV; that was TV only. Dallas, Fort Worth has an R, so it is a radio

market only. To come up with some actual applied figures, if you wanted to, for example on the East Coast, if you took fifty-three percent figure as a national network program of [4079] TV, which would be two point three eight five million, less the two point one eight zero spot, so approximately two hundred thousand dollars, fifty-three percent or a hundred thousand dollars was spent on the East Coast for national network TV.

Q And you could do the same thing for the next quadrant on Exhibit 351 with respect to the radio?

A Fifty-three percent of one million one hundred and fifteen thousand, less two hundred and fifty thousand, approximately nine hundred thousand dollars was spent on radio. So that would be approximately four hundred thousand dollars?

Q In the East Coast quadrant?

A In the East Coast quadrant.

Q Basically the same set-up as you've done with the '89 charts?

A Yes. Then if you wanted to take these, as you said before, take the spot markets and use those as a proportion times the spot market numbers for radio and for TV—

Q Which are the little brackets on Exhibit 351?

A 351, and then you could then allocate and come up with a dollar figure number to apply.

Q To those spots?

A Which would give you a total figure spent on [4080] the East Coast.

Q Okay. So for example, I would add up all the little spots, if I wanted to do Washington, DC, Baltimore, divide that into two point four, get a proportion, the other way and get a proportion and then figure out that against the spot market, two point one eight million for TV and two hundred and fifty thousand for—oh, that was just the TV on—

A Yeah, that was the TV on the market—

Q Okay. That would be just against the TV side.

A Ultimately, you would get the dollar figure minus ten. And those are kind of time zone qualities too. So if you would want to follow what we—it was almost by time zones.

Q Okay. Let's go to the last exhibit, which is what I call a time chart, again. I understand that this Exhibit, number 353, which I'm now putting in front of you, which is captioned, "1988 Media Expenditures" is, again, just domestic expenditures. And, again, I understand that what you've done on Exhibit 353, is you've taken the TV, forty-three percent quadrant, and the radio twenty percent quadrant, from Exhibit 351, and you've time spread it on Exhibit 353.

A Yes.

Q In other words, Exhibit 353 with respect to [4081] 1988 is similar to or the same as what you've done with respect to Exhibit 350 regarding 1989?

A Yes.

Q Okay. Let's—

A Do you want to go a little quicker on this one?

Q Yes.

A The significant difference is, we started with the radio expenditure during the first week, radio only, no TV and that lasted for the first week.

Q Now the first—your season started a little earlier, I guess.

A Earlier season.

Q You've got the date May 16 there?

A Yes.

Q Okay. So your season started a little earlier. And you, and for the first week of the season, you only did some radio expenditures and that two point five percent of the expenditures?

A Yes.

Q Okay.

A And then we came on following that, we had a three week radio—we had continued with our national radio, which we've talked about before.

Q Yes.

[4082] A We also had three weeks, from the end of week one to the end of week four, three weeks of national network TV, spot radio and spot TV.

Q So in essence you spent between the beginning—the end of the first week and the beginning of the second week and the end of the fourth week, you spent forty-two percent of the budget?

A Fifty-two percent.

Q I'm sorry; fifty-two percent of the budget. So that in essence by the end of the fourth week, you had a cumulative expenditure of fifty-four point five percent. I'll make the point a little darker.

A Fifty-four point five percent.

Q Okay. By the end of the fourth week?

A And then the way our program was designed, you're on for three weeks and then you have a hiatus for two weeks.

Q Now by hiatus—

A No TV spot, radio—no TV advertising during that two week hiatus from the market.

Q All right. So let me circle the word "hiatus TV spots". In other words, you mean a hiatus in TV spots?

A Right. Well, TV and spot radio also.

Q Ah, hiatus—

A I didn't calculate it each individually.

[4083] Q Okay. A hiatus in TV and in spot radio?

A Yes.

Q All right. In other words, there was none going on?

A Right.

Q Okay. And so you spent a little—so there was a little hiatus there in TV and also a hiatus in spot radio from the end of the fourth week through the end of the fifth week?

A Two weeks.

Q For two weeks? So thus, by the end of the fifth week and the beginning of the sixth week, we had spent an accumulation of fifty-nine point percent of—

A By the end of the sixth week, we had spent, yeah, fifty-nine and a half percent. And the next three

week period, we came back in with TV at reduced levels. We also reduced our level on radio, as you can see, and we spent about twenty-five percent of our budget during that next three week period.

Q And that's the week of—

A Week number seven, eight, and nine.

Q The week ending seven, eight and nine. So that by the end of the ninth week, you had spent eighty-four point five percent cumulatively—

A Yes.

[4084] Q—of your domestic media expenditures for the '88 season?

A Then we had a two week hiatus again, with only national network radio.

Q And I'll circle the hiatus and TV. And, again, that was a hiatus in both TV and also a hiatus in radio spots?

A Yes.

Q Okay. I'll write "hiatus in TV and spot radio"; okay?

A And it came back in for three weeks, the weeks of eleven, twelfth—weeks of eleventh, twelfth, thirteenth, fourteenth, that three week period. We came back in with another TV flight, another three weeks of TV advertising, spot radio advertising, at a reduced level again; seventy-five—twenty-five to fifty rating points. And we spent about ten percent of our budget during that time.

And then at the end of the fourteenth week, we have just the remainder of our radio program, national

radio program, which we spent about three and a half percent of the budget through the end of the season.

But in the comparison of the two tables, I don't know how I'm going to do this, but in comparison of the two tables, as Tom noted, you look at the [4085] number at the end of six weeks, for example, in 1989 eighty percent of the budget had been spent on Exhibit 350. And comparatively, with the same table on Exhibit 353, at the end of the six weeks, we had spent fifty-nine and a half percent. We had a more—in '89 was a more front loaded program than 1988. If we had gone back to '85, '84, '83, you would see it would still have that dramatic front loading effect of the program, to get it off to a—to kind of give it a good kick-start, to begin with.

Q And that's like Mr. Dave Parker testified the tendency has been to front load more and more to get more bang for your costs?

A Yes.

Q And there's a little box in the right had corner of Exhibit 353?

A Yes.

Q And can you explain that, please?

A The upper right had corner of 353 are the numbers that I used for spot TV, two million one hundred and eighty thousand; network cable TV, two hundred and five thousand; network radio, eighty hundred and sixty-five thousand, and spot radio, two hundred and fifty thousand.

Q Thank you, Mr. Field. Again, you've told us something about pears with respect to '89, how they started basically after peach, plum and nectarine

money was already [4086] used up. Was the same true with respect to Exhibit 353 and regarding the 1988 season?

A Yes.

Q About when did the pears plug in, about that eleventh or twelfth week again?

A Right. They plug in around the twenty-second of July, depending on their season, earliness, lateness. And I don't—

Q Again, I take it, they don't do much TV?

A They don't do any TV. They provide a grant to the stone fruits, because on our summer—on the fruit bowl effect, there is a pear.

Q I see.

A You know, subliminally, some people will see the pear and so they do give a grant to the stones because the pear is in the ads.

Q So what you're saying that with respect to TV, they don't put up enough money to really worry about—just a little tiny grant, as I understand it?

A No TV.

Q And they spend a little bit in radio but by then peach, plum and nectarine has spent eighty-six, eighty-seven percent of the budget anyway; is that true?

A Yes, that's true. And also, see, their expenditures—the eighteenth week, I think, is around—[4087] the eighteenth week would probably be around the middle of September. And California is still selling pears out of storage the middle of September; they might have two thousand cars or anywhere—

maybe half of their crop still to sell, so they go into a spot TV buy in collaboration with the Northwest at that time, so it's not that they don't participate, it's that they have different demands on their schedule, their marketing development schedule, and so it does not truly affect these tables that I've presented.

Q So is it fair to say that with respect to all of the tables that we've just talked about, 348 through and including 353, we can just more or less forget about the pear influence?

A I think if you used the numbers and just compared the numbers, that they're relatively correct.

Q Okay. Because the pear numbers aren't significant enough in their timing and sold much later than peach, plum and nectarines, that it's really insignificant; is that what you're saying?

A Yes.

MR. CAMPAGNE: Your Honor, may we have a recess now for our afternoon recess to give me a chance —

JUDGE BAKER: Very well.

MR. CAMPAGNE: —to check the Federal Register for a couple of questions. But I wanted to know if

* * * * *

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket Nos.
F & V 916-3
F & V 917-4

IN THE MATTER OF WILEMAN BROTHERS & ELLIOTT,
INC., A CALIFORNIA CORPORATION AND KASH, INC.,
A CALIFORNIA CORPORATION, PETITIONERS

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE,
RESPONDENT

[Excerpts of Testimony of John Kashiki]

Fresno County Courthouse
1100 Van Ness
Fresno, California
Wednesday, February 14, 1990

The above-entitled matter came on for hearing,
pursuant to Recess, before the Secretary of Agriculture,
at 9:05 a.m.

Before: DOROTHEA A. BAKER, Administrative Law
Judge

[4141] Whereupon,

JOHN KASHIKI

the witness on the stand at the time of the recess,
resumed the stand and was examined and testified as
follows:

DIRECT EXAMINATION (RESUMED)

BY MR. CAMPAGNE:

Q Good morning, Mr. Kashiki.

A Good morning.

Q When we recessed for our evening recess last
night at 6:00 p.m., you had been describing some
efforts that you had made to make the Kash label
known in Chili and the United States and in Japan and
so I want to start this morning's testimony with a
broad question to you and that is, why are you so
devoted to giving recognition to the Kash label?

A I think because a very important thing is
getting the buyer or my wholesaler recognition of the
Kash label and also familiar with the housewife or the
consumers, recognition of the Kash label. I think
that's very important.

Q You sell to a lot of chain stores?

A We sell a lot to chain—primary most of it to the
chain stores and we—

Q And you're trying to get recognition from [4142]
the chain store buyers of the Kash label?

A Yes.

Q And also from their customers, the housewife?

A The housewife, right down to the consumers.

Q I see. Why is that so important to you to have
Kash label recognition of the chain store buyers and
of the housewives that shop at the chain stores?

A Well, this had been about ten years ago on one of
my trips back east, one of my good friends from South

Carolina and he was selling his peaches with his recognition of Sunnyslope Farm at a higher price and here the California peaches and nectarines were side by side selling at a cheaper price and the movement, it was about maybe one hundred to one. Why the Sunnyslope label? Recognition is very important and—

Q Let me see if I understood you correctly, what you're saying is that ten or more years ago, you were visiting a farmer friend of yours in South Carolina who had the Sunnyslope label?

A That's right.

Q And you and him were in a store together and noticed that your peaches weren't moving and his were moving about one hundred to one?

[4143]

A That's right.

Q And you determined that that was because no one knew your label but everybody knew his label?

A That's right.

Q Is Sunnyslope a pretty famous label in South Carolina?

A I think it's—on the far—on the eastern coast I think it's very famous over there. In fact, his demand exceeded his supply and so I told him maybe I could supplement that, you know.

Q You wanted to copy his idea—

A Or even supplement for the price that he was getting and—

Q And that's when you and him were in that store together, was he even getting more money for his peaches than you were for yours?

A Well, they wouldn't even look at mine. I mean, they were buying Sunnyslope Farm peaches. And I

think our quality peaches, plums and nectarines were just as good.

Q As his?

A As his.

Q But they were—

A As anybody, I think in California we have pretty good fruit. I think—

[4144]

Q But they were buying his anyway?

A Buying his. And it wasn't the price factor because I can show the time that some of his were sixty-nine cents a pound and we were trying to sell at thirty-nine cents a pound and the consumer would turn around and keep buying the sixty-nine cents.

Q Because they knew his label?

A Evidently.

Q And then you—this was ten or more years ago when you then learned that lesson and decided to copy Sunnyslope and start building your own label?

A Let's don't say ten years, because it makes me pretty old, it seems like just a few years back. It's been a few years.

Q We don't want to age you.

A They're trying to put me out in the pasture already, and I don't want to expedite them, but it's been a few years and Mr. —from Sunnyslope—Louis Gonseones (phonetic), a very close friend of mine. He's been over to my place and I've been over to his place and he says, "why don't you do something"? And he says I can show you different areas, I want you to go up to Cincinnati and Minneapolis and whatnot. And I went to those areas.

Q You took this gentleman's advice that owns [4145] Sunnyslope label?

A Right, I made some trips back there and I did some surveying so I was probably there for about two weeks. Just general survey exactly how the movement was going, what type of promotion, what type of ideas. And these things really come to my mind and so at that point I wanted Kash recognition. Brand recognition, I guess you would call it. Also to the—

Q This is after doing some surveys as to how important brand recognition is to the Kash company?

A Right. And in the Cincinnati area we have what we call a Sweetheart Plum. It's a new variety that comes in late. And it's through this we thought maybe we could get a little more recognition. And so what we did, we had—we didn't have too much varieties, but we had a lady cut the little pieces up and you've probably gone to the store where they give you a little taste and see what it tastes like. If it's good you'd go back and if it's bad you'd just keep on walking.

Q A sampler lady in the store?

A I guess you would call a sampler lady. And we did this in Cincinnati and it was amazing what were the results. Some little child walking by with their mother and gave her a piece of this. And the child ate this. First thing I knew, grabbing the mother [4146] back and he says, I want a bag of this. And we were selling that, if I'm not mistaken, almost about a dollar a pound. But we didn't have too much but we just wanted to see if it would move at a dollar a pound. It was no problem, the price. So the price is not the thing. I think it's the recognition, what that—of the variety of that fruit, plus I think if it's Kash they're going to come back and keep buying Kash regardless of what it is.

So I think a Kash brand recognition is very important. Not only from the buyer's standpoint but also from a consumer.

Q Now you told me one time that you even received letters on you Kash recognition advertising program from some of the consumers asking where they can find more Kash labels and things like that.

A Well, this is not only for stone fruit, but we also try to put this on an individual product itself and when this was on display and I think you have some of those little stickers—

Q Rodney showed us some of those little stickers—

A And from different varieties, we have different labels for designating how to cook the merchandise or how to store it or something like that. [4147] And we've gotten letters back and they say, where can we still buy the certain product? So I say, go to your store manager and request Kash brand and we would be very happy to accommodate them.

Q Is it fair to say, Mr. Kashiki, that you strongly believed that the chain store buyers recognition of the Kash label and their consumers recognition of the Kash label, in your opinion, is one of the reasons for your company's good success?

A Yes, that's right.

Q Now, is it also fair to say that if you didn't have to give the advertising assessments to CTFA you would instead spend that money promoting your own Kash label?

A I think I would have spend a lot more money than what I have cause I think I'm limited to what I could do at this present time and I think it's part of the budget. It's like any other business, you can do so much and that's it.

Q So, what you're saying is that by CTFA, taking about eighty thousand dollars a year from you, I guess is approximately what was stipulated when Rodney was testifying, that that has limited the amount of money you could spend promoting your own label because of budgetary factors?

[4148]

A That's right. At least if they give me eighty thousand dollars more I could spend and I can spend and evaluate it whether we're getting results from that. And I think it would help to get Kash recognition to the—down to the consumer level.

Q Now I wanted to show you a picture—I wonder if I can mark this photograph next in order. For the record, Mr. Kashiki, I've marked a photograph that appears to be a photograph of a fruit display in a store with the Kash labels, with the fruit kind of cascading down at an angle towards it. It's a photograph of maybe about five inches by seven inches, something like that. Is that the type of in-store—is that a sample of the type of in-store promotion that you've started doing for some years now, ever since Sunnyslope gave you the idea of pushing your Kash label?

(The document referred to was marked as Exhibit P 357 for identification.)

(Witness proffered document)

A This is one of the projects that we started. I think—in other words when they come up to buy something, they buy the fruit and right below it Kash stands out. We have it right out in the open. And if—something has to be with you, you can hear a lot

* * * * *

[4193] In other words, if I want to turn around and put them through a hydro cool forced air, that's my judgment. Don't tell me what I can do and what I can't do. I'm not telling you or anybody else to go to hydro cool or—by going to hydro cool in the same definition we got a lot of favorable results.

And on our box that we put the Kash on the side, we put hydro cool and a lot of the buyers would want this hydro cool fruit because Kash is the one that has it. Now everybody, there's quite a few people that have hydro cool so it doesn't give me advantage, so now we're going to have to change our method of doing other things here in advertising merchandising and this is why I like to go out into the areas where they handle the fruit, not only the packing end of it, but the handling of the fruit.

Q You mean—without—you like to visit retail stores—

A Retail stores, and see how the housewife, the consumer that buys the product. Why did you buy this? And it's been changed over a period of years. And—

Q In the surveys you've been conducting?

A In the surveys I've been conducting. I know when I went to the Orient, it's a different type of [4194] market and different type of product that they want. You might like one type I might like different. I know you talked to yesterday—he got up there and said he liked nectarines—which he thinks are the best. I don't think they're the best, that's his opinion, but I think on my end, I like the John Rivers, or Stand Rivers nectarine, I think that's a better nectarine, so to each his own.

I think we have a different taste, we have a different opinion and—but don't tell me what I can do and what

I can't do. I think this is a free enterprise and we'd like to be—do what we want to do. I think that's what makes it challenging and it makes it real interesting. And not to follow somebody else but do things that you want to do to make a better product.

To make the consumer happy, that they want to come back to, that's my reward. I want the consumer to be able to come back, I want the Kash label, I want that product, it's not dollar and cents wise, that's Rodney's department. As far as I'm concerned, I want the people who are happy on the other end to be able to come back and say I want Kash merchandise, Kash merchandise. I think that's my reward and how do you determine that in dollars and cents.

Q And you don't want your money being spent [4195] promoting someone else's—

Some else—well, if they want to do that fine, that's up—certainly I'm not going to tell them what they want to do. If they want to contribute voluntarily to a certain organization to do TV or radio advertising, that's fine, but let me do the way what I want to do, the way I think it's good.

MR. CAMPAGNE: Thank you, Mr. Kashiki, excuse me one moment.

Your Honor, may we go off the record for a minute?

JUDGE BAKER: Off the record.

(Whereupon, a short recess was taken.)

JUDGE BAKER: We are now back on the record.

MR. CAMPAGNE: Yes, your Honor, I have no further questions for Mr. Kashiki at this time.

JUDGE BAKER: Very well—

MR. CAMPAGNE: Other than, I would like to move into evidence the picture of the squash, which is 356, the picture of Mr. Kashiki and his wife in front of their Japanese office, in Japan, which is Exhibit 355.

I'd like to move the picture of the fruit in the store kind of cascading down the Kash label boxes which is 357 and then I would like to move in the photocopies of the

* * * * *

Section 501(a)-(d) of the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 1029, provides as follows:

SEC. 501. COMMODITY PROMOTION AND EVALUATION.

(a) **COMMODITY PROMOTION LAW DEFINED.**—In this section, the term “commodity promotion law” means a Federal law that provides for the establishment and operation of a promotion program regarding an agricultural commodity that includes a combination of promotion, research, industry information, or consumer information activities, is funded by mandatory assessments on producers or processors, and is designed to maintain or expand markets and uses for the commodity (as determined by the Secretary). The term includes—

(1) the marketing promotion provisions under section 8c(6)(I) of the Agricultural Adjustment Act (7 U.S.C. 608c(6)(I)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937;

(2) Public Law 89-502 (7 U.S.C. 2101 et seq.);

(3) title III of Public Law 91-670 (7 U.S.C. 2611 et seq.);

(4) Public Law 93-428 (7 U.S.C. 2701 et seq.);

(5) Public Law 94-294 (7 U.S.C. 2901 et seq.);

(6) subtitle B of title I of Public Law 98-180 (7 U.S.C. 4501 et seq.);

(7) Public Law 98-590 (7 U.S.C. 4601 et seq.);

(8) subtitle B of title XVI of Public Law 99-198 (7 U.S.C. 4801 et seq.);

(9) subtitle C of title XVI of Public Law 99-198 (7 U.S.C. 4901 et seq.);

(10) subtitle B of title XIX of Public Law 101-624 (7 U.S.C. 6101 et seq.);

(11) subtitle E of title XIX of Public Law 101-624 (7 U.S.C. 6301 et seq.);

(12) subtitle H of title XIX of Public Law 101-624 (7 U.S.C. 6401 et seq.);

(13) Public Law 103-190 (7 U.S.C. 6801 et seq.);

(14) Public Law 103-407 (7 U.S.C. 7101 et seq.);

(15) subtitle B;

(16) subtitle C;

(17) subtitle D; or

(18) subtitle E.

(b) **FINDINGS.**—Congress finds the following:

(1) It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.

(2) These generic commodity promotion programs, funded by the agricultural producers or processors who most directly reap the bene-

fits of the programs and supervised by the Secretary of Agriculture, provide a unique opportunity for producers and processors to inform consumers about their products.

(3) The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor.

(4) The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.

(5) It has never been the intent of Congress for the generic commodity promotion programs established and funded by the commodity promotion laws to replace the individual advertising and promotion efforts of producers or processors.

(6) An individual producer's or processor's own advertising initiatives are typically designed to increase the share of the market held by that producer or processor rather than to increase or expand the overall size of the market.

(7) In contrast, a generic commodity promotion program is intended and designed to

maintain or increase the overall demand for the agricultural commodity covered by the program and increase the size of the market for that commodity, often by utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ.

(8) The commodity promotion laws establish promotion programs that operate as "self-help" mechanisms for producers and processors to fund generic promotions for covered commodities which, under the required supervision and oversight of the Secretary of Agriculture—

(A) further specific national governmental goals, as established by Congress; and

(B) produce nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding the markets for the covered commodities.

(9) While some commodity promotion laws grant a producer or processor the option of crediting individual advertising conducted by the producer or processor for all or a portion of the producer's or processor's marketing promotion assessments, all promotion programs established under the commodity promotion laws, both those programs that permit credit for individual advertising and those programs that do not contain such provisions, are very

narrowly tailored to fulfill the congressional purposes of the commodity promotion laws without impairing or infringing the legal or constitutional rights of any individual producer or processor.

(10) These generic commodity promotion programs are of particular benefit to small producers who often lack the resources or market power to advertise on their own and who are otherwise often unable to benefit from the economies of scale available in promotion and advertising.

(11) Periodic independent evaluation of the effectiveness of these generic commodity promotion programs will assist Congress and the Secretary of Agriculture in ensuring that the objectives of the programs are met.

(c) INDEPENDENT EVALUATION OF PROMOTION PROGRAM EFFECTIVENESS.

—Except as otherwise provided by law, each commodity board established under the supervision and oversight of the Secretary of Agriculture pursuant to a commodity promotion law shall, not less often than every 5 years, authorize and fund, from funds otherwise available to the board, an independent evaluation of the effectiveness of the generic commodity promotion programs and other programs conducted by the board pursuant to a commodity promotion law. The board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this subsection.

(d) ADMINISTRATIVE COSTS.—The Secretary shall annually provide to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate information on administrative expenses on programs established under commodity promotion laws.

Supreme Court of the United States

No. 95-1184

DAN GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROTHERS & ELLIOTT, INC., ET AL.

[Filed: June 3, 1996]

ORDER ALLOWING CERTIORARI

The petition herein for a writ of certiorari to the
United States Court of Appeals for the Ninth Circuit
is granted.

21

Supreme Court, U.S.

FILED

AUG 23 1996

No. 95-1184

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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5700

QUESTION PRESENTED

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1184

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 58 F.3d 1367. The opinion of the district court (Pet. App. 40a-100a) is unreported. The opinions of the Judicial Officer of the Department of Agriculture (Pet. App. 114a-268a) are reported at 49 Agric. Dec. 705 and 50 Agric. Dec. 1165.¹

¹ The Judicial Officer (JO) issued two decisions, one dismissing each of the administrative petitions that respondents, and others, filed in the administrative proceedings that led to the present case. Because of the length of the JO's decisions, and the fact that they are reported, we reproduced in the appendix to the petition (Pet. App. 113a-274a) only the JO's decision that addresses the question presented here.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1995. A petition for rehearing was denied on September 18, 1995. Pet. App. 2a. On December 15, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including January 16, 1996. On January 11, 1996, Justice O'Connor further extended the time within which to file a petition to and including January 24, 1996. The petition for a writ of certiorari was filed on that latter date, and was granted on June 3, 1996. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 are 7 U.S.C. 608a(6), 608c(1)-(4), (6), (7) and (15), and 610(b)(2) and (c). They are reproduced at Pet. App. 275a-286a.

The relevant regulations implementing the Act are 7 C.F.R. 916.20, 916.31, 916.40, 916.41, 916.45, 916.62; and 7 C.F.R. 917.4, 917.16, 917.20, 917.30, 917.34-917.37, and 917.39. They are reproduced at Pet. App. 287a-296a.

STATEMENT

This case presents a First Amendment challenge to provisions in the marketing orders for California peaches, nectarines, and plums issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U.S.C. 601 *et seq.*

and omitted from that decision the concluding portions that have no bearing on the First Amendment question.

The challenged provisions impose mandatory assessments on the handlers (i.e., packers and distributors) of California peaches, nectarines, and plums. The assessments are used to finance the administration of the orders, including the generic advertising of the covered commodities. See 7 C.F.R. 916.45 and 917.39.

1. Congress passed the AMAA in 1937 in order to address the serious problem of instability in the agriculture industry and the resulting threat to the national economy. In enacting the AMAA, Congress determined that:

[T]he disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure[,] and * * * these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

7 U.S.C. 601. The Act seeks, through a variety of means, to "establish and maintain * * * orderly marketing conditions for agricultural commodities in interstate commerce," 7 U.S.C. 602(1), and, "in the interests of producers and consumers," to provide an orderly flow of supply of the commodities so as "to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. 602(4); see *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 543-546 (1939). As relevant here, the Act authorizes the Secretary to develop and implement "minimum standards of quality and maturity" and "production research, marketing research, and development projects." 7 U.S.C. 602(3).

The AMAA authorizes the Secretary to carry out his statutory duties by issuing marketing orders for certain commodities, including peaches, nectarines, and plums. 7

U.S.C. 608c(1) and (2). A marketing order may include limits on the quantity, quality, grade, and size of the commodity that may be marketed. 7 U.S.C. 608c(6)(A). It may also provide for "production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption" of the commodity. 7 U.S.C. 608c(6)(I). The Act specifies that such projects may include—with respect to certain commodities, including California-grown peaches, nectarines, and plums—"paid advertising." *Ibid.*² The Act further provides that "the expense of such projects [is] to be paid from funds collected pursuant to the marketing order." *Ibid.*; see also 7 U.S.C. 610(b)(2)(ii) (handlers shall pay annual assessments equal to their pro rata share of expenses of administering marketing orders).

Before issuing a marketing order for a commodity, the Secretary conducts a formal rulemaking proceeding and must in general obtain approval of the order either by two-thirds of the producers (growers) of the commodity, or by the producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. 608c(3)-(4), (8) and

² The provision authorizing the Secretary to establish "marketing * * * development projects" was added to the AMAA in 1954. Agricultural Act of 1954, Pub. L. No. 83-690, § 401(c), 68 Stat. 906. The provision specifying that those projects may include "paid advertising" with respect to certain commodities was first added to the AMAA by the Food and Agriculture Act of 1962, Pub. L. No. 87-703, § 403, 76 Stat. 632 (authorizing paid advertising of cherries), and was extended to the commodities at issue here in amendments to the AMAA made between 1965 and 1971. See Act of Nov. 8, 1965, Pub. L. No. 89-330, § 1(b), 79 Stat. 1270 (extending "paid advertising" provision to, *inter alia*, California plums and nectarines); Act of Aug. 13, 1971, Pub. L. No. 92-120, § 1, 85 Stat. 340 (extending "paid advertising" provision to California peaches).

(9)(B); see *Block v. Community Nutrition Institute*, 467 U.S. 340, 342 (1984); *United States v. Rock Royal Cooperative*, 307 U.S. at 547-548. Once in place, a marketing order is administered under the Secretary's supervision by a committee that typically is composed of producers, or producers and handlers, of the regulated commodity. 7 U.S.C. 608c(7)(C), 610; 7 C.F.R. 916.20, 917.16-917.25. The members of such a committee are appointed by the Secretary, serve without compensation, and are subject to removal by the Secretary at any time. 7 C.F.R. 916.23, 916.33, 916.62, 917.25, 917.30. Among other duties, the committee recommends a yearly budget for administering the marketing order, which includes a budget for advertising and other types of promotion. See J.A. 464 (PX 297x). The Secretary may accept or reject the committee's recommendation. 7 U.S.C. 608c(7)(C); 7 C.F.R. 916.31(e), 916.62, 917.35(f); see Pet. App. 10a-11a (describing budget-approval process in this case). After the Secretary adopts a budget, he promulgates a rule imposing assessments on handlers to fund the budget. See 7 U.S.C. 610(c); 7 C.F.R. 916.41, 917.37; see also, *e.g.*, 60 Fed. Reg. 52,067, 52,068 (1995) (approving expenditures and establishing assessments for California nectarines and peaches for 1995-1996 fiscal year).

A marketing order may be discontinued in two ways. The Secretary must terminate or suspend an order if he finds that it "obstructs or does not tend to effectuate the declared policy" of the AMAA, 7 U.S.C. 608c(16)(A)(i), and he must terminate an order if he determines that a majority of producers does not support it. 7 U.S.C. 608c(16)(B). In addition, a handler who is subject to a marketing order may petition for modification of, or exemption from, the order on the ground that "such order or any provision of * * * such order or any obligation

imposed in connection therewith is not in accordance with law." 7 U.S.C. 608c(15)(A).³

2. This case concerns two marketing orders issued under the AMAA: the marketing order for California-grown peaches and plums and the marketing order for California-grown nectarines.⁴ The marketing order for

³ On April 4, 1996, the President signed into law the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888. The FAIR Act addresses generic promotion for agricultural commodities both by setting forth congressional findings regarding the impact of such promotion, and by creating new authority for the Secretary in this area. See FAIR Act, §§ 501-579, 110 Stat. 1029-1083. Subsection (a) of Section 501 defines "commodity promotion law[s]" to include "the marketing promotion provisions under section 8c(6)(I)" of the AMAA, 7 U.S.C. 608c(6)(I), which is the Act at issue here. FAIR Act, § 501(a)(1), 110 Stat. 1029. Subsection (b) sets forth congressional findings concerning, *inter alia*, the need for and effectiveness of "generic commodity promotion programs established under commodity promotion laws." See, e.g., FAIR Act, § 501(b)(1), 110 Stat. 1030. Subsection (c) generally requires every commodity board established under a commodity promotion law to fund periodic, independent evaluations of the generic promotion program that it administers, to submit the results of those evaluations to the Secretary, and to make the results publicly available. FAIR Act, § 501(c), 110 Stat. 1031, Pet. App. 4a-5a. Subsection (d) relates to the administrative expenses of such programs. FAIR Act, § 501(d), 110 Stat. 1031.

The FAIR Act also grants the Secretary new authority to issue orders, on petition or on his own initiative, establishing boards to develop and carry out nationwide generic promotional programs funded by mandatory assessments on handlers (and importers, with respect to imported commodities). See FAIR Act, §§ 511-526, 110 Stat. 1032-1048. Continuation of such orders is subject to approval by overed persons as determined in periodic referenda. See FAIR Act, § 518(b), 110 Stat. 1043-1044.

⁴ The AMAA requires marketing orders to be restricted "to the smallest regional production areas * * * practicable" and consistent with the Act. 7 U.S.C. 608c(11)(B). For that reason, there

California peaches and plums was first issued in 1939. See 4 Fed. Reg. 2135 (1939); Pet. App. 43a. It was amended in 1965 to authorize marketing promotion projects. 30 Fed. Reg. 15,995 (1965). It was further amended in 1971 to specify that such projects could include "paid advertising" for plums, and began in 1976 to authorize advertising for peaches. See 36 Fed. Reg. 14,381 (1971); 41 Fed. Reg. 14,375, 17,528 (1976). The plum portion of the marketing order ended in 1991, after a majority of plum producers failed to vote for its continuation in a periodic referendum. Pet. App. 5a n.1, 43a; 56 Fed. Reg. 14,633 (1991); *id.* at 23,772.⁵

The marketing order for California nectarines went into effect in 1958. See 7 C.F.R. 937.45 (1959). It has authorized marketing promotion projects since its inception, and has specifically authorized "paid advertising" since 1966. See 31 Fed. Reg. 8177 (1966). A portion of the assessments imposed on handlers by the two marketing orders has been used to pay for generic advertising programs in each of the years at issue here. See Pet. App. 8a n.3.⁶

3. a. The present case arose from two administrative petitions filed pursuant to 7 U.S.C. 608c(15)(A) by re-

may be different orders for the same commodity grown in different States. Compare, e.g., 7 C.F.R. Pt. 946 (marketing order for Irish potatoes grown in Washington State) with 7 C.F.R. Pt. 950 (marketing order for Irish potatoes grown in Maine) and 7 C.F.R. Pt. 953 (marketing order for Irish potatoes grown in southeastern States).

⁵ Respondents seek a refund of that portion of past assessments that was used for the generic advertising program for plums. The validity of that program is therefore not moot.

⁶ "[T]he committees have developed the details of the generic advertising program—radio and TV commercials ('California nectarines are the juiciest'), newspaper inserts ('How to make a peach pie with California peaches'), etc." Pet. App. 8a.

spondents, which are handlers of California peaches, nectarines, and plums. The petitions challenged various provisions of the marketing orders for California peaches, nectarines, and plums in effect from 1980 through 1988. Pet. App. 6a, 41a. The challenges were far-ranging but primarily concerned: (1) the substance of the maturity and size standards for nectarines, peaches and plums⁷; (2) the procedures followed by the Secretary in adopting those standards, and other provisions in the marketing orders; and (3) the generic advertising programs established by the orders.⁸ *Ibid.* As additional handlers joined those challenges, they temporarily ceased paying their assessments. *Ibid.*

The Judicial Officer (JO) of the Department of Agriculture dismissed both administrative petitions (Pet.

⁷ Before the Secretary had disposed of the administrative petitions, respondent Wileman Bros. & Elliott, Inc., brought an action in federal district court challenging the maturity standards in the marketing orders. The district court dismissed that action on the ground that Wileman Bros. had failed to exhaust administrative remedies. The court of appeals affirmed. *Wileman Bros. & Elliott, Inc. v. Yeutter*, No. 87-2938, 1990 WL 163929 (9th Cir. Oct. 29, 1990); see also Pet. App. 6a-7a.

⁸ The generic advertisements and promotional materials produced by the committees under the two marketing orders include paid radio and television announcements, J.A. 396-400 (DX 303), 428-433 (DX 302), 530 (DX 301(b)), press materials, *e.g.*, Wileman II, DX 380, 381, "point-of-sale" materials for distribution at supermarkets and other retail establishments, *e.g.*, Wileman II, DX 383, and children's educational materials, *ibid.* Each of the materials bears the logo of, or is otherwise attributed to, "California Summer Fruits," the "California Tree Fruit Agreement," or both. See, *e.g.*, J.A. 530 (DX 301(b)). "Wileman II" refers to the second of the two administrative proceedings in this case, Docket Nos. F & V 916-3 and F & V 917-4; "Wileman I" refers to the first of the administrative proceedings, Docket No. CV-F-90-473(OWW).

App. 114a-274a), reversing two decisions by an administrative law judge (ALJ) in favor of respondents Wileman Bros. and Kash. See *id.* at 6a. Because the ALJ granted Wileman Bros. relief on non-constitutional grounds, she did not reach the First Amendment question here at issue. See Pet. App. 85a n.36. In the ruling relevant here,⁹ the JO rejected respondents' First Amendment challenge to the Secretary's approval of budgets that included expenditures for generic advertising programs. He determined, *inter alia*, that, assuming that the use of mandatory assessments for generic advertising implicates handlers' First Amendment rights, such use is nonetheless permissible under "cases involving 'union-shop' arrangements," as well as under *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990).¹⁰ Pet. App. 194a-207a. The JO's decision represented the final decision of the Secretary. See 7 C.F.R. 2.35.

b. Respondents filed this action in the United States District Court for the Eastern District of California pursuant to 7 U.S.C. 608c(15)(B), which confers on the district courts jurisdiction in equity to review the Secretary's disposition of administrative petitions filed under Section 608c(15)(A). Contemporaneously, the United States brought 15 enforcement actions against the handlers under 7 U.S.C. 608a(6) to recover unpaid assessments and to require compliance with the maturity stan-

⁹ As noted above (note 1, *supra*), the JO issued separate decisions on the two petitions. Only the later-filed petition challenged the generic advertising programs on First Amendment grounds.

¹⁰ In *Frame*, the court upheld against First Amendment attack a generic beef promotion program created under the Beef Promotion and Research Act of 1985, 7 U.S.C. 2901 *et seq.*, and funded by mandatory industry assessments.

dards in the challenged marketing orders. Pet. App. 7a; see generally *United States v. Ruzicka*, 329 U.S. 287, 289 (1946). The district court consolidated 13 of the enforcement actions with respondents' action, dismissed two of the enforcement actions without prejudice, and ordered the handlers to pay assessments into the registry of the court. In a subsequent decision, the district court entered summary judgment in favor of the Secretary and entered a money judgment against the handlers for approximately \$3.1 million. Pet. App. 108a, 7a.

The district court rejected respondents' First Amendment claims, applying the three-part inquiry articulated by the Third Circuit in *United States v. Frame*, *supra*. In accordance with that inquiry, the district court first determined that the mandatory funding of generic advertising serves the "compelling government interest" of avoiding instability in the Nation's agriculture markets. Pet. App. 89a. The court next determined that the generic advertising programs for California peaches, nectarines, and plums serve the "ideologically neutral" purpose of "bolster[ing] the image of California tree fruit in an effort to increase sales." *Id.* at 89a-90a. Finally, the court found that "[t]he assessment programs' interference with first amendment rights is slight." *Id.* at 90a. It explained that the programs promote products that respondents have voluntarily chosen to market, and that respondents' complaints about those programs reflected only disagreement over advertising strategies. *Id.* at 90a-91a.

The district court also rejected respondents' non-constitutional challenges, including their claim that the generic advertising programs were arbitrary and capricious, and should therefore be set aside under the Admin-

istrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*¹¹ Pet. App. 59a-81a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-37a. It affirmed the district court's rejection of respondents' APA challenge to the paid advertising provisions, observing that "[t]he formal rule-making records accompanying the Secretary's original decisions to implement the paid advertising programs for nectarines, plums, and peaches are replete with evidence that supports his decision." *Id.* at 9a. The court also

¹¹ In other rulings outside the scope of the petition for a writ of certiorari granted by this Court, the district court identified those claims by respondents over which it had jurisdiction, determined the type of relief that was available for those claims, and held, with respect to those claims, as follows: (1) the minimum-size requirements for nectarines were supported by substantial evidence (Pet. App. 58a-62a); (2) the Secretary had good cause for allowing those requirements to take effect in less than 30 days (*id.* at 63a-67a), and committed, at most, harmless error by adopting them after a comment period of less than 30 days (*id.* at 67a-71a); (3) the assessments imposed under the marketing orders, including the assessments for generic advertising, were not procedurally invalid under the APA (*id.* at 71a-84a); (4) the Secretary did not violate the equal protection guarantee of the Fifth Amendment by requiring the handlers of peaches and nectarines produced in California, but not the handlers of peaches and nectarines produced in other States, to pay assessments for generic advertising (*id.* at 92a-93a); (5) the AMAA did not unconstitutionally delegate legislative authority to the Secretary (*id.* at 94a); (6) the proceedings of the tree fruit committees did not violate the Government in the Sunshine Act, 5 U.S.C. 552b, the Federal Advisory Committee Act, 5 U.S.C. App. 1 *et seq.*, or state law (Pet. App. 95a-96a); (7) the handlers failed to demonstrate any illegal conduct by the "California Tree Fruit Agreement" (the term used to identify the committees and staff that administer the two marketing orders at issue) cognizable in the present case (*id.* at 96a-98a); and (8) the handlers were not deprived of procedural due process because of any delay by the Secretary in ruling on their administrative petitions. *Id.* at 98a-100a.

held that there was ample evidence to support the continued need for the programs. It observed that much of that evidence was supplied by the "industry-led committees and their staff," who "engage in a careful process each year * * * in approving the advertising program for the upcoming season." *Id.* at 11a. The court rejected respondents' argument that the Secretary relied too heavily on the Committees, observing that the Committees are made up of "parties with firsthand knowledge of the state of their industry." *Id.* at 12a (citing *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir.), cert. denied, 506 U.S. 999 (1992)).

The court of appeals nevertheless reversed the district court's holding that the challenged generic advertising programs satisfy the requirements of the First Amendment. Pet. App. 15a-21a. The court observed that its First Amendment analysis was "largely governed by" (*id.* at 15a) its prior decision in *Cal-Almond, Inc. v. United States Dep't of Agriculture*, 14 F.3d 429 (9th Cir. 1993), in which it invalidated on First Amendment grounds the generic advertising program established by the almond marketing order then in effect under the AMAA. Adhering to the reasoning in *Cal-Almond*, the court analyzed the generic advertising program in this case under the test for restrictions on commercial speech articulated by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980). Pet. App. 16a (citing *Cal-Almond*, 14 F.3d at 436). Under that test, a regulation that suppresses truthful, non-misleading commercial speech is constitutional if (1) the government's asserted interest in the regulation is "substantial;" (2) the regulation "directly advances" that interest; and (3) the restriction on speech "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

The court held that the government's interest in "enhancing returns to peach and nectarine growers" is substantial. Pet. App. 16a. It further observed that "[t]he Supreme Court assumes as a matter of law that advertising increases consumption of the product being advertised." *Id.* at 17a. Under its prior decision in *Cal-Almond*, however, the court stated that the proper constitutional inquiry "is not whether the generic advertising program has increased peach and nectarine sales—it undoubtedly has. Rather, the question is whether the mandatory generic advertising program sells the product more effectively than the specific, targeted marketing efforts of individual handlers." *Ibid.* (internal quotation marks omitted). The court held that the government had failed to establish that the programs satisfy that standard.

First, the court noted that the sums that respondents paid toward generic advertising "could have been used in their own marketing efforts" (Pet. App. 18a), and that respondents had identified individual advertising techniques that they believed would be more beneficial to them. *Ibid.*¹² Second, while concluding that "the Secretary has demonstrated that advertising increases consumption of peaches and nectarines," the court held that the government had "not gone the necessary next step of demonstrating that the generic advertising program is better at increasing consumption than individual advertising." *Id.* at 20a.

¹² The court noted, for example, that "[respondent] Kash, Inc. claims it benefits more from in-store promotions, and that it would devote more resources to such advertising if it did not have to contribute to the generic advertising program. [Respondent] Gerawan Farming, Inc. suggests that it would advertise its own label." Pet. App. 18a.

The court also held that the generic advertising programs were not narrowly tailored to achieve the government's interest. Pet. App. 20a-21a. Specifically, the court faulted the programs for their failure to include a credit system, whereby handlers may obtain a limited reduction in their assessment for certain of their own advertising efforts. In the court's view, the existence of a credit system in the marketing order for California almonds considered in *Cal-Almond*, see 7 C.F.R. 981.441(c) (1993), demonstrated that the program for nectarines and peaches is not narrowly tailored. Pet. App. 20a-21a.

Addressing the question of remedy, the court held that respondents were not entitled to monetary damages but were entitled to a refund of that portion of past assessments that was used for generic advertising. Pet. App. 32a-34a. The court determined that sovereign immunity precluded an award of monetary damages, but that equitable relief in the form of a refund was available. *Id.* at 32a-33a. The court remanded the case to the district court for a determination of the amount of the refund due. *Id.* at 34a.¹³

SUMMARY OF ARGUMENT

I. Neither the Agricultural Marketing Agreement Act nor the generic advertisement programs at issue in this case suppress or restrict respondents' speech. Rather, the programs use monetary assessments to fund collective activities that have an expressive component. In such circumstances, the appropriate First Amend-

¹³ The court of appeals also rejected respondents' challenge to the fruit maturity and minimum size provisions of the marketing orders. Pet. App. 22a-31a. This Court denied respondents' cross-petition for a writ of certiorari (No. 95-1393) seeking review of the court of appeals' decision with respect to the maturity standards. 116 S. Ct. 1876 (1996).

ment analysis is one that looks to the relevance or "germaneness" of the subsidized activities to the government's important regulatory objectives. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990). That analysis, and not the test for the suppression of commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), is applicable here.

The generic advertising programs comport with the First Amendment under the principles of *Abood* and *Keller*. The programs are undeniably "germane" to the statutory purposes of establishing stable agricultural market conditions and expanding the market for the covered commodities by increasing consumption of those commodities. The system of mandatory assessments also serves the government's interest in preventing the problem of "free riders" within the industry who would otherwise benefit from commodity advertising without contributing to its cost. Moreover, because the challenged programs involve purely commercial speech that promotes consumption of products that respondents have voluntarily chosen to sell, any burden on their speech is minimal in comparison to the union and integrated-bar contexts from which *Abood* and *Keller*, respectively, arose.

II. If we assume, *arguendo*, that the *Central Hudson* test is applicable to respondents' First Amendment challenge, the generic advertising programs satisfy that test. The court of appeals erred by requiring the government to demonstrate that generic advertising is more effective than hypothetical private advertising by individual handlers in achieving the government's objectives. In any event, Congress could reasonably conclude that advertising by individual handlers would not fully serve the

government's interest in a broad-based commercial message, and would not adequately address the problem of "free riders" or as effectively protect the interests of producers, who are at the core of the Act's purposes. Moreover, the court of appeals' test is unworkable, because its results are inevitably the product of speculation about collective private conduct, would shift over time, and would vary depending on the party framing each challenge, thereby robbing the government of the stability and predictability that the AMAA seeks to achieve.

The court similarly erred in concluding that the generic advertising programs at issue here are not narrowly tailored because they do not allow handlers credit against their assessments for advertising their own brands. Such a credit system would prevent the government from addressing the problem of free riders, and is unsuited to the commodities markets covered by these marketing orders. The record here shows not only that generic advertising increases overall consumption of the fruits covered by these marketing orders, but also that generic advertising is the most effective means of expanding the total market for these fruits. The court of appeals thus erred in concluding that the generic advertising programs do not satisfy the *Central Hudson* test.

ARGUMENT

THE GENERIC ADVERTISING PROGRAMS UNDER THE AGRICULTURAL MARKETING ORDERS FOR NECTARINES, PEACHES, AND PLUMS ARE FULLY CONSISTENT WITH THE FIRST AMENDMENT

The marketing orders at issue in this case are designed to stabilize the market for California nectarines, peaches and plums; to improve and promote the marketing, distribution and consumption of those fruits; and to enhance the incomes of the farmers who grow them. The costs of

administering the marketing orders are assessed against the handlers of the fruits on a pro rata basis. Respondents are in the business of selling peaches, nectarines and plums. Respondents nevertheless object to efforts by the committees administering the marketing orders to promote such sales through generic advertising, and they claim a First Amendment right not to pay the portion of their pro rata assessment that is used for that purpose.

Respondents' objections are, however, far removed from the central concerns of the First Amendment. The marketing orders impose no restrictions at all on respondents with respect to their own speech, commercial or otherwise, including whatever advertising and promotional efforts they might undertake on their own. Nor do the orders require respondents to contribute to expressive activities of a political or ideological nature. The generic advertising is pure commercial speech: it proposes and promotes commercial transactions—in commodities that respondents have voluntarily chosen to sell. Such advertising is integrally related to the overall purposes of the marketing orders, which provide for a range of concerted measures in the marketing of the commodities. The orders not only further substantial public purposes, but also further the interests of respondents and other handlers and growers in the California summer fruit market. The requirement that respondents contribute their pro rata share of the overall expenses of administering the marketing orders fairly allocates the burdens of participation in a market covered by a marketing order according to the benefits each handler receives, and thereby prevents the problem of the "free rider." Such a program of commercial regulation represents no substantial interference with interests protected by the First Amendment.

I. THE GENERIC ADVERTISEMENT PROGRAMS ARE CONSTITUTIONAL UNDER THE PROPER FIRST AMENDMENT ANALYSIS, WHICH FOCUSES ON THEIR GERMANENESS TO THE GOVERNMENT'S IMPORTANT REGULATORY OBJECTIVES

In accordance with its prior decision in *Cal-Almond, Inc. v. United States Dep't of Agriculture*, 14 F.3d 429 (9th Cir. 1993), the court of appeals analyzed respondents' First Amendment challenge to the generic advertising programs under the test articulated by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Pet. App. 16a. In *Cal-Almond*, the court reviewed a marketing order for California almonds under the *Central Hudson* test because it viewed that order as imposing a "[r]estriction[] on lawful and non-misleading commercial speech." *Cal-Almond*, 14 F.3d at 436. We of course agree that the expression at issue in *Cal-Almond* and this case is commercial in nature. See, e.g., *Board of Trustees v. Fox*, 492 U.S. 469, 473-474 (1989) (commercial speech is expression that "propose[s] a commercial transaction"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (same). The *Central Hudson* test, however, is inapposite in this setting. That test is applicable to regulations that suppress or ban commercial speech. See, e.g., *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996). It does not apply where, as here, a regulatory framework uses monetary assessments to fund collective activities having an expressive component. In such circumstances, this Court has applied an analysis that looks to the relevance or "germaneness" of the subsidized expressive activities to the government's regulatory objectives. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Ellis v. Railway Clerks*, 466 U.S. 435, 447 (1984); *Keller v. State*

Bar of California, 496 U.S. 1 (1990). In this case, there can be little doubt that generic advertising of a commodity covered by an agricultural marketing order is germane to the purposes for which the order is adopted in the first place: to stabilize the market for the commodity, promote its sale, and enhance the purchasing power of the farmers who produce the commodity.

A. The test employed by the Court in *Central Hudson* and its progeny seeks to vindicate the First Amendment interest in "the informational function of advertising." 447 U.S. at 563 (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)); see also *Virginia State Bd. of Pharmacy*, 425 U.S. at 770 ("people will perceive their own best interests if only they are well enough informed, and * * * the best means to that end is to open the channels of communication rather than to close them"); *Board of Trustees*, 492 U.S. at 480 ("the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing * * * the harmless from the harmful"); *44 Liquormart*, 116 U.S. at 1506 (plurality opinion). Accordingly, the Court has applied that test to regulatory schemes that ban or otherwise suppress commercial speech. See, e.g., *Central Hudson*, 447 U.S. at 558 ("This case presents the question whether a [state regulation] violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility."); *44 Liquormart*, 116 S. Ct. at 1501 (invalidating state statutes that prohibited retailers from "advertising in any manner whatsoever" the price of alcoholic beverages and imposed "a categorical prohibition against the publication or broadcast of any advertisements" mentioning alcohol prices); *Coors Brewing Co.*, *supra* (invalidating federal statute prohibiting beer labels from displaying alcohol content); *Edenfield v. Fane*, 507 U.S.

761, 763-764 (1993) (invalidating state agency's "comprehensive rule" prohibiting personal solicitation by certified public accountants).

By contrast, the generic advertising programs for California peaches, nectarines, and plums at issue here *promote* the dissemination of truthful information, without limiting or suppressing respondents' ability to advance their own commercial messages. The statutory authority for the marketing orders provides that "[n]o order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product." 7 U.S.C. 608c(10). Consistent with that prohibition, neither marketing order attempts to regulate, or in any way to restrict, respondents' private advertising efforts. Respondents thus remain free to advertise their own products, to criticize their competitors' products, and even to criticize the generic advertisements created pursuant to the marketing orders.¹⁴

The court of appeals suggested that the imposition of an assessment on handlers "hampered" their ability to engage in their own advertising because it deprived them of money that they could otherwise have spent on such endeavors. Pet. App. 18a; see also Resp. C.A. Br. 11. That incidental consequence of the assessment system is constitutionally irrelevant. An assessment, tax or other financial burden imposed by government does not implicate the First Amendment simply because the payor might otherwise have used the funds to engage in expres-

¹⁴ Moreover, the challenged financial assessments are not imposed on the basis of, and are not triggered by, any advertising or other expressive activity undertaken by respondents. Compare *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-257 (1974).

sive activity. While the purposes for which a mandatory assessment is used are relevant to the constitutional analysis, the mere exaction of that payment does not independently raise First Amendment concerns. Thus, respondents' challenge can only properly be founded, not on any restriction of their right to engage in their own commercial speech, but on the requirement that they contribute to the cost of commercial speech conducted on behalf of California summer fruit growers and handlers generally.

B. The marketing orders in this case are part of a larger regulatory framework aimed at enhancing the Nation's agricultural economy through the collective efforts of government and members of the affected industries. See 7 U.S.C. 601, 602. Here, such collaborative programs involve mandatory contributions that are used, *inter alia*, for expression made on behalf of a group that includes the contributors. In such a case, this Court employs a First Amendment test that accommodates the government's programmatic interests while protecting individuals from compelled expression falling outside of those interests.

In a series of cases beginning with *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), the Court considered the authority of government to require membership in, or contributions to, labor unions as a condition of employment. See also *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, *supra*; *Abood v. Detroit Bd. of Educ.*, *supra*. The Court acknowledged in those cases that employees "may very well have ideological objections" to some of the union's activities, and that, as a result, "compel[ling] employees financially to support their

collective-bargaining representative has an impact upon their First Amendment interests." *Abood*, 431 U.S. at 222. But those cases hold that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress," *ibid.*, through the promotion of "labor peace," *id.* at 224, and "labor stability," *id.* at 229. The Court has further recognized that the problem of "free riders"—employees who would decline to contribute to the union while obtaining the benefits of union representation—justifies a system of compelled assessments to support the union's activities. See *Street*, 367 U.S. at 760; *Ellis*, 466 U.S. at 447. These "important government interests," *Abood*, 431 U.S. at 225, justify a system of mandatory union contributions in both public and private employment. *Ellis*, 466 U.S. at 435.

Under the analysis developed in the union cases, "expenses that are relevant or 'germane' to the collective-bargaining functions of the union generally will be constitutionally chargeable to dissenting employees." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. at 516. "[A] union, however, [may] not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis*, 466 U.S. at 447; see also *Abood*, 431 U.S. at 232 ("agency shop" agreement for public employees does not violate the First Amendment "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes," but service charges could not be used "for political and ideological purposes *unrelated to collective bargaining*") (emphasis added). Otherwise stated, unions may utilize the dues of dissenting employees for expressive activities, so long as those activities are

germane to the unions' statutory role under the labor laws.¹⁵

In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court applied a similar analysis in a First Amendment challenge to an "integrated-bar" arrangement whereby a State conditions the practice of law on membership in, and payment of dues to, an association of attorneys vested by statute with various functions with respect to the practice of law. The Court discerned "a substantial analogy between the relationship of [an integrated] State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." *Id.* at 12. It observed, *inter alia*, that the "free rider" problem that supports mandatory assessments in the union context also arises with respect to associations of lawyers authorized to regulate their own profession. *Ibid.* ("It is entirely appropriate that all of the lawyers who derive benefit from the unique status of-being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort."). The Court therefore held in *Keller* that the State Bar's member-subsidized activities are "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." *Id.* at 13. In applying that rule to the integrated-bar context, the Court held that the State Bar could utilize the dues of dissenting members

¹⁵ When a union engages in activities outside of its specific statutory functions, courts inquire in addition whether the expenses at issue "involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." *Ellis*, 466 U.S. at 456; see also *Lehnert*, 500 U.S. at 518.

for expressive activities so long as "the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality opinion)).

In this case, in turn, there is a "substantial analogy," *Keller*, 496 U.S. at 12, between the relationship of the fruit committees and the growers and handlers governed by the marketing orders, on the one hand, and the relationship of the union and the integrated bar and their members, considered in *Abood*, *Keller*, and related cases, on the other. Cf. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 345 (1977) (noting, in context of "associational standing" under Article III, parallels between state-created commodity advertising commission, labor unions, and integrated bar associations). In all three contexts, a statutorily recognized body utilizes mandatory assessments to engage in a range of representative activities, including expressive conduct, on behalf of its constituents. In each context, moreover, the regulatory framework imposes no restriction on the contributors' own speech; the First Amendment is implicated solely by the use of mandatory assessments for activities having a speech component. Compare *Abood*, 431 U.S. at 230 (public employees subject to agency-shop arrangement remain free to express their personal viewpoints). The "germaneness" analysis thus provides the appropriate test under which to evaluate respondents' First Amendment claims.

C. The generic advertising programs for peaches, nectarines, and plums clearly pass muster under the "germaneness" test. Certain aspects of the expressive

activities at issue here, moreover, further diminish any impact on respondents' free-speech interests.¹⁶

1. The broad objectives served by the AMAA's regulatory framework, and by the generic advertising programs in particular, are comparable to those identified by this Court in the labor and integrated-bar contexts. The court of appeals therefore correctly held that the governmental interest underlying the generic advertising programs is a "substantial" one. Pet. App. 16a-17a.

¹⁶ The committees responsible for administering the marketing orders at issue here are established and appointed by the government, and their budgets and the assessments necessary to support them are approved by the government. In addition, although the assessments are levied against the handlers of the fruits, the marketing orders are designed in large measure for the benefit of the producers (farmers). See pages 26, 28, *infra*. Thus, unlike in the union and integrated-bar contexts, the constituency of the governing body extends beyond those who contribute financially to its support. Although producers must approve the adoption of a marketing order, that condition does not detract from the status of the marketing order as a governmental regulation. See *Currin v. Wallace*, 306 U.S. 1, 15-16 (1939).

In the court of appeals, the United States did not advance the argument that the generic advertising supported by the system of assessments on handlers constitutes "government speech" that does not implicate respondents' First Amendment rights. See, e.g., *Keller*, 496 U.S. at 10, 12-13; *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment) ("[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is the representative of the people."). We similarly do not rely on that argument in this Court as an independent ground of decision. We note, however, that the constitutionality of these programs is reinforced by the substantial degree of governmental involvement in the development and adoption of the promotional efforts, by the attenuated connection between handlers' contributions to the administration of the orders and the generic advertising that results, and by the broader statutory goal of furthering the interests of producer (not merely handlers) through generic advertising and other aspects of the marketing orders.

The AMAA's express goal of "maintain[ing] * * * orderly marketing conditions for agricultural commodities," 7 U.S.C. 602(1), and the advertising programs' aim of "promot[ing] the marketing, distribution, and consumption" of covered commodities, 7 U.S.C. 608c(6)(I), play an important role in the Nation's economy. Compare *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. at 336-337, 344-345. As the district court held in this case (Pet. App. 89a), the Act's promotional programs were intended to address the devastating effects of depressed consumption and unstable market forces that prevailed at the time of their enactment. See *ibid.* (describing economic effects of market instability at the time the AMAA's promotional assessment program was adopted); *ibid.* (provisions of the Act authorizing promotional activities "present[] a farm program to protect the income of farmers while comprehending the interest, the needs, and the security of all segments of the economy and all our people") (quoting H.R. Rep. No. 1927, 83d Cong., 2d Sess. 5 (1954)). That history amply demonstrates the importance of the programs' objectives. Further, as the court of appeals concluded in rejecting respondents' APA challenge (Pet. App. 9a-11a), the operation of the Act's industry-based Committees, and the process by which commodity-specific marketing orders are developed, reinforce the continuing importance of the programs to the covered markets. It is only fair that the participants in that market pay their pro rata share of the costs of those programs.

In addition, the system of mandatory assessments to support the marketing orders addresses a "free-rider" problem similar to that at issue in the union and integrated-bar cases. See, e.g., *Chicago Teachers Union*, 475 U.S. at 302-303; *Keller*, 496 U.S. at 12. That problem arises in connection with advertising just as it does in

other aspects of the marketing orders. Generic advertising programs utilize economies of scale to reach the largest number of potential customers of a given commodity. They also provide a mechanism for smaller handlers and individual farmers to obtain the benefits of advertising that they could not afford on their own. Those benefits of collective action would be virtually impossible to achieve in the absence of mandatory assessments. As the Acting Secretary of Agriculture noted in recommending legislation authorizing paid advertising under AMAA marketing orders, "[v]oluntary efforts have shown that financing an advertising program is difficult without the help of State legislation or similar mediums such as under a Federal marketing order." H.R. Rep. No. 846, 89th Cong., 1st Sess. 3 (1965). See also Olan D. Forker & Ronald W. Ward, *Commodity Advertising: The Economics and Management of Generic Programs* 10 (1993) (programs for generic advertising and promotion of agricultural commodities "are a direct outgrowth of the potential free-rider problem"); Nicholas J. Powers, U.S. Dep't of Agriculture, *Agricultural Economic Report No. 629, Federal Marketing Orders for Fruits, Vegetables, Nuts and Specialty Crops* 19 (1990) ("[c]ollective funding of generic advertising and promotion overcomes * * * problems of free riders and helps assure that handlers share the costs in proportion to any benefits").

The danger that would be posed by a program that did not provide for mandatory assessments is not simply that certain individuals would unfairly benefit from the collective efforts of others, but also that the collective system of benefits—here, promotional programs intended to enhance and stabilize the industry as a whole—would collapse for lack of participation. See, e.g., James D. Gwartney & Richard L. Stroup, *Economics: Private and*

Public Choice 679 (1987) (Where a large number of free riders exist, "the aggregate lack of action will lead to an insufficient quantity of public goods."); *United States v. Ruzicka*, 329 U.S. at 293 ("Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements."); cf. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977) (observing, in the antitrust context, that market imperfections such as the free-rider problem may result in the unavailability of certain retailer services "despite the fact that each retailer's benefit would be greater if all provided the services than if none did"). Addressing the free-rider problem thus is inextricably linked to the Act's broader goals.

2. The advertising and promotional programs authorized by the marketing orders are, by their nature, germane to the Act's important regulatory goals. In contrast to cases involving labor unions and bar associations—organizations that may have occasion to engage in a range of expressive conduct unrelated to their statutory duties—this case involves the specific authorization in the AMAA itself for marketing orders to provide for activities that are "designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production" of covered commodities. 7 U.S.C. 608c(6)(I); see also 7 C.F.R. 916.45, 917.39. In addition, the Secretary must terminate or suspend a marketing order if he finds that it "obstructs or does not tend to

effectuate the declared policy" of the Act. 7 U.S.C. 608c(16)(A)(i).¹⁷

Pursuant to that mandate, the Secretary adopted the challenged marketing orders based, *inter alia*, on "the consensus of the industry * * * that promotional activities * * * have been beneficial in increasing demand," 36 Fed. Reg. 8735, 8736 (1971); Pet. App. 74a, and that certain advertising techniques "create an impact on the buying trade as well as the consuming public." 36 Fed. Reg. at 8737; Pet. App. 74a. See also 41 Fed. Reg. 14,375, 14,376-14,377 (1976); 31 Fed. Reg. 5636 (1966). Moreover, as the court of appeals found (Pet. App. 11a), "[t]he Nectarine Administrative Committee and the Peach Commodity Committee engage in a careful process each year prior to and during their annual spring meetings in approving the advertising program for the upcoming season." In particular, the staff of the Subcommittee on Advertising and Promotion formulates its advertising recommendations based on "monthly reports on price trends, consumer interests, and general market conditions." *Ibid.* The individual advertisements produced pursuant to this process are necessarily in furtherance of the Committees' statutory mission—a mission that, as explained above, could not be met absent compelled assessments.

The court of appeals erred in focusing its inquiry on the efficacy of the generic advertisements as compared with the potential advertising or promotional efforts of individual handlers. See Pet. App. 17a. Where, as here,

¹⁷ The Secretary must also terminate an order if he determines that a majority of producers does not support it. 7 U.S.C. 608c(16)(B). Because the consensus of producers is generally an accurate measure of the utility of a particular marketing order, this provision offers an additional guarantee of the germaneness of an order's provisions.

subsidized speech is germane to important governmental objectives, it need not also be shown to be more effective in achieving those objectives than would private speech by the individuals against whom assessments are levied. In the union context, for example, particular strikes, picketing, and other bargaining tactics by unions are often ineffective at achieving their desired goals. That fact, however, does not render them unconstitutional when carried out with compelled employee funds. Dissenting employees "may feel that their money is not being well-spent, but that does not mean that they have a First Amendment complaint." *Ellis*, 466 U.S. at 456. Nor does the fact that an individual employee might have independently obtained the desired benefit for herself through independent means render invalid the union's subsidized activities on behalf of the group. To the contrary, "[t]he very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds." *Ibid.* As this Court has explained:

The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.

Abood, 431 U.S. at 222-223 (quoting *Street*, 367 U.S. at 778 (Douglas, J., concurring)). Because the Committees' generic advertising activities are germane to important governmental objectives, they are constitutional, even if they do not uniformly succeed in achieving those objec-

tives, and even if they have not been proven more effective than respondents' hypothetical efforts.¹⁸

The court of appeals also erred in rejecting the "free-rider" rationale on the ground that the generic advertising programs at issue here do not completely prevent their benefits from flowing to non-contributors. Pet. App. 21a. The court observed that because the challenged marketing orders cover only California handlers of peaches and nectarines, handlers of those products in other States (who are not required to contribute to generic advertising efforts) may benefit from the California programs. *Ibid.* The court's reasoning misconstrues the nature of the free-rider problem, and ignores the statutory framework within which the programs operate.

California dominates the national markets for the fruits covered by these marketing orders,¹⁹ and, therefore, its handlers and producers stand to reap most of the benefits of increased sales resulting from generic advertising of the commodities. Moreover, the utility of generic advertising under these marketing orders to out-of-state producers and handlers is limited because, as the court of appeals recognized, the advertising promotes California fruit as unique. Pet. App. 8a; J.A. 396 (DX 303). This focus on the commodities' State of origin reflects the approach of the AMAA itself, which requires marketing orders to cover "the smallest regional production areas * * * practicable." 7 U.S.C. 608c(11)(B).

¹⁸ Moreover, as explained in Part II.B.1, *infra*, the record below amply demonstrates, and the court of appeals correctly found (Pet. App. 20a), that generic advertising achieves the goal of increased consumption of the covered commodities.

¹⁹ California produces approximately 90% of all domestically produced nectarines and plums and 50% of peaches. Wileman II, DX 326.

Particularly in light of the AMAA's region-specific focus, the court of appeals was incorrect in concluding that generic advertising programs do not meaningfully address a free-rider problem.

In the context of union activity, individuals outside of a given bargaining unit may incidentally benefit from union activity that is properly chargeable to members of that unit. This Court has nonetheless held that the avoidance of free riders within a given collective bargaining unit justifies a system of mandatory assessments from that unit. Cf. *Lehnert*, 500 U.S. at 522-524; see also *Keller*, 496 U.S. at 12 (discussing free-rider problem in integrated-bar context).

In any event, the fact that a regulatory program is not universally effective in assessing the costs against everyone who might benefit in some measure does not mean that the program has failed to achieve its important governmental objectives, or to benefit those against whom the costs are assessed. Nor, more importantly, does that fact lead to the conclusion that the regulatory program is not germane to its governmental objectives.

3. Under *Hanson*, *Street*, and their progeny, individuals may be compelled to contribute to a representative entity's core statutory activities, even if those activities contain an ideological component. See, e.g., *Ellis*, 466 U.S. at 456; *Lehnert*, 500 U.S. at 517. Thus, while a union may not, for example, use dissenting members' dues to support a political candidate who favors paternity leave or civil rights legislation, it may use those dues to negotiate a contract that contains paternity leave or anti-discrimination provisions, even if such provisions may be objectionable to the dissenting members. See *Abood*, 431 U.S. at 222-223; see also *Keller*, 496 U.S. at 16 (dissenting members of an integrated bar association "ha[d] no valid constitutional objection to their compulsory dues being

spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession").²⁰

It follows that where, as here, the compelled contribution is for expression that is not principally ideological in nature, the First Amendment implications are far less severe.²¹ In this case, the challenged marketing orders authorize only commercial speech designed to promote greater consumption of the products that respondents themselves offer for sale. See Pet. App. 90a; *United States v. Frame*, 885 F.2d 1119, 1136 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). Because of commercial speech's "subordinate position in the scale of First

²⁰ As the Court observed in *Abood*, unions' collective-bargaining activities contain an inherently ideological component:

An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, * * * while another might have economic or political objections to unionism itself. * * * But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

431 U.S. at 222-223.

²¹ The Court's cases in this area have repeatedly identified the core First Amendment concern to be the prospect that individuals might be compelled to contribute to the expression of "political" or "ideological" views, not germane to the organization's statutory role, with which they disagree. See, e.g., *Lehnert*, 500 U.S. at 516, 517, 518, 528; *Keller*, 496 U.S. at 13-14, 15; *Chicago Teachers Union*, 475 U.S. at 302, 305; *Ellis*, 466 U.S. at 438, 447, 450; *Abood*, 431 U.S. at 219-220, 232, 234, 235; *Street*, 367 U.S. at 749, 750, 764, 767-772, 775.

Amendment values," the government has broader latitude in this setting. *Board of Trustees v. Fox*, 492 U.S. at 477 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (commercial speech is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression"); see also *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2375 (1995). Further, as the district court observed (Pet. App. 91a), respondents' objections amount to little more than disagreements as to the best strategy for promoting the consumption of the goods they have voluntarily chosen to market. Accordingly, the challenged programs intrude only minimally on respondents' First Amendment interests, and are manifestly justified by their close relationship to the Act's important objectives.

II. THE GENERIC ADVERTISING PROGRAMS ALSO SATISFY THE FIRST AMENDMENT TEST SET OUT IN *CENTRAL HUDSON*

We have explained in Point I, *supra*, that the *Central Hudson* test is inapposite here because this case does not involve any restriction on respondents' commercial speech. Nonetheless, as we demonstrate below, nothing in *Central Hudson* undermines the constitutionality of the generic advertising programs that respondents challenge. Under *Central Hudson*, a restriction on truthful, commercial speech regarding a lawful activity does not violate the First Amendment if the government has asserted a "substantial interest to be achieved by" the restriction, the restriction "directly advance[s]" that interest, and the restriction "is not more extensive than is necessary to serve that interest." 447 U.S. at 566. Assuming, *arguendo*, that the *Central Hudson* test is applicable here, the generic advertising programs satisfy that test.

A. As we have demonstrated, see Part I.C.1., *supra*, the government has a substantial interest both in the narrow goal of "enhancing returns to peach and nectarine growers" (Pet. App. 16a-17a), and in the AMAA's broader objectives of "maintain[ing] * * * orderly marketing conditions for agricultural commodities," 7 U.S.C. 602(1), "promot[ing] the marketing, distribution, and consumption" of covered commodities, 7 U.S.C. 608c(6)(I), and avoiding the problem of free riders. The court of appeals therefore correctly held that the programs satisfy the first element of the *Central Hudson* test. See Pet. App. 16a-17a; see also *Cal-Almond*, 14 F.3d at 437 ("stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest"); *Frame*, 885 F.2d at 1134 (government has a "compelling" interest in "maintaining and expanding beef markets" in order to "prevent[] further decay of an already deteriorating beef industry").

B. The court of appeals further concluded that "the Secretary has demonstrated that advertising increases consumption of peaches and nectarines." Pet. App. 20a. Indeed, this Court has long viewed as axiomatic the proposition that promotional advertising leads to increased consumption of the advertised product or service. See, e.g., *Central Hudson*, 447 U.S. at 569 (recognizing "an immediate connection between advertising and demand for electricity"); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993) (accepting Congress's "commonsense judgment" regarding the causal link between broadcast lottery advertising and lottery participation); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986) ("We think [that] the legislature's belief [that advertising of casino gambling would serve to increase

the demand for the product advertised] is a reasonable one.”).

The record in this case, moreover, amply supports the court of appeals’ conclusion that the generic advertising programs in fact promote consumption of the covered commodities. The record includes, for example, a 1987 study of the effectiveness of that year’s generic advertising program for “California Summer Fruits.”²² J.A. 409-427 (PX 297t). The study demonstrated that 65% of consumer-respondents were aware of some aspect of the Committees’ advertising campaign, J.A. 417, and that consumer-respondents who were aware of the advertisements were more likely to have purchased all four fruits covered by the program than were those who were not aware of the ads. J.A. 419. The study further reported that the advertising “substantially increased the frequency of purchasing nectarines and pears” and “[t]o a lesser extent * * * increased the frequency of purchasing peaches and plums.” J.A. 413. See also J.A. 407 (PX 297v) (consumers who were aware of California Summer Fruits ad campaign were willing to pay higher non-sale prices than were consumers unaware of the ads). See also page 29, *supra*.

The court of appeals nevertheless held that the challenged programs do not “directly advance” the government’s interests because the Secretary had not “gone the necessary next step of demonstrating that the generic advertising program is *better* at increasing consumption

²² “California Summer Fruits” is the term usually used to refer to the fruits historically covered by the marketing orders at issue here—peaches, plums, pears, and nectarines. Joint advertising for some or all of those products has often been undertaken by the Committees and staff that administer the marketing orders (known as the “California Tree Fruit Agreement”). See Pet. App. 96a-98a; J.A. 396-400 (DX 303), 428-433 (DX 302).

than individualized advertising.” Pet. App. 20a (emphasis added). In imposing that further requirement, the court of appeals misapplied the second element of the *Central Hudson* test.

1. In holding that generic advertising under the marketing orders must be shown to be more effective than whatever private advertising individual handlers might undertake, the court of appeals relied on this Court’s admonition in *Central Hudson* that a challenged regulation may not be sustained if it “provides only ineffective or remote support for the government’s purpose.” Pet. App. 17a (quoting *Central Hudson*, 447 U.S. at 564); see also *Cal-Almond*, 14 F.3d at 437. That aspect of the *Central Hudson* test, however, requires only that the challenged regulation effectuate the government’s purposes through direct, rather than attenuated or purely speculative, means. See *Central Hudson*, 447 U.S. at 564 (“the Court has declined to uphold regulations that only indirectly advance the state interest involved”); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 769 (1976) (ban on advertising of prescription drug prices did not directly advance the State’s interest in the professional standards of its pharmacists because “[t]he advertising ban does not directly affect professional standards one way or another”); *Bates v. State Bar of Arizona*, 433 U.S. 350, 378 (1977) (“Restraints on advertising * * * are an ineffective way of deterring shoddy work.”); see also 44 *Liquormart*, 116 S. Ct. at 1509. This Court has never held that the government’s methods, in order to be constitutional, must be *more* effective than private efforts of a similar nature might be.

Such a requirement would be especially out of place in the present setting. Because the objectives that support the AMAA’s regulatory structure are collective in na-

ture, and relate to the economic well-being both of the industry and of the Nation as a whole, comparisons between the generic advertising efforts of the Committees and the private efforts of respondents have no bearing on whether the former activities "directly advance[]" the government's purposes. Accordingly, the programs' day-to-day impact on respondents and other individual handlers or producers is not a necessary element in the constitutional analysis. See *United States v. Edge Broadcasting*, 509 U.S. 418, 427 (1993) ("It is readily apparent that this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity."). Not only is the United States' interest linked to national market stability, but, as the district court found, Congress's concerns in adopting the AMAA's promotional provisions focused on "the condition of the American farmer." Pet. App. 89a (emphasis added) (citing H.R. Rep. No. 1927, 83d Cong., 2d Sess. (1954)); see also *Block v. Community Nutrition Institute*, 467 U.S. 340, 352 (1984) (describing "the protection of the producers" as the AMAA's "most fundamental objective[]") (emphasis added). The court of appeals' scrutiny of the programs' comparative impact on respondents and other handlers thus ignores an important aspect of the government's interest.

Moreover, the aim of generic advertising is to increase the overall market for the fruit or vegetable grown by producers, thereby avoiding the adverse market conditions associated with reduced demand. Individualized advertising, on the other hand, is intended to increase the demand for the advertiser's own brand, which can result either from encouraging existing consumers of the commodity to choose the advertiser's particular brand, or from increasing overall consumption for the commodity. This dual focus detracts from the effectiveness of brand

advertising in advancing the governmental interest in increasing demand across the entire industry. While such advertising, viewed in the aggregate, no doubt increases the overall market for a commodity, it also aims to give each particular advertiser a larger share of that market. See Forker & Ward, *supra*, at 10 (generic promotion programs are "most often directed to the total commodity and not specific brands; that is, the programs must be designed to benefit the entire industry and not selected segments within the industry."); Powers, *Federal Marketing Orders for Fruits, Vegetables, Nuts and Specialty Crops*, *supra*, at 18. Respondents' claims that they would personally reap a greater benefit from different types of advertisements (see Pet. App. 18a) thus do not diminish the close connection between the Committees' activities and the government's objectives.

2. The record in this case, in addition to showing that the Committees' advertising efforts have increased total consumption of the commodities (see pages 35-36, *supra*), demonstrates the utility of generic advertising in ways that set it apart from advertising by individual handlers. A 1989 study designed "to uncover * * * the primary purchase influences" on consumers of the covered fruits (J.A. 512 (PX 297f)) found that joint marketing of California summer fruits has a synergistic effect on consumption: "[T]hese fruits 'play well' together. People typically buy tree fruits more than one type at a time * * *. Interest begets interest in this category, and purchase begets purchase. There is a definite advantage, therefore, to the presentation of these fruits as a group, especially in the absence of any single fruit having a sufficient advertising and promotional budget to create a unique presence all for itself." J.A. 523-524. That is precisely the type of generic advertising in which individual handlers of a particular fruit will not engage, but

which reaps demonstrated benefits for the industry as a whole.

Similarly, record evidence demonstrates the importance of consumer education regarding the maturity and proper ripening of the covered fruits. A study in the record found that "pervasive ignorance regarding how tree fruits should be ripened" exists among consumers, and that many potential customers will unnecessarily refrain from buying fruit that is not ready to eat immediately. J.A. 520-521 (PX 297f). The study emphasized the importance of "point-of-sale" advertising and promotional efforts designed not only to encourage purchases, but also to educate the customer about the fruit in order to avoid negative experiences that discourage future sales. J.A. 526. Individual handlers typically lack the incentive and resources to engage in that type of expansive undertaking, in addition to promoting their own brands. Collectively-funded generic advertising is therefore a necessary and effective tool for enhancing nationwide consumer interest and demand.

Another study in the record demonstrates that over 90% of each fruit's total volume of sales is drawn from repeat purchasers, and that the highest percentage of repeat purchasers was found among customers who first purchased the fruit during its first four weeks of availability during the season. J.A. 405 (PX 297v). The study concluded that, "[g]iven the importance of these buyers, it is essential to focus directly on them and their initial entry into the market." J.A. 405. Advertising expenditures focused on these "early triers" thus has the best chance of increasing total commodity sales. See J.A. 404-405. But because the numerous varieties of each of the fruits in question here appear on the market at various times in the summer season, and because each remains available for only a few weeks, see, *e.g.*, Wileman

I, Pt. 37, DX 15 (table from 1986 annual report of California Tree Fruit Agreement indicating initial shipment dates ranging from mid-April to mid-October for 71 different varieties of peaches during the years 1977 through 1986); Wileman II, DX 256 and 298 (charts indicating weeks of availability in 1989 season for selected varieties of all three fruits), the incentive for individual handlers is to advertise when their particular variety comes on the market, not at the beginning of the season for peaches, plums, or nectarines generally. Generic advertising by the Committees addresses that need. See, *e.g.*, J.A. 467 (PX 297x) (discussing Committees' "First Day of Summer" promotional campaign).

Finally, the record demonstrates that the generic advertising programs result in a breadth of consumer exposure to advertising messages that is beyond the realistic reach of individual advertisers. In a policy statement regarding their joint plans for the 1988 season, for example, the Committees reported that their projected array of radio and television advertisements for California summer fruits would reach "virtually every U.S. market with almost 212 billion impressions against U.S. adults." J.A. 479 (DX 31pp). The economies of scale made possible by those collectively-funded efforts are simply not available to the individual advertiser. See Powers, *supra*, at 19 ("[t]he minimum investment required for advertising and promotion to be effective in developing and expanding regional, national, and overseas markets is generally too large for most individual handlers"). J.A. 413 (PX 297t) (In order for advertising to have substantial impact on consumer attitudes and behavior, "[a] large percentage of the target audience must be exposed to the advertising."). Thus, there is ample support in both common sense and the record in this case for the conclusion that generic advertising

further the goals of the AMAA in ways that individual advertising could not be expected to do.

3. What is more, the court of appeals' requirement that the Secretary affirmatively demonstrate—at any given time, under each marketing order—that generic advertising is more effective than individual advertising would impose an unworkable standard that may be virtually impossible to satisfy in any given case. First, there is no way definitively to determine what form and level of advertising individual handlers would engage in absent a system of mandatory assessments. Assertions and evidence as to *respondents'* future conduct do not, of course, speak to the activities of the industry as a whole—or even to all handlers who might seek to opt out of the generic advertising program. Nor is there any way reliably to gauge such future conduct.

Second, a particular level of private advertising today does not ensure a constant minimum of advertising in the future, as do the programs sponsored by these marketing orders.²³ The court of appeals' standard would rob the industry and the public of the stability and predictability that are the cornerstone of the AMAA's regulatory structure and purpose.

Third, the results of the court of appeals' inquiry would necessarily shift over time as new advertising techniques were adopted and old ones abandoned, both by individual handlers and by the committees administering the marketing orders. Under the court's analysis, a handler apparently may mount a new constitutional challenge whenever it identifies a different promotional

²³ The Secretary's prior approval of a budget for generic advertising has the added advantage of enabling members of the covered industry to plan their own advertising efforts for the season with the knowledge that a minimum level of generic promotional activities will occur.

strategy that it believes would better increase consumption. See Pet. App. 18a. Disagreements as to strategy would threaten the government's ability to institute long-term measures. See *id.* at 90a-91a. Similarly, the court of appeals' standard would prevent committees from adopting innovative advertising techniques. Because new promotional approaches would be, by definition, untested, the government could not meet its burden of demonstrating that its approach would prove more effective than the efforts of individual handlers. The constitutional validity of the challenged programs cannot depend on such a speculative inquiry.

4. Contrary to the court of appeals' conclusion (Pet. App. 21a), the funding of generic advertising through mandatory assessments also directly advances the government's interest in addressing the problem of free riders—members of the industry who would not engage in advertising aimed at increasing overall consumption absent a program of mandatory assessments. The fact that respondents would purportedly engage in additional advertising absent a system of mandatory assessments does not mean that other handlers who benefit from the generic advertising programs would not become free riders if mandatory assessments were terminated. The free-rider problem, like the other problems addressed by marketing orders, is an industry-wide concern that warrants a uniform and comprehensive response.

Even if we assume, *arguendo*, that all handlers would today engage in individual advertising that resulted in aggregate consumption equal to or greater than generic efforts could generate—an assumption that the record in this case does not support—there would be no assurance that individual handlers would continue to advertise at a constant rate, or with consistent success. Absent an ongoing program supported by mandatory (and there-

fore predictable) assessments, the Committees would be unable to respond quickly to a reduction in private advertising, or to a change in consumer behavior. That danger is particularly acute in this case, because the commodities covered by the marketing orders that respondents challenge have a long and costly development period, and an exceedingly short period of availability. See, e.g., *Wileman II*, DX 256 and DX 298. In short, if the generic advertising programs were eliminated, the government's ability to prevent fluctuations in supply and demand, and the economic disruptions that such uncertainty causes, would be significantly diminished.

C. Under the *Central Hudson* analysis, in order to demonstrate that the generic advertising programs are "not more extensive than is necessary" to serve the government's important interests, 447 U.S. at 566, the Secretary need not demonstrate that "the manner of restriction is absolutely the least severe that will achieve the desired end." *Board of Trustees v. Fox*, 492 U.S. at 480. "What [this Court's] decisions require, instead, is a 'fit' between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable." *Florida Bar v. Went For It, Inc.*, 115 S. Ct. at 2380 (internal quotation marks omitted); see also 44 *Liquormart*, 116 S. Ct. at 1510. "Within those bounds," the First Amendment "leave[s] it to governmental decisionmakers to judge what manner of regulation may best be employed." *Board of Trustees v. Fox*, 492 U.S. at 480; see also 44 *Liquormart*, 116 S. Ct. at 1511 ("Our commercial speech cases recognize some room for the exercise of legislative judgment."). The generic advertising programs satisfy that standard.

1. Rather than banning or suppressing expression by handlers, the programs utilize the less intrusive strategy of imposing standardized charges to support commercial

speech on behalf of the California summer fruit industries as a whole. See, e.g., J.A. 530 (DX 301(b)). Compare *Central Hudson*, 447 U.S. at 558; 44 *Liquormart*, 116 S. Ct. at 1501; *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *Edenfield v. Fane*, 507 U.S. at 763-764. In addition, because the government seeks in this case to encourage, rather than prohibit, increased public consumption of a product, it does not have available the option of direct, non-speech-based regulation of consumer conduct. Compare, e.g., *Coors Brewing Co.*, 115 S. Ct. at 1593 (given government's ability to, among other things, directly limit the alcohol content of beer, provision banning disclosure of alcohol content on beer labels was invalid); 44 *Liquormart*, 116 S. Ct. at 1510 (plurality opinion) (State could not promote consumer "temperance" through ban on advertising of liquor prices given the available option of directly limiting consumer purchases). Because Congress cannot plausibly require the public to increase its consumption of a given commodity in the way that it could prohibit or otherwise limit such consumption, the use of advertising and other promotional efforts represents a narrowly tailored method of achieving the public purpose of increasing consumption.

2. The court of appeals held that the generic advertising programs are not narrowly tailored to achieve the government's objectives because they do not include an advertising "credit" system of the kind contained in the Almond Marketing Order at issue in *Cal-Almond*, *supra*. Pet. App. 20a. Under that system, an almond handler could seek a reduction in the portion of its assessment attributable to generic advertising based on certain of its

own advertising efforts. See *Cal-Almond*, 14 F.3d at 433-434; 7 C.F.R. 981.441(c) (1993).²⁴

Contrary to the court of appeals' reasoning, if we assume that the *Central Hudson* analysis applies here at all, the absence from these marketing orders of a credit system for private advertisement efforts does not undermine the conclusion that there is a reasonable fit between the generic advertising programs and the government's objectives. The use of a credit system in the programs for these commodities would be contrary to the government's interest in avoiding free riders. Under such a system, individual handlers would have little interest in participating in collective efforts to promote increased overall consumption of a commodity. Instead, there would be a strong incentive for each individual handler to tailor its own advertising to inure to its own benefit. Moreover, because the free-rider problem that would arise from the inclusion of a credit system would threaten the Secretary's capability to fund generic advertising at all (see pages 27-28, *supra*), it would jeopardize the government's ability to achieve *any* of its stated interests.

The court of appeals discounted the Secretary's concerns regarding the free-rider problem as "weak in the case of peach and nectarine programs" because the almond marketing program at issue in *Cal-Almond* contained a credit system "and yet managed to avoid the problem of free riders," and because the generic pro-

²⁴ The court in *Cal-Almond* struck down the generic advertising program for almonds, notwithstanding the credit provision, because it concluded that the program impermissibly denied handlers credit for particular categories of advertising expenses. 14 F.3d at 440. The Secretary subsequently altered the Almond Marketing Order in response to the *Cal-Almond* ruling. See 7 C.F.R. 981.441(c) (1995).

gram here does not prevent free riding by out-of-state handlers who are not bound by these marketing orders. Pet. App. 21a. In light of the regional, commodity-specific nature of the AMAA's regulatory program, these factors do not alter the conclusion that the generic advertising programs at issue here are narrowly tailored.

The AMAA requires marketing orders to be restricted "to the smallest regional production areas * * * practicable," 7 U.S.C. 608c(11)(B), and, as noted, the process by which the Secretary and the committees fashion particular advertising and promotional programs focuses on commodity-specific market conditions. Where, as in the California almond industry, a single agricultural cooperative or producer dominates the market for retail sales of a commodity,²⁵ certain types of individual and brand advertising may accomplish the government's goals of market stability and increased consumption without creating a significant free-rider problem. Because authorized private advertising benefits both the dominant seller and the industry generally, and accomplishes the coordination necessary for effective market-wide advertising, potential non-participation by smaller entities in such a market poses less of a threat to the viability of the marketing order, and results in less unfairness.

The conditions that permit the use of a credit system for California almonds and certain other commodities do not exist in the California peach, plum, and nectarine industries because no single entity dominates the overall retail market. As a result, the risk of free riders in those industries, and the resulting potential for a credit system to undermine the generic advertising programs, are particularly pronounced. Such distinctions between the two

²⁵ See *Cal-Almond*, 14 F.3d at 438 n.9 ("As of July 1987, Blue Diamond had a 92 percent share of almonds sold in grocery stores.").

markets are more than sufficient to explain the difference in approach.

For similar reasons, the fact that handlers and producers in other regions are not included in the generic promotion and advertising programs does not defeat their constitutionality. Though generic, the advertisements authorized by the marketing orders generally promote fruits from the covered region. See, *e.g.*, J.A. 396-400 (DX 303), 428-433 (DX 302), 530 (DX 301(b)). In addition, the central threat posed by the free-rider problem is that it will erode or eliminate financial support for the AMAA's region-specific activities. The fact that the Committees' programs may have the ancillary effect of benefitting handlers and producers in other regions does not diminish the suitability of mandatory assessments on handlers within the region covered by the marketing orders. Those handlers, and the producers whose fruits they purchase, realize the most immediate benefits from the marketing orders, including their generic advertising provisions. It therefore is only fair that those handlers pay their pro rata share of the expenses of administering the orders. The First Amendment does not prevent Congress—and the regional industry itself—from providing for such a program of commercial regulation and promotion that is grounded in and responsive to regional concerns.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1996

22

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, Secretary of Agriculture,
Petitioner.

v.

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.;
KOBASHI FARMS, INC.; TANGE BROS., INC.;
NAGAO FARMS; NILMEIER FARMS;
CHOSEN ENTERPRISES;
GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS;
KOBASHI FARMS; NAKAYAMA FARMS, INC.; and
MIHARA FARMS,
Respondents.

On Writ of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

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H.R. Rep. No. 1927, 83rd Cong., 2nd Sess. (1954), <i>reprinted in</i> , 1954 U.S.C.C.A.N. 3399, 3427	2
H.R. Rep. No. 846, 89th Cong. 7th Sess. (1964), <i>reprinted in</i> , 1965 U.S.C.C.A.N. 4142, 4144	3
S.R. No. 92-295, 92nd Cong., 1st Sess. (1971), <i>reprinted in</i> , 1971 U.S.C.C.A.N. 1406, 1407	4
Alex Kozinsky and Stuart Banner, <i>Who's Afraid of Commercial Speech?</i> 76 Va. L.Rev. 627 (1990) ...	34

No. 95-1184

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, Secretary of Agriculture,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.;
KOBASHI FARMS, INC.; TANGE BROS., INC.;
NAGAO FARMS; NILMEIER FARMS;
CHOSEN ENTERPRISES;
GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS;
KOBASHI FARMS; NAKAYAMA FARMS, INC.; and
MIHARA FARMS,
Respondents.

On Writ of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE RESPONDENTS

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble[.]"

STATEMENT

Statute and Regulation Background

This case presents a First Amendment challenge to compelled advertising of California peaches, plums, and nectarines. The advertising arises under marketing orders covering specified agricultural commodities promulgated by the Secretary of Agriculture pursuant to his authority under the Agricultural Marketing Agreement Act of 1937, as amended (AMAA). 7 U.S.C. 601, *et seq.* Respondents are forced to fund and be associated with advertising messages that they disagree with — on commercial, economic, moral and ideological grounds — purportedly to serve the collective of the California tree fruit industry.

Respondents grow, pack, and market peaches, plums and nectarines from four counties in California's Central San Joaquin Valley. App. 3a; Opp. 119a.¹ Most have extensive experience growing and marketing these stone fruits. Wileman Bros. & Elliott, Inc., for example, has handled nectarines and plums since 1948. Kash, Inc. has handled peaches, plums, and nectarines since 1968. Opp. 11a. These commodities are regulated by the Marketing orders issued under the discretionary authority within the AMAA — which does not require the secretary to regulate anything. The AMAA's purpose is "to establish and maintain . . . orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. 602(1). The AMAA allows the Secretary to promulgate marketing orders regulating,

¹"App." denotes the appendix to the petition for certiorari. "Opp." denotes the appendix to the opposition to the petition.

inter alia, minimum maturity and size of specified commodities. See, 7 U.S.C. 608c(6)(H).

Committees consisting of respondents' competitors administer the marketing orders. See, 7 U.S.C. 608c(7)(C), 610; 7 C.F.R. 916.20, 917.20; App. 96a-98a. To fund the marketing orders, assessments are imposed on processors, associations of producers, and others engaged in handling the regulated fruit, all of whom are referred to in the AMAA as "handlers." 7 U.S.C. 608c(1), 610(b)(2)(ii). Violations of marketing orders carry civil forfeiture and criminal penalties. 7 U.S.C. 608a, 608c(14). Respondents directly compete with the entire tree fruit industry, including committee members, for buyers, brokers, and other growers.

A 1954 AMAA amendment authorized marketing orders "[e]stablishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order." 7 U.S.C. 608c(6)(I). This amendment was a small part of the Agricultural Act of 1954. See, H.R. Rep. No. 1927, 83rd Cong., 2nd Sess. (1954), *reprinted in*, 1954 U.S.C.C.A.N. 3399, 3427.²

In 1958 the Secretary promulgated marketing order 916 for California nectarines. 7 C.F.R. 916. In 1959 the Secretary promulgated marketing order 917 for California peaches, plums, and pears.³ 7 C.F.R. 917.

²That Act did not authorize a compelled advertising program, but instead focused on one year price supports for specific crops, not at issue here, because of over production caused by government requests during WWII and the Korean conflict.

³The federal plum marketing order was terminated by the Secretary in 1991. App. 5a, n.1. As the Secretary notes, the compelled advertising of plums is not moot since respondents seek a return of assessments used to advertise plums. The pear provisions are not at issue.

In 1962 authority for a marketing order allowing cherry advertising was added to 7 U.S.C. Section 608c(6)(I): "*Provided*, That with respect to orders applicable to cherries such projects may provide for any form of marketing promotion including paid advertising[.]" Pub. L. 87-703, 76 Stat. 632, Sept. 27, 1962. This provision was added in conference with amendments to the Farmers Home Administration Act of 1961. Conf. R. No. 2385, Sept. 17, 1962, *reprinted in*, 1962 U.S.C.C.A.N. 2700. No explanation or discussion appears in the legislative history.

In 1965 language was added to 7 U.S.C. 608c(6)(I) giving the Secretary authority to set up advertising of plums and nectarines. Pub. L. 89-330, 79 Stat. 1270, Nov. 8, 1965. The legislative history at best consists of a letter from the Acting Secretary to the House Agriculture Committee Chair explaining that the AMAA authorized a marketing order including cherry advertising, but the cherry marketing order did not provide for advertising, "[t]herefore, [USDA did] not [have] any experience in the operation of an advertising program under marketing . . . orders." H.R. Rep. No. 846, 89th Cong. 7th Sess. (1964), *reprinted in*, 1965 U.S.C.C.A.N. 4142, 4144. The House Report notes that the AMAA did not originally provide for advertising, but goes on to state that when Congress was asked for "... authority to provide for such activities [under marketing agreements] it has always been granted." 1965 U.S.C.C.A.N. 4143. The following year the Secretary amended marketing order 916 to provide for committee authority to advertise nectarines. 7 C.F.R. 916.45.

In 1971 Congress gave the Secretary authority to set up advertising of California-grown peaches. Pub. L. 92-120, 85 Stat. 340, Aug. 13, 1971. The Acting Secretary wrote that "We anticipate increased effort by the fruit and vegetable industries to obtain means of financing the advertising and promotion of these commodities in the marketplace [and] the [AMAA] could provide the facility for this purpose."

S.R. No. 92-295, 92nd Cong., 1st Sess. (1971), *reprinted in*, 1971 U.S.C.C.A.N. 1406, 1407. Also in 1971, the Secretary amended marketing order 917 to provide for committee authority to advertise plums. 7 C.F.R. 917.39. In 1976 the Secretary amended marketing order 917 providing for committee authority to advertise peaches. 7 C.F.R. 917.39.

The committees, consisting of respondents' competitors, control and carry out all aspects of the compelled advertising program including the nature, content, and distribution of the messages. App. 4a, 8a. Each year the committees submit to the Secretary expenses and assessment rates the committees estimate for each commodity. 7 C.F.R. 916.31(c), 917.35(f). The Secretary authorizes the expenses and assessments by publication in the Federal Register. Meanwhile, assessments are imposed on every box of peaches and nectarines (and plums until 1991) packed in the San Joaquin Valley. 7 C.F.R. 916.40, 916.41, 917.36, 917.37. The assessments total approximately 10 to 12 million dollars annually. Approximately 53 percent of these assessments fund the compelled advertising and promotion budget. App. 8a, n.3. Although thirty-three states commercially handle peaches, twenty-eight handle nectarines, and twenty-six handle plums, only California handlers are forced to pay for so-called generic advertising. App. 21a.

Litigation History

Respondents Wileman Bros. & Elliott, Inc. and Kash, Inc. filed administrative petitions in 1987 with USDA, pursuant to 7 U.S.C. section 608c(15)(A), challenging certain aspects of the marketing orders governing California nectarine and plum maturity regulations from 1980-1987.⁴ Following a nine-day

⁴Beginning with the 1987 harvest season Wileman/Kash paid their assessments into an attorney-client trust account. The U.S. Attorney's office filed collection actions in the United States District Court, Eastern District of California. District Court Judge Edward D. Price ordered the assessments, and all assessments for future harvest seasons, retained in trust

hearing, USDA Administrative Law Judge (ALJ) Dorothea A. Baker ruled in favor of Wileman/Kash. In 1988, Wileman/Kash again challenged the marketing order regulations. The second petition incorporated challenges to the peach marketing order (7 C.F.R. 917) maturity regulations and the compelled advertising program for nectarines, plums and peaches. Respondents sought refund of assessments imposed since 1980. Following 19 days of testimony, ALJ Baker ruled in favor of Wileman/Kash, and in dicta analyzed the compelled generic advertising program finding it unconstitutional under *U.S. v. Frame*, 885 F.2d 1119 (CA3 1989). Opp. 362a393a.⁵ In the interim, the remaining fourteen respondents each filed 7 U.S.C. 608c(15)(A) administrative petitions making similar challenges.

USDA's Judicial Officer (JO) subsequently issued decisions overruling both of ALJ Baker's decisions. App. 5a, 7a. Wileman/Kash sought review of agency action in District Court. 7 U.S.C. 608c(15)(B). The parties stipulated that all respondents would rise or fall on the Wileman/Kash complaint, and the District Court heard cross-motions for summary judgment. USDA argued *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n.*, 447 U.S. 557 (1980) was controlling, and that *Abood v. Detroit Bd. of Ed.*, 431

pending final disposition of the case. App. 7a. Approximately six million dollars in assessments is presently in trust.

⁵ALJ findings are part of the record evidence to be weighed against the agency. *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1486 (CA9 1984). ALJ Baker made extensive findings in her decision. Opp. 119a-204a. USDA contended constitutional issues were beyond the ambit of a (15)(A) proceeding at the time of ALJ Baker's decision, leaving respondents (and the ALJ) in the catch-22 of failure to exhaust administrative remedies if they went directly to district court. See, *Saulsbury Orchards and Almonds Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1193, n.2 (CA9 1990). Though ALJ Baker discussed the First Amendment in dicta toward the end of her opinion (Opp. 340), she wove in her initial findings testimony and evidence she heard and received related to First Amendment issues.

U.S. 209 (1977) and its progeny had no application to a government-mandated, commercial advertising program. Opp. 2a. The District Court, relying on *Frame*, 885 F.2d 1119, ruled for USDA concluding that although the compelled advertising program "implicates the First Amendment rights of handlers forced to participate, [it] was enacted in furtherance of an ideologically neutral compelling state interest, and infringes on their rights to a minimum degree no more than necessary to achieve the stated goal." App. 91a-92a. The District Court consolidated all respondents for judgment and appeal.

Respondents appealed to the Ninth Circuit. USDA again argued *Central Hudson* was controlling. The Court of Appeals invalidated the compelled generic advertising program. The Court ruled that under *Central Hudson* the mandatory program did not directly advance USDA's asserted interests and was not sufficiently narrowly tailored. USDA petitioned for rehearing, requested rehearing *en banc*, arguing that the Ninth Circuit erred by relying on *Central Hudson*, rather than the *Abood* line of cases.⁶ The Ninth Circuit did not

⁶It is beyond peradventure USDA took the opposite position in the courts below. Opp. 2a, 5a, 8a n.2. Consistent with the Court's admonishments respondents raised this issue at the petition stage. Whether the "germaneness" test derived from *Abood* and its progeny may be applicable to compelled advertising is a question that the Secretary presses too late. "Only in exceptional cases will this Court review a question not raised in the court below." *Lawn v. United States*, 355 U.S. 339, 362 (1958). The Secretary argued on petition that the Ninth Circuit's decision could not be squared with the National Beef Promotion Act's survival of scrutiny in *Frame*, 885 F.2d 1119. No discord exists, however, because the Third Circuit found it unnecessary to apply *Central Hudson* to *Frame's* free speech challenge since an overwhelming Congressional record supported the Beef Promotion Act under heightened scrutiny, while the Ninth Circuit subsequently found the fundamentally different compelled advertising of California peaches, plums, and nectarines failed the less burdensome *Central Hudson* test based on lack of evidence. See, *Frame*, 885 F.2d at 1134, n.12; Cf. *Cal-Almond v. Dept.*

order a response and denied the petition. App. 38a-39a. The Secretary petitioned this Court for certiorari and on June 3, 1996, this Court granted the petition. 116 S.Ct. 1875.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Solicitor requests this Court review a compelled advertising program which the government would have this Court believe is neutral, "generic," and works to the benefit of California peach, plum and nectarine growers and handlers, with minimal incursion on respondents' First Amendment rights. That is not the advertising program at issue.

In reality, less than 50 percent of millions of dollars in advertising assessments are utilized for television and radio advertisements promoting "eat California fruit." The remaining advertising dollars are utilized on promotional materials which promote specific varieties, often times limited to only a few handlers. There are over one hundred varieties *each* of peaches, plums and nectarines. Respondents necessarily only grow a few of these varieties. More often than not, the promotional material promotes specific varieties that tend to be sold by growers involved in the promotional activities — the committee members — who are competitors of respondents. As a result, the larger percentage of the assessment dollar which respondents are forced to contribute to the advertising program is directed to promoting specific varieties of peaches, plums and nectarines which respondents do not grow or handle. Often times, respondents are forced to pay for advertising specific varieties of peaches, plums and/or nectarines that are proprietary varieties of a single handler, which respondents are not entitled to plant, grow or sell.

of Ag. 14 F.3d 429, 434-436 (CA9 1993) (heightened scrutiny need not be applied because forced almond advertising failed the less rigorous *Central Hudson* test).

Throughout this entire litigation, respondents have sought to determine what the Secretary's interest is in compelling handlers of fruit in only five counties in central California to finance a nationwide advertising program — when the same commodities are commercially grown in the majority of the states within the United States. The stipulated trial record fails to reveal that any problem unique to California peach, plum and nectarine growers exists.

Although California's "generic" advertising program is discretionary with the Secretary, not once in the over 20 years that the Secretary has reviewed and approved the annual program, has a problem been identified. Not once has the Secretary conducted any studies which demonstrates that the compelled advertising program is of any benefit to the California peach, plum and nectarine grower. Nowhere in the stipulated trial record is there evidence that the compelled advertising program works better than private enterprise.

Instead, all that can be established is that the Secretary forces respondents to spend their advertising budget on a program not designed for their benefit. It takes money from respondents that could be used to otherwise advertise their own varieties over those of their competitors; while at the same time using respondents' assessment dollars to promote their competitors' own varieties.

Regardless of the level of scrutiny applied in evaluating the Secretary's interest in requiring California peach, plum and nectarine growers to finance this advertising program, the Secretary's claimed interest cannot override respondents' constitutionally protected speech and associational freedoms: (i) The Secretary has identified no existing problem; (ii) the Secretary has not established that either a "compelling" interest or "substantial" interest exists in rectifying the unidentified problem; (iii) the Secretary has provided no evidence that the cure the government has

chosen (i.e., compelled advertising) works to alleviate the problem, or in fact, is not itself the problem.

Respondents show in section I that the government has never demonstrated a genuine need or identified a problem to justify the need for compelled advertising. In addition, under *Central Hudson* the record evidence proves that no substantial interests are directly advanced in a manner no more extensive than necessary. In section II, respondents show that compelled advertising is presumptively invalid under the compelled speech rubric, and fails strict scrutiny applied to interference with expressive association rights. In section III, respondents explain the test urged by the Secretary does not apply here, but regardless, compelled advertising fails that test as well.

LAW AND ARGUMENT

I. Compelled Advertising Fails Scrutiny Under The *Central Hudson* Commercial Speech Standard

After arguing that the "germaneness" test from the *Abood* line of cases applies, the Secretary argues that nothing in *Central Hudson* undermines compelled advertising. Pet. Brf. 34. Under *Central Hudson*, regulation impacting protected commercial speech rights must be supported by a substantial government interest which is directly advanced in a manner no more extensive than necessary to serve that interest. 447 U.S. at 566. The record evidence here shows no substantial interests are directly advanced in a manner no more extensive than necessary.

A. The Government's Asserted Interests In Enhancing Grower Returns, And Avoiding Free Riders And Underadvertising Are Not Substantial

The first step under *Central Hudson* is to identify with care the asserted government interest. *Edenfield v. Fane*, 507, U.S. 761, 768 (1993). That interest must be "substantial." *Central Hudson*, 447 U.S. at 566. The Secretary

multiplies his interests as the case progresses, but taken together or individually none support compelled advertising. Before the ALJ and the JO, the Secretary argued compelled advertising was designed "only to encourage the purchase of peaches, plums, and nectarines." Before the Ninth Circuit, the Secretary argued USDA has a substantial interest in enhancing returns to California peach, plum, and nectarine growers, thus, the goal of compelled advertising is to convince consumers to buy California stone fruit; the Secretary added that USDA has an interest in avoiding free riders who would somehow benefit should the government's compelled advertising program be discontinued. The Secretary repeats these assertions here adding that compelled advertising aims to increase overall market, while individual advertising is insufficient because its intent is to give the particular advertiser a bigger share of market. Pet. Brf. 38-39.

At bottom, the Secretary's assertion of interests and problems sought to be rectified comes down to an unimportant, unsubstantiated concern about underadvertising that ostensibly would occur without compelled advertising. When the government seeks to defend regulation impacting protected speech as a means of redressing past harms or preventing anticipated harms it must do more than posit the existence of a disease sought to be cured, because even if a regulation is otherwise permissible in the face of a given problem that regulation may be highly capricious if the problem does not exist. *Turner*, 114 S.Ct. 2445, 2470 (1994) (government must show local broadcasting in genuine jeopardy and in need of requiring cable TV to devote channels to local stations). After telling Congress in 1965 that USDA had no experience in advertising under the marketing orders (*supra*, 4), and after promulgating amendments to the marketing orders back in the 1960's and 1970's allowing the committees to initiate compelled advertising, the Secretary has yet to establish that the industry is in genuine jeopardy and/or in need of compelled advertising.

Nothing in the record supports the Secretary's supposition that underadvertising of California peaches, plums, and nectarines, or decreased demand, or genuine jeopardy will exist without the government forcing an advertising program on the California stone fruit industry. The Secretary's arguments are nothing more than post hoc rationalizations.

Beyond failure to demonstrate a genuine problem justifying a need for compelled advertising, the government's posited interests are not substantial. The record does not reveal what the Secretary means by "enhance" grower returns. Juxtaposed with assertions alluding to increase in consumption and total market, the Secretary apparently assumes increased production equates to increased profits. The record presents no evidence, whatsoever, on whether increased production increases or decreases growers' profit margin. Regardless, however the Secretary defines or measures enhancement of grower returns as an identified interest, it cannot be supplanted with other suppositions. See, e.g., *Edenfield v. Fane*, 507 U.S. at 768. ("[T]he Central Hudson standard does not permit us to supplant the precise interests put forward by the State with other suppositions.")

An ambiguous asserted goal of "enhancement" of grower returns does not qualify as substantial. Enhancing returns to only California growers of peaches, plums, and nectarines when so many other states have growers producing identical commodities leads to the conclusion that the government could claim a substantial interest in enhancing returns to any discrete economic cluster, making the concept of substantial interests meaningless, particularly where, as here, the record does not demonstrate a principled distinction explaining why the Secretary seeks to enhance returns for California growers through compelled advertising but not for growers in other stone fruit producing states. The Secretary simply begs the question and asserts that because California dominates the national markets for peaches, plums, and nectarines, California handlers and growers "stand to reap

most of the benefits" of increased sales. Pet. Brf. 31. *Cf. Frame*, 885 F.2d at 1181-1182 (Sloviter J., dissenting) (government interest neither compelling nor substantial when forced advertising messages represent economic interest of one segment of population).

The Secretary does not claim that an increase in overall demand is a "substantial" interest, but he posits this aim avoids adverse market conditions associated with reduced demand. Pet. Brf. 38. Nothing in the record points to any evidence that adverse conditions due to decreased demand has or will exist without compelled advertising. On the other hand, the record evidence affirmatively demonstrates that the advertising program has been manipulated to provide for promotion of select, discrete varieties — not the overall market. Moreover, the AMAA was not intended to control production. See, 50 Stat., Ch. 296, p. 247, June 3, 1937; 7 USC 608c(10). At best the AMAA only gives the Secretary ability to use marketing orders to limit a flooding of the market with particular commodities at a given time. 7 U.S.C. 608c(6) [order may provide for limiting total quantity of commodities, which have been produced, which may be marketed or transported during specified period].⁷ Yet production is just what the Secretary necessarily seeks to control by increasing the overall demand.

The purported interest in avoiding free riders, on which the Secretary places almost talismanic reliance, is not the vital policy interest that it is in the union context. See, part III. Under the Secretary's reasoning, free riding is a concern to be remedied in connection with virtually any industry or individual advertising. The same imagined concern about free riding could be used to justify compelled advertising of products from every conceivable regulated industry. Whether voluntary collective advertising or indi-

⁷The marketing orders at issue do not contain such quantity limiting provisions.

vidual advertising would allow others to "free ride" by not participating or engaging in their own individual advertising cannot justify compelled advertising.

The Secretary cannot point to any substantial interest that warrants compromising First Amendment principles with compelled advertising. Advertising stone fruit must not be placed in the same category as health, safety and other arguable legitimate governmental interests. If advertising stone fruit is a "compelling" or "substantial" governmental interest, then what is not a substantial governmental interest? Advertising products in any industry could be mandated by the government in an effort to overcome the consumers' supposed lack of interest in that particular product.

B. The Government's Asserted Interests Are Not Directly Advanced By Compelled Advertising

Under *Central Hudson*, the Government carries the burden of showing that the challenged regulation advances the government's interest in a "direct and material way."⁸ That burden is not satisfied by mere speculation and conjecture. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, 1592 (1995). The record evidence defeats the Secretary's arguments regarding achievement of the asserted goals of enhancing grower returns, increase in total market, avoiding free riders, and the alleged underadvertising that would occur without compelled advertising.

1. Compelled Advertising Does Not Directly Advance The Asserted Interest In Enhancing Grower Returns

The government's assertion of an interest in enhancing only California peach, plum, and nectarine grower returns

⁸Moreover, wholesale compelled advertising should at least be required to "significantly" advance a substantial interest, just as wholesale suppression of advertising must do. See, *44 Liquormart, Inc. v. Rhode Island Liquor Stores*, 116 S.Ct. 1495 (1996).

through compelled advertising need not detain us since it has failed to accomplish that goal to *any extent*. As noted above, the Secretary granted the committees authority to engage in forced advertising beginning in 1966 for nectarines, plums in 1971, and peaches in 1976. The committees' management committee chairperson testified that, since he had been on the committees, beginning in 1971, the industry pays more each year for the same level of advertising, but nonetheless the growers' economic position has not improved — growers may even make less now than in 1971. See, App. 19a; W/K-II, R.T. 1293-1295.

2. Compelled Advertising Does Not Directly Advance The Asserted Interest In Increasing Total Market But, Instead, Is Utilized By the Committees To Promote Select, Discrete Varieties Of Stone Fruit

At trial, USDA relied on its trial exhibit 297, without reference to any specific document, as the record evidence supporting compelled advertising of peaches, plums, and nectarines. Opp. 134a, ¶ 59. Trial Exhibit 297, covering the years 1980 to 1989, consists primarily of commodity committee meeting minutes, proposed committee budgets, assessment rates, and a few USDA memoranda. The ALJ found no evidence which supported any of the rhetoric of the Secretary that the documents in USDA's trial exhibit 297 were reviewed before the Secretary authorized the commodity committees' expenses and approved implementing the so-called "generic" advertising each season. Opp. 336a. The ALJ concluded that "it may well be true that such documents were available but no witness indicated that he reviewed all of these documents and made certain judgmental determinations with respect thereto." Opp. 339a.

A review of the contents of USDA's trial exhibit 297 reveals nothing supporting compelled advertising. For example, since 1980 the Secretary merely rubber stamped the

committees' budgets and assessment rates.⁹ The committees met each year and came up with a budget and an assessment rate for each regulated commodity. The budget was sometimes outlined in a document called "California Stone Fruit Projects." JA 265, 289, 302, 338. There was usually a memorandum addressed to the USDA fruit and vegetable division director recommending approval of the California Stonefruit Budgets. JA 271, 277, 280, 293, 308, 313, 315, 318, 330, 345, 358, 369, 378, 484, 485, 498, 500. These memoranda categorized the items on which the money would be spent and advised whether expenditure, based on crop size, was going to be increased or decreased compared to the previous year. *Id.* Rules, without prior notice and/or opportunity to comment, appeared in the Federal Register authorizing the fiscal year expenses and assessment rates that the committees wanted.¹⁰ JA 284, 323, 327, 334, 351, 362, 366, 370, 374, 382, 487.

The Secretary claims this "prior approval" of a budget enables industry members to plan their own advertising efforts. Pet. Brf. 42, n. 23. This cannot be based on record evidence. The ALJ found: "It is undisputed, and the evidence clearly shows, that a very substantial percentage of the tree fruit harvest season was completed prior to the issuance of the assessment [regulation]. In other words, fruit was picked and packed prior to the effective date of each years' assessment regulations." Opp. 340a. "A review of the Secretary's assessment regulations from 1979 through 1989 establishes their retroactivity and, also, that, through the last decade,

⁹The Ninth Circuit correctly reasoned that the Secretary must rely on current information since the Secretary continually approved annual committee budgets and assessment rates. App. 10a-11a.

¹⁰On June 16, 1988, after respondents had filed petitions challenging the marketing orders, the Secretary issued, for the first time, a proposed rule regarding the estimated assessment rates, and an opportunity for comment. Opp. 159a.

virtually the entire advertising budget was expended well before the Secretary authorized any expenses to be incurred or assessments collected." Opp. 339a-340a. A close look reveals that this record is mostly an exercise in pushing paper. For example, the Secretary published notice in the Federal Register on August 10, 1981 authorizing the commodity committees' expenses and assessment rates for fiscal year ending February 28, 1982. The internal USDA memorandum to the director of the fruit and vegetable division recommending approval of the committees' expenses and assessment rates, however, is dated over one month after the Secretary approved the expenses and assessment rates. JA 293.

Faced with this untenable record, the Secretary begins with a notion that advertising is assumed to increase consumption of the thing advertised. The record defeats the Secretary's arguments and demonstrates the falsity of that assumption.¹¹ As a prime example, the Secretary's reliance on the nonpeer reviewed 1987 Carmelita Enterprise Report

¹¹The assumption in *Central Hudson*, 447 U.S. at 569 that there is an immediate connection between advertising and demand is debunked by the record evidence in this case. Additionally, in 44 *Liquormart*, 116 S.Ct. at 1511 this Court rejected *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 341-342 (1986) and the government's argument that because commercial speech concerns products and services, greater deference must be afforded a legislative determination to regulate commercial speech to achieve the government's ends. See also, *Kiwi Fruit Commission v. Moss*, 45 Cal.App.4th 769, modified 46 Cal.App.4th at 1089c, 53 Cal.Rptr.2d 138, 147, n.18 (1996) (observation that *Posadas* not only limited to facts, but presuming advertising increases demand empirically unsound). In *Turner*, 114 S.Ct. at 2471, the Court explained that Congress' judgments are not insulated from judicial review and First Amendment requires ensuring that Congress has drawn reasonable inferences based on substantial evidence. Neither the record nor the legislative history support the Secretary's position that compelled advertising increases consumption and/or grower profits.

for his argument that compelled advertising works (Pet. Brf. 36) does not change the fact that, as the Ninth Circuit correctly found, respondents poked several methodological holes in the report. The October 1987 report focused on 254 members of a Kansas City panel. JA 410. The report contains no discussion about any bias in the sample, i.e., relevant differences between members of the sample and members of the general consumer population; the report contains no discussion of the homogeneity of the population to determine whether the sample size is adequate; nor do the panel members' responses support the Secretary's assertion. The people interviewed were exposed to excerpts of compelled advertising television and radio ads and then asked to prove they were "aware" of the ads by describing something about the ads not in the excerpts. JA 411. Measuring levels of awareness of the ads resulted in assignment of a percentage of the sample who acknowledged awareness of at least one commercial. JA 416. The report calls this percentage the "net campaign awareness." *Id.* The report then admits that it assumes awareness of the advertising equates to a finding that the advertising is persuasive. *Id.*

The Secretary's reliance on a perceived correlation between awareness of the ads and the purchase of fruit is without foundation. The Carmelita report completely fails to allow for the impact, if any, of individual advertising to which the interviewees may have been exposed. Retailer television or radio advertising, handler and retailer point of sale, newspaper or other private advertising, may account for all consumer purchases — with no relationship to the compelled advertising supplied by respondents' assessment monies. In fact, the Carmelita report even suggests in-store, point of purchase advertising may be better than "generic" television advertising.¹²

¹²In-store point of purchase advertising is the type of advertising that respondent Kash, Inc., for example, would use to a greater extent if not

Most telling, to measure the impact of forced "generic" advertising, the Carmelita report compared the interviewee's fruit purchases in 1986 to purchases made in 1987 and concluded that those interviewed purchased fewer peaches and plums than the previous year — and about the same amount of nectarines. JA 419. This additional finding discredits the Secretary's contention that compelled advertising increases consumption.¹³ Despite the failure of "generic" advertising, at least in Kansas City, the committees went on in 1988 to spend 43 percent of the advertising budget, or approximately \$2,385,000, on television ads, and an additional 20 percent, or approximately \$1,115,000, on radio ads. Similarly, in 1989 the committees spent 28 percent of the advertising budget, or \$1,441,000, on network and cable TV ads, and 23 percent, or \$159,000, on radio ads. JA 533, 535.¹⁴

Besides the failure of the Carmelita report to show that so called "generic" advertising advances the asserted governmental aims, substantial evidence clearly established that compelled advertising forced respondents to pay for advertising their competitors' particular varieties — not total market. CTFA's manager testified under oath (at the hearing on

forced to expend his advertising budget to support the committees' compelled advertising program. App. 19a, n.9; See, JA 545-546.

¹³See "Loved The Ad. (May or May Not) Buy the Product," Wall Street Journal, April 7, 1994, page B1 (7 packaged goods among the most popular and best remembered commercials of 1993 — 5 of those brands had either flat or declining sales).

¹⁴A small portion of the expenditure represented on Trial Exhibits 351 and 348 (JA 533, 535) includes pear promotion. JA 742-743. No TV ads were run for pears. JA 742. Pear ads on radio began about the 12th week of a 18-week peach, plum, and nectarine advertising campaign; by that time the peach, plum, and nectarine ad expenditure has expended 87 percent of the budget. JA 742, 534, 536. The percentages and allocations of expenditure on Exhibits 348 and 351 relating to peaches, plums, and nectarines are insignificantly affected by the pear radio advertising expenses. JA 743.

the 7 U.S.C. 608c(15)(A) petition brought by respondent Gerawan Farming, Inc.) that the millions of dollars extracted from California handlers in advertising assessments were expended solely on "generic" advertising — no specific variety was promoted. Opp. 349a. However, one week later, CTFA's 1989 California Summer Fruit Late-Mid Season Varieties Brochure was distributed throughout the nation, which included the specific promotion of the "Red Jim" nectarine — the exclusive proprietary variety of committee member Jim Ito. App. 15a, n.6; Opp. 349a; JA 531. Compelled advertising also forced respondents to pay for advertising the proprietary variety of a nectarine known as the "Maybelle" exclusively owned and distributed by a particular family packing operation. JA 618. The Maybelle similarly appears on CTFA's 1989 California Summer Fruit Early-Mid Season Varieties Brochure. JA 532.

Proprietary varieties of others cannot lawfully be planted or sold by respondents. Respondent Ray Gerawan testified that the Red Jim nectarine directly competes with his varieties. To compete with the Red Jim nectarine (one of the more popular varieties sold), it is necessary for Gerawan to spend additional money and expend additional effort to promote his own "Prima Red" variety. Yet, while he expends his own money to compete with the Red Jim, the commodity committee is spending Gerawan's assessments to directly promote his competitor's variety. See, Opp. 349a¹⁵ Testimony established that in addition to promoting

¹⁵Other record evidence further underscores the variety-specific and insider manipulation of compelled advertising. In April 1988, committee member Jim Ito wrote to CTFA's director of merchandising threatening him over the content of trade communications promoting varieties other than the Red Jim nectarine. JA 434-434. The CTFA manager wrote back that the trade communication sought to promote Fairlane, Flamekist, Autumn Grand, and Late Le Grand varieties of nectarines, but did not mean to do so to the detriment of Ito's brand. JA 438. The manager also explained that CTFA often selected Ito's fruits for use in

proprietary varieties, the committees' color brochure advertising promotes only the top selling 15 varieties of peaches, plums, and nectarines. See, Opp. 333a. Only varieties sold in "significant volume" make it to these charts. W/K-II, R.T. 2293, 2374; See, JA 531, 532. In 1988 the committees spent 19 percent, and in 1989 23 percent, of the advertising budget, over one million dollars each year, on this form of advertising. See, JA 533, 535.

The compelled advertising program seeks to increase sales of those varieties that already command a significant portion of the market. Handlers of varieties other than the current top 15 sellers are literally forced to finance the promotion of their competitors' fruit.¹⁶ Nor are these isolated instances; CTFA's manager testified that the compelled advertising of specific varieties will become an even greater problem over time [as new proprietary varieties move into the category of the select 15]. W/K-II, R.T. 4888. Most damaging, CTFA's manager testified that as much as 40 to 60 percent of the varieties promoted are varieties sold in the market place under only one handler's label. W/K-II, R.T. 4889-4890. Yet, respondents' assessments are extracted to advertise these select proprietary varieties none of which respondents grow or sell.

Compelled advertising also projects a particularized message that red nectarines (of respondents' competitors, including the committee members, to the potential detriment of the yellow varieties grown by respondents) are better than

the committees' advertising efforts. JA 439. On another occasion Ito refused to pay his assessments unless committee television advertising ran at the same time his Red Jim nectarines were harvested. JA 633. The ad agency was ordered to accommodate the timing of Ito's Red Jim harvest. JA 634.

¹⁶ At the time of hearing, for example, approximately 130 varieties of peaches were under the jurisdiction of the peach committee. W/K-II, R.T. 1436.

other varieties. App. 15a, n.6. This is subtle, broad based advertising of varieties grown by respondents' competitors. Compelled advertising also does not consider or benefit members of the industry who sell to buyers different from those that the compelled advertising targets. Wileman Bros. & Elliott, Inc., does not sell directly to retailers, but instead sells primarily to brokers and jobbers. W/K-II, R.T. 3882-3884. Nonetheless, Wileman Bros. & Elliott, Inc. must pay for advertising directed to consumers who buy its competitors' fruit.

The committees additionally force respondents to pay (through their assessments) for other activities that serve only to benefit committee members. For example, in June 1989, buyers from "Lucky" stores were provided meals, cocktails, hotel accommodations and tours of the packinghouse owned by the chairman of the nectarine committee; a tour of Ito packing, owned by a commodity committee member and owner of the proprietary variety — Red Jim nectarine; a tour of Ballantine produce, owned by the long time chairman of the plum committee; and a tour of Wawona packing where the chairman of the peach committee is employed. See, JA 495, 626-629; Opp. 309a-310a. Forcing respondents to pay for tours to bring retail buyers to companies owned by or connected to commodity committee members cannot fairly be said to be aimed at increase in market other than for the commodity committee members.¹⁷

USDA argues that forced advertising has "utility," which individual advertising lacks. This argument fails to improve upon USDA's weak posited concern regarding underadver-

¹⁷ A CTFA employee questioned why the "Lucky" tour only involved a few select packing houses, when many others sell to Lucky stores as well. JA 634. CTFA personnel explained that Wileman/Kash would not be included in the tour because CTFA could not control what respondent Elliott, for example, would say during such a tour. JA 635.

tising. Citing the September 1989 nonpeer reviewed RMC report, dated only one month before the start of the administrative hearing in this case, the Secretary argues individual advertisers will not present fruits in a group, but that the committees' compelled advertising does, which allegedly creates a synergistic effect with purchase begetting purchase.¹⁸ Pet. Brf. 39. The RMC report begins by pointing out its conclusions are not statistically supportable, but instead merely represent "qualitative" observations of those who responded. JA 519. Even with this qualifier, the report underscores the failure of the forced advertising. The report concludes that the grouping of peaches, plums and nectarines (also Bartlett pears) is an artificial grouping imposed by the committees. JA 519. Compelled advertising failed to provide a sufficient "...artifice to hang them together... [and does] not...identify the fruits in the consumer's mind." JA 523.

Citing the RMC report, the Secretary next argues that only compelled advertising effectively uses "point of sale" efforts to educate consumers about "how tree fruits should be ripened," allegedly because consumers are ignorant and individual handlers lack incentive and resources for this type of advertising. Pet. Brf. 40. *First*. The RMC report takes care to point out that its conclusions are of no statistical use to project conclusions beyond those persons interviewed. JA 519. Hence, even if the ignorance which the Secretary espouses does exist, it cannot reliably be said to go beyond those interviewed. *Second*. The record evidence concerning education about how to ripen fruit is sketchy at best. For a time the committees sold ripening bowls (in which fruit is

¹⁸The record evidence establishes the inverse of the Secretary's contention that individual advertisers would not group fruits together. Wileman Bros. & Elliott, Inc., for example, presents, displays, and discusses grapes, oranges, nectarines, and plums together in one detailed, colorful brochure. JA 537-544.

placed to ripen), but the profits generated from sales of these bowls were later siphoned to an entity called Tree Fruit Reserve — an entity purposely used by committee chairmen to engage in activities that are illegal for them to do in their capacities as committee chairmen. Opp. 165a, 173a-174a. While the committees did use assessments to pay for paper bags stamped with the phrase "Ripening Bag," no record evidence supports the Secretary's assertion that consumers were educated about ripening fruit by these efforts or that individual advertising cannot provide that same education. W/K-II, R.T. 4679. *Third*. The Secretary mixes items from the educational assessments expenditure with those earmarked for compelled advertising. Expenditures for the ripening bag, for example, are from the assessments allocated to publicity and education. W/K-II, R.T. 4679. This category of expenditure accounted for only 5.5 percent of the budget for 1989 or \$280,000 out of an advertising budget of well over 5 million dollars. JA 535. *Fourth*. The Secretary's contention that consumer ignorance can only be effectively addressed by compelled advertising buttresses respondents' contentions that compelled advertising is impermissibly based on the Secretary's unsupported paternalistic assumption that the committees know best what to say about the fruit and how to say it. *See, Riley*, 108 S.Ct. at 2675 ("the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners").

The Secretary's concern that compelled advertising is needed to focus on repeat purchasers who begin buying early in the season, because individual handlers' advertising allegedly takes place only when their varieties ripen, is similarly unpersuasive. Pet. Brf. 40-41. The Secretary, citing the nonpeer reviewed 1987 NPD/Nielsen report, relies on a supposition that buyers who make purchases in the first four weeks of fruit availability were more likely to return to make a second purchase than buyers who do not make a purchase

until the second four weeks of availability. Assuming the Secretary's supposition holds true, compelled advertising should instead focus on those who make their initial purchases later in the fruit availability window, instead of preaching to the converted.

Compelled advertising concentrates on early season varieties by running most of the advertising at the beginning of the season. The committees' compelled advertising efforts take place over an 18-week period. W/K-II, R.T. 4054. However, by the end of the fourth week, the committees have spent approximately 54 percent of the advertising budget. *Id.* 4082. This necessarily focuses on specific varieties available early in the season, well before the better quality, later season varieties are ready for market. Even if the early season advertising worked it would bring consumers into stores well before later season California fruit is available, guiding consumers to fruit from other nations with altered growing seasons (e.g., Chile). JA 660-661.

Forced advertising of select, discrete varieties and targeting market outlets of respondents' competitors' fruit does not advance total market, or result in benefit inuring to all required to fund the program. Compelled advertising of select varieties reduces and skews the free flow of vital commercial information to the public about the fruits, and impermissibly pressures respondents to expend additional monies to respond to the messages respondents are forced to finance — messages which they are not allowed to author and messages from which they do not benefit.

To side-step the record evidence, the Secretary argues the Ninth Circuit erred in requiring USDA to prove that compelled advertising increases sales better than individual advertising. The Secretary misapprehends the Ninth Circuit's decision. What USDA must demonstrate is that the harms it recites are real and that its regulation will in fact alleviate those harms to a material degree. *Edenfield*, 507 U.S.

at 771; *Turner*, 114 S.Ct. 2445. This USDA cannot do. There is no record evidence supporting the premise that underadvertising would occur, resulting in market instability, absent compelled advertising. There is no record evidence that handlers and growers would not advertise peaches, plums, and nectarines absent compelled advertising. There is no record evidence that without compelled advertising, growers and handlers would not combine their resources to promote their product. There is no record evidence that individual advertising is insufficient to increase overall market or enhance grower returns. The Secretary failed to show, much less prove, the harm he recites is real, and that forced advertising alleviates that harm to any degree.

3. Compelled Advertising Does Not Directly Advance The Government's Asserted Interest In Avoiding Free Riders

Finally, the Secretary argues that compelled advertising directly advances a substantial governmental interest in avoiding free riders. Pet. Brf. 35, 43. Avoidance of free riders begins with the premise that those who would be free riders receive a benefit. However, USDA has not established any enhancement of grower returns or any increase in total demand. Even so, compelled advertising does not avoid free riders because unlike in the union and integrated-bar context, the constituency of the commodity committees extends beyond those who pay assessments. Pet. Brf. at 25, n.16. The Ninth Circuit also correctly pointed out that "[i]f the Secretary is worried about free-riders, there are already plenty of them in other states[]" — thirty-three states handle peaches commercially, twenty-eight handle nectarines and twentysix handle plums, yet only central California handlers are required to advertise. See, App. 21a.

C. Compelled Advertising Is More Extensive Than Necessary To Serve The Asserted Goals

Under *Central Hudson*, regulation impacting commercial speech must be no more extensive than necessary to serve the asserted interest. 447 U.S. at 566. The Secretary cannot show a sufficient fit between his stated goals and the abridgment of respondents' First Amendment rights. See, 44 *Liquormart*, 116 S.Ct. at 1510 (plurality) (even under less strict standard in commercial speech cases, state failed to show "reasonable fit" between temperance goal and abridgment of speech). The incontrovertible record evidence proves that compelled advertising completely fails to be no more extensive than necessary to serve the asserted goals. Compelled advertising promotes proprietary varieties, select high sales volume varieties, pushes red varieties, spends most of the advertising budget on early varieties, 40 to 60 percent of the varieties advertised are discrete varieties shipped only under individual labels, and the committees use assessments to pay for activities that can only fairly be said to benefit the committee members. Apart from this evidence and the evidence contradicting the Secretary's claim of enhanced grower returns, use of compelled advertising to achieve the asserted aims reflects a poor ends/means fit for other reasons as well.

The Secretary cannot show that compelled advertising increases total demand when the stone fruit promotion subcommittee's own advertising personnel explained to the committee that because all supplies of stone fruit that make it to market are consumed, the impact of compelled advertising cannot be measured. See, USDA Trial Exh. 297, Jan. 27, 1987 Promotion Subcommittee Minutes, p. 6. On the other hand, the Carmelita report the Secretary relies on concluded that persons *in the sample* purchased fewer peaches and plums in 1987 than the prior year, despite compelled advertising, primarily because of the appearance

or condition of the fruit. JA 426. The experiences of the committees' advertising personnel not only belie the Secretary's contentions about decreased demand, but also confirms the failure of the Carmelita report to contain a representative sample; nevertheless, the Carmelita report makes respondents' point — it is brand recognition and individual quality that affects purchases, not "generic" ads. If the Secretary has a substantial interest in benefiting California growers of stone fruit (to the exclusion of growers of other commodities and stone fruit growers in other states) he should concentrate on quality control, instead of hindering branded advertising while purportedly pushing a "generic" message.¹⁹

The Secretary argues that individual advertising is insufficient because it is intended to "increase the demand for the advertiser's own brand, which can result either from encouraging existing consumers of the commodity to choose the advertiser's particular brand, or from increasing overall consumption for the commodity." Pet. Brf. 38, 46. The Secretary asserts this "dual focus" detracts from the effectiveness of brand advertising to increase demand across the industry.²⁰ Compelled advertising, however, is simply a shift, from that which the Secretary complains individual advertising does — promote only individual handler's product — to even narrower select, discrete variety advertising of the committees. The spillover effect the Secretary relies on also undercuts his assertion that free-riding in other states is

¹⁹The record additionally shows that assessments and the percentage used for compelled advertising vary yearly with the size of the crop. See, e.g., JA 319, 359. This elasticity undercuts the Secretary's use of compelled advertising to increase total market and expand regional, national, and overseas markets.

²⁰Respondents are not concerned with increasing demand "across the industry." They are interested in promoting their own product and increasing demand for their own specific brand label.

"limited" because compelled advertising aims to promote California fruit as unique (Pet. Brf. 31), since assuming, *arguendo*, compelled advertising works, it follows that promotion of California fruit similarly increases consumption of fruit from handlers and growers in other states, thereby creating free riders.²¹

Using compelled advertising to increase total market still lacks coherence when so many other states commercially handle the same commodities without being forced to advertise. CTFA's Dave Parker testified that the goal of compelled advertising is to get retailers to push California peaches, plums, and nectarines more than peaches, plums, and nectarines from other states. JA 610. The Secretary seeks to increase the size of California's slice of market in relation to the slices the other producing states enjoy. Following the Secretary's logic, he will reduce the slices of market share that South Carolina and Georgia enjoy because he does not force handlers in those states to advertise. See, JA 391 (In 1987 South Carolina produced 350 million pounds of freestone peaches; Georgia produced 100 million pounds).

The Secretary would undo with one hand what he tries to do with the other. Reduction of returns to growers and market instability is more likely under the Secretary's reasoning. To increase California's share of market, greater production of the commodities must occur. But, in theory, this would lead to over production, reduced returns to California growers, reduced returns to growers in other states and a decline in their production thereby creating market instabilities. Plus, the Secretary's hidden premise that compelled advertising will result in an increase in

²¹ Because most supermarkets do not identify the state or country of origin, once the fruit is on the supermarket shelves, it is impossible to distinguish a California peach from a Georgia peach, a South Carolina peach or a Chilean peach.

production is at odds with Congress' express declaration that the AMAA provisions for orderly marketing conditions were not "intended for the control of production[.]" 50 Stat. Ch. 295, June 3, 1937.

The Secretary contends that compelled advertising is narrowly tailored because Congress cannot require the public to increase consumption of peaches, plums, and nectarines. Pet. Brf. 45. The assertion of this as a carefully considered alternative is no answer and it turns the analysis in *44 Liquormart*, 116 S.Ct. 1495 on its head. There, the Court explained that under the First Amendment, attempts to regulate speech are more dangerous than attempts to regulate conduct. *Id.* 1512. The assertion that because Congress cannot force the public to eat fruit, the Secretary can freely force handlers to advertise is contrary to this basic principle.

The Secretary argues that compelled advertising would not be more narrowly tailored by allowing credits against assessments for handlers that engage in their own advertising because credits would be contrary to his interest in avoiding free riders. Pet. Brf. 46. The Secretary's argument ignores that credits do not allow handlers to avoid advertising. To avoid funding the committees' advertising program, the handlers' only alternative would be to engage in their own individualized or cooperative advertising. Assuming the Secretary could permissibly mandate either form of advertising in this way, his arguments regarding underadvertising dissipate.²² The Secretary's only basis for refusing credits is that he impermissibly favors the content of committee

²² When authorizing credits for handlers of filberts (hazelnuts) engaged in their own advertising, the legislative history points out that the credits "would stimulate filbert handlers to promote their own brands and to develop their own promotional programs in concert with the overall marketing strategy." Pub. L. 98-171, 97 Stats. 117 (1983).

advertising and disfavors the content of individual advertising.

In sum, this record shows compelled advertising completely fails scrutiny under *Central Hudson* since no substantial interests are directly advanced in a manner no more extensive than necessary.

II. Compelled Advertising Violates Core First Amendment Protection From Forced Speech And Association

Beyond compelled advertising's failure to survive intermediate scrutiny under the commercial speech doctrine, respondents contend compelled advertising is presumptively invalid under the compelled speech rubric. Respondents must pay for content-based compelled advertising messages they are necessarily associated with — and disagree with on commercial, economic, moral and ideological grounds. Compelled advertising also fails strict scrutiny applied to interference with associational rights.

A. Compelled Advertising Is Presumptively Invalid Because Respondents Must Fund Content-Based Messages That They Disagree With And That Impel Response

Compelled advertising is presumptively invalid because it not only disseminates messages closely associated with respondents, but it burdens respondents' speech and favors the speech of the committees based on content, while impelling respondents to alter their speech in response — or remain silent. The Secretary cannot point to any governmental need sufficiently weighty to sustain the presumptively invalid forced advertising program.

The First Amendment protects the right to speak freely and refrain from speaking. *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 633-634 (1943); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974);

Wooley v. Maynard, 430 U.S. 705, 715 (1977); *Pacific Gas & Electric v. Public Ut'l Comm'n. of Cal.*, 475 U.S. 1, 11 (1986). This principle applies equally to expressions of "value, opinion, or endorsement, [and] statements of fact the speaker would rather avoid [Citations omitted]." *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 115 S.Ct. 2338, (1995). The controlling principles in these cases include impermissible penalization of points of view, or a content basis for the regulation, or forcing a speaker to alter its speech to conform to an agenda it does not set. Forced association which burdens protected speech in these ways is impermissible. See, *Pacific Gas & Electric*, 475 U.S. at 9-12.

Compelled advertising uses respondents and their handling of the regulated fruit as an advertising mechanism for the committees and respondents' other competitors. The compelled advertising messages are often identified as coming from the growers, which includes respondents. See, JA 396-400, 428-432. The messages are sometimes identified as coming from the California Tree Fruit Agreement (CTFA), or the peach, plum, and nectarine committees and their employees, whom the Secretary argues essentially "represent" respondents as handlers and growers.²³ See, JA 530;

²³These identifications undercut the Secretary's assertion that the connection between respondents and the forced advertising program is "attenuated," and thus somehow similar to "government speech." Pet. Br. 25, n. 16. Not only is the government speech doctrine not properly before the Court, but the Secretary's attempt to analogize the committees and their relationship to growers and handlers to unions and integrated bars underscores that the assessments and advertising messages attach to a small group and as such the compelled advertising cannot be said to be government speech, conducted by USDA, as representative of the people. See, *Frame*, 885 F.2d at 1133. The record also belies the Secretary's assertion that there is a "substantial degree of government involvement in the development and adoption of the promotional efforts[.]" Pet. Brf. 25, n. 16. The ALJ found that: "... based on

Pet. Brf. 36, n.22. When respondents must pay for, and be associated with, the advertising messages, they are, in essence, forced to proclaim to the public and to other businesses that they desire to engage in the propounded advertisement, that they believe in the message propounded, that they believe the type of message conveyed is the message they want to project and reaches the audience that they wish to reach, and that this message is being conveyed of their own free will. When one sees or hears an advertisement for the sale of stone fruit, the listener or viewer assumes that those paying to disseminate the message are attempting to sell the product in the manner that the product is being promoted, believe that the advertising is necessary to the sale of the product, and are free to send the message conveyed. The listener is not aware that the persons paying for the advertisement are forced to advertise and forced to advertise in that method and manner.

This association or nexus between respondents and compelled advertising messages invidiously forces response, endorsement, or silence.²⁴ Compelled advertising forces respondents to pay for, among other things, promotion of

the stipulated responses, and other evidence, there is a lack of showing of independent scrutiny and analysis of the Committee's recommendations, and there is no way of knowing upon what factual basis the Secretary did, in fact, base his approvals. One can try *in vain* to give the Secretary benefit of doubt, namely, that he was aware of important matters affecting the industry and that his approval was a significant act." Opp. 337a (*italics added*).

²⁴The closeness of the association that creates these dangers can be a matter of degree. *Cf.* *Turner*, 114 S.Ct. at 2459 (cable's history as conduit for broadcast signals leaves little risk viewers would assume stations carried on cable convey ideas or messages endorsed by cable operator or create danger of altering agenda) *with Hurley*, 115 S.Ct. 2348 ("when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."); *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality) (assessment of

proprietary varieties, advertising the top selling 15 varieties (when there are hundreds of varieties), advertising early season varieties (which respondents don't grow), and other select varieties shipped under individual handler's labels, while pushing the particularized messages that red nectarines are better than other varieties. The committees promote particular messages to manipulate consumption of particular varieties of stone fruit. Compelled advertising has the effect of impelling respondents to fight against messages which they must finance and with which they must associate. Respondent Gerawan testified that he feels impelled to increase his efforts to promote his brand label because the compelled advertising promotes his competitors' fruit. Opp. 349a-350a. This testimony was adopted and affirmed by all respondents who testified. *Id.*

Besides variety-specific promotion, the committees also promote two falsehoods respondents cannot condone — "red is better" and "all California fruit is the same." Substantial testimony established that different varieties of the same commodity have different tastes. Even the same variety grown on different parcels of land will have differences in taste, color, size, amounts of soluble solids, etc. W/K-II, R.T. 2961-2963, 4596-4597; JA 589. The stone fruit industry is very competitive, despite the restrictions imposed by the marketing orders. Respondents have developed cultural practices that enable them to grow and harvest high quality fruit they consider substantially superior to that grown and packed by most of their competitors. Respondents contend "truth" in advertising is literally a matter of taste and their commodities are superior to varieties that the commodity committees advertise and any message that all California

employees' salary under patronage system for advancement of political party's policies tantamount to coerced belief).

fruit is the same is false and belied by the record evidence of variety-specific compelled advertising.²⁵

The Secretary even argues that respondents should alter their own speech to attempt to distinguish their varieties while criticizing the compelled advertising messages. Pet. Brf. 22. On the other hand, respondents might conclude under these onerous circumstances not to engage in their own advertising thereby reducing the free flow of valuable information the First Amendment protects. In addition, the connection of the compelled advertising messages to respondents cannot be reduced by labels to defeat a First Amendment claim since even the presence of a disclaimer to avoid giving listeners and viewers the impression that the forced advertising messages are respondents' messages would not eliminate the impermissible pressure to respond to the committees' messages. See, e.g., *Pacific Gas & Elec.*, 475 U.S. at 16, n.11 (presence of required disclaimer on consumer group's messages did not eliminate impermissible pressure on utility to respond). The First Amendment should not be read to allow the coercive power of the government to compel financing of discrete messages, even advertising messages, from a particular group and purportedly on behalf of a particular group by cloaking the connection between the messages and those compelled to pay for them.

More importantly, compelled advertising is content-based regulation. The most exacting scrutiny applies "to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner*, 114 S.Ct. at 2459. "[L]aws that by their terms distinguish

²⁵ See, Alex Kozinsky and Stuart Banner, *Who's Afraid of Commercial Speech?* 76 Va. L. Rev. 627, 635 (1990) ["What about the claim that Burger King's hamburgers taste better than McDonald's because they are charbroiled? That begins to sound more like the claim of a political candidate; it's hard to say that its truth can be easily verified."]

avored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Id.* "[E]ven a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys." *Id.* "Content-based regulations are presumptively invalid [Citation]." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Despite the Secretary's assertion that compelled advertising is not imposed based on, or triggered by, respondents' advertising (Pet. Brf. 20, n.14), the goals, justifications, and the imposition of the compelled advertising reflect its content basis. The Secretary's contention that compelled advertising increases demand (which according to the Secretary individual advertising cannot do sufficiently because it aims to give the particular advertiser a greater share of that market) and his contention that compelled advertising has utility that individual advertising does not, manifestly relates to favoring the content of committee messages. The aim to promote particular content is best illustrated by the Secretary's refusal to allow credits against assessments for handlers' own advertising because individual advertising, in the Secretary's view, is aimed at inuring benefit to the individual, not the collective. Pet. Brf. 46.

The Secretary apparently would credit individual advertising if its content served the collective. The Secretary admits as much when he argues, in context of almonds, "certain types of individual and brand advertising" and "authorized private advertising" may be acceptable for credits. Pet. Brf. 47. The speaker-based allowance of credits can only be explained in reference to content.²⁶ This offends the core of the First Amendment. Indeed, this goes beyond

²⁶ Cf., *Turner*, 114 S.Ct. at 2460 (cable TV "must carry" provisions distinguish between speakers based on manner in which speakers transmit messages; so long as not subtle means of exercising content preference, speaker distinctions of this nature not presumed invalid).

mere content-based regulation to regulation based on viewpoint. See, e.g., *R.A.V.*, 505 U.S. at 391 (viewpoint discrimination of St. Paul bias motivated crime ordinance illustrated by pointing out that aspersions cast upon a person's mother could be used by one arguing in favor of racial, religious, and gender tolerance, but such aspersions could not be used by that speaker's opponent). The Secretary refuses to diminish the burden on respondents' First Amendment freedoms because individual advertising reflects the individual's mind set and incentive to advertise his fruit in particular; unless the handler is a dominant player in the market, such as Blue Diamond in the almond market. Pet. Brf. 47. The Secretary will allow credits for advertising "buy fruit from the dominant handler," but in a market not dominated by a single handler, individuals can not obtain credits for advertising "buy my fruit, it's better than fruit from a market-dominating handler." In this way, the Secretary favors a particular viewpoint.

The Secretary avers that allowing credits for advertising in a market dominated by one handler will not result in a significant free rider problem. Pet. Brf. 47. This is just another way of saying the Secretary prefers the content and viewpoint of dominant handler advertising. Credits do not allow free riding, assuming, *arguendo*, any benefit could be derived, since the only way a handler may avoid funding compelled advertising is to engage in its own advertising. By assuming that compelling handlers to advertise their own product to circumvent funding the generic program still would not achieve what a dominant handler's advertising would achieve, the Secretary impermissibly favors brand name advertising content and viewpoint from a market-dominating handler.

Contrary to the Secretary's assertion, moreover, compelled advertising need not be "triggered" by speech of any particular content to be impermissible. See, e.g., *Turner*, 114

S.Ct. at 2465 (explaining that in *Pacific Gas & Elec.*, 475 U.S. 1, compelled speech not triggered by particular content, but regulation impermissibly conferred benefit to speakers based on viewpoint different from utility). "[T]he law [] is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 115 S.Ct. at 2350.

In this regard, compelled advertising serves the impermissible purpose of enhancing the relative voice of respondents' competitors based on preference for the committees' messages. Respondents have the right "to be free from government restrictions that abridge [their own] rights in order to 'enhance the relative voice' of [their] opponents." *Pacific Gas & Electric*, 475 U.S. 1, 14 [quoting, *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)]. The Secretary identifies a favored speaker — the commodity committees — based on the interests they represent and forces respondents to make dissemination of the committees' variety-specific advertising messages possible by extracting heavy assessment amounts. This necessarily burdens the expression of the disfavored individual advertisers. See, e.g., *Pacific Gas & Electric*, 475 U.S. at 14 (rule that identified speakers based on interests different from PG&E, and then forced PG&E to assist in disseminating that speaker's message, impermissibly burdened PG&E's expression). This is particularly true where, as here, in contrast to integrated-bar and union dues, the more fruit one handles, the more one is forced to pay for the advertising messages of competitors.

Compelled advertising is invidious to the First Amendment where it is premised on impermissible paternalism. "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how they want to say it [Citations omitted]." *Riley v. National Federation of the Blind et al.*, 487

U.S. 781, 790 (1988). "To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners[.]" *Id.* The Secretary's arguments clearly demonstrate the impermissible paternalism engendered by the compelled advertising program; he contends the committees know best how to promote California peaches, plums, and nectarines.

Compelled advertising is presumptively invalid, for it is content-based, premised on paternalism, and forces respondents to be associated with messages they disagree with and that impel response. As shown above in part I, the Secretary has no asserted governmental interests sufficient to overcome the presumption of invalidity.

B. Compelled Advertising Also Interferes With Respondents' Right To Freedom Of Expressive Association

Strict scrutiny must be applied where compelled advertising implicates respondents' freedom from forced expressive association. The Constitution protects the freedom of individuals to associate for protected speech activities. *Roberts v. United States Jaycees*, 468 U.S. 608, 618 (1984); *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). The right of freedom of expressive association presupposes a right not to associate. *Roberts*, 468 U.S. at 623 (citing, *Abood*, 431 U.S. 209, 234-235). Government interference with associational rights must be justified by "compelling interests, unrelated to the suppression of ideas, which cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623.

In *Frame*, 885 F.2d 1119 the court applied the scrutiny articulated in *Roberts*, 468 U.S. 608 to *Frame's* First Amendment claims against the Beef Promotion and Research Act of 1985, 7 U.S.C. section 2901, *et seq.* Similar to the challenger in *Frame*, respondents are forced to finance

particular advertising messages related to their industry. By definition, forced participation impacts respondents' associational rights.²⁷ Additionally, even though not required for First Amendment protection, no workable line of predominately commercial expressive association can be drawn.²⁸

Beyond advertising select, discrete varieties of fruit of respondents' competitors, the compelled advertising employs morally objectionable sexual overtones. For example, Mr. Rodney Chang, President of Kash, Inc., identified a CTFA television advertisement which he found objectionable because of its subliminal sexual overtones. See, JA 530; App. 15, n.6. The First Amendment protects against forced fostering of morally objectionable points of view. *Wooley*, 430 U.S. 705, 715 ("The First Amendment protects the rights of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.") The transcript of a radio ad bears out the sexual overtones of the committees' advertising by asking the listener to associate biting into a big juicy peach with the first time the listener danced with a girl; to associate savoring the juice of a fresh ripe plum with the boy the listener met one summer and never saw again; to associate the taste of a sweet, fresh nectarine with the first time the listener kissed a boy and liked it; and biting into the sweet softness of a pear with double dating — all brought to the listener by "California growers." JA 429-432. A cogent argument can be made that ideologies are based on value systems. Use of sexual connotations in advertising can offend, in addition to moral offense, at an ideological level

²⁷The marketing orders further require respondents to maintain books and records, and to make regular reports to CTFA. See, 7 C.F.R. 916.60, 917.50.

²⁸See, *Roberts*, 468 U.S. at 634 (O'Connor J., concurring).

no less than being forced to associate with expressive activity about other ideological values.²⁹

This forced expressive association is directly tied to the messages, rather than opening up membership as was the issue in *Roberts*, 468 U.S. 608. There, the danger was impairment of the ability of the original members to express the views that brought them together. *Roberts*, 468 U.S. at p. 623. Here, the original message is not respondents' at all. Respondents are forced at the outset into expressive association not their own. Moreover, unlike the state interest in stopping discrimination against women at issue in *Roberts*, respondents are forced into expressive association premised on the Secretary's impermissible content-based paternalistic assumption that the committees, not individuals, are better suited to promote stone fruit. There is also a significant danger of impelling counter expressive association. At the same time, the danger of silencing a different collective voice is significant when handlers are faced with the prospect of paying to support the association while also compelled to pay assessments to the commodity committees to support forced advertising. See, *Elrod*, 427 U.S. at 356.

Comparing the record here with the record in *Frame*, 885 F.2d 1119 underscores the failure of compelled advertising to survive scrutiny. The Third Circuit found the beef promotion program withstood First Amendment scrutiny based upon an overwhelming congressional record. In *Frame*, Congress expressly found the beef industry to be on the verge of crumbling—which Congress believed would be

²⁹ Attempts to influence consumer preferences has potential political aspects as well. See, e.g., *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 538-539 (1991) (Brennan, J., concurring) ("May the city decide that a United Automobile Workers billboard with the message 'Be a patriot — do not buy Japanese-manufactured cars' is 'commercial' and therefore forbid it?"). Here, one admitted object of the compelled advertising is to push California fruit rather than fruit from other states. JA 610.

devastating. *Frame*, 885 F.2d at 1134. The beef industry and Congress decided to embark upon an advertising program. Because Congress envisioned the collapse of our nation's economic base without the implementation of a beef promotion program, the court found a compelling governmental interest sufficient to overcome free speech and associational freedoms within the cattle industry nationwide. *Id.* 1137.

In contrast, no such economic crisis in the tree fruit industry exists. California growers and handlers did not go broke because of not advertising.³⁰ No in-depth Congressional investigation supported amendments to 7 U.S.C. Section 608c(6)(I) providing the Secretary authority to implement forced advertising. No evidence was proffered that the national economy would collapse without commercials imploring consumers to "eat California fruit." The history behind the amendments giving the Secretary authority to force advertising of nectarines and plums makes clear that USDA had no experience in advertising, and the history accompanying the amendment giving the Secretary authority to force advertising of California peaches merely notes that the amendment could be the "facility" for financing advertising. See, *supra*, 4.

In addition, California cattlemen are not singled out, as California tree fruit handlers are, to finance and subsidize a promotion program for an entire nationwide industry. The discriminatory impact of the compelled advertising program as applied to central California stone fruit handlers cannot be equated with a sufficient "fit" between the asserted governmental interest and the regulations at issue. For example, the beef promotion program is nationwide. For

³⁰ The federal plum marketing order was discontinued prior to the 1991 harvest season. As a result, no forced "generic" advertising took place during the 1991 through 1993 harvest seasons. Instead, the growers formed a voluntary program. In 1994, a state marketing order was put into place regulating maturity and advertising.

every head of cattle sold in America, or imported into America, a \$1.00 assessment, set by Congress, is applied to the beef promotion program. On the other hand, within the compelled advertising program for California peaches, plums, and nectarines, the assessment level is a moving target set by the committees and rubber stamped by the Secretary; more importantly it is paid for *only* by central California stone fruit handlers. Historically, the cost of advertising, and accordingly, the assessment rate continues to rise. The extensive hearing record shows that respondents are forced to pay to advertise proprietary and other select varieties of fruit, while respondents' own distinctive advertising efforts are hampered or foreclosed by the assessment burden forced on respondents to support compelled advertising. As this demonstrates, compelled advertising fails strict scrutiny.

III. Compelled Advertising Fails The Germaneness Test

The Secretary argues that the most analogous cases are those involving forced funding of union activities as in *Abood*, 431 U.S. 209, and compelled integrated bar dues as in *Keller v. State Bar of California*, 496 U.S. 1 (1990). The Secretary reasons that the analogy the Court found in *Keller*, 496 U.S. at 12, between the state bar and its members and unions and their members should be extended to encompass the relationship between California stone fruit handlers and the advertising program the handlers are forced to support. Pet. Brf. 24. The principle from *Abood* relied upon in *Frame* (and the Ninth Circuit in *Cal-Almond*), is that compelling one to make contributions of money for otherwise constitutionally protected purposes "works no less an infringement" than prohibiting such contributions. See, *Abood*, 431 U.S. at 234; Cf. *Riley*, 487

U.S. 751, 797 (explaining that, in context of fully protected expression, compelled speech is constitutional equivalent to compelled silence [citing cases including *Abood*, 431 U.S. at 234-235]). Beyond this principle, however, the Secretary's efforts to apply the test developed in the *Abood* line of cases to compelled advertising is unpersuasive. The *Abood* test is designed to balance interests not at stake here.

The perceived unequal bargaining power between employer and employee led to legislative enactments to realign that bargaining power. See, e.g., 79 Cong. Rec. 7565 (1935) (Senator Wagner's remarks re Wagner Act); NLRA of 1947, 29 U.S.C. 141 *et seq.* (Taft-Hartley Amendments). The national interest in labor-management peace resulted in statutory schemes allowing one collective bargaining representative to exclusively speak for represented employees. Allowing voices other than the certified bargaining representative to speak concerning wages, hours, and working conditions disrupts labor peace. See, *Abood*, 431 U.S. at 224 (confusion and conflict would result if rival teacher's unions each sought to obtain employer's agreement). The designation of exclusive representation carries great responsibilities and duties of fair representation of all employees in the unit. *Id.* at 221.

With the overriding principle of exclusive representation to achieve labor peace comes an ancillary interest in avoiding "free riding." Statutory schemes allow unions and employers to negotiate a union shop, where represented employees must join the union as a condition of employment, or an agency shop requiring payment of dues. Only the certified exclusive bargaining agent can negotiate a contract requiring all employees to make contributions to the union. See, *Ellis v. Railway Clerks*, 466 U.S. 435, 447-448 (1984). "[T]he free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its mem-

bers." *Id.* at 452 (union could not spend dissenters' dues for nonbargaining unit organization).

The driving forces that shaped the "germaneness" test are not at work here.³¹ At the outset, the Secretary's posited concern about underadvertising is manifestly less important than aligning the bargaining power of employer and employee and labor peace. The AMAA does not seek to align respective bargaining powers between growers, handlers, and consumers of agricultural products. Congress expressly recognized this when amending the AMAA of 1933 into the AMAA of 1937. After pointing out that the AMAA had not been intended to control production, Congress expressly struck the language from the 1933 Act that claimed the policy of the Act was to establish and maintain "balance between the production and consumption of agricultural commodities . . ." and inserted instead "orderly marketing conditions for agricultural commodities . . ." 50 Stats. Ch. 296, p. 247, June 3, 1937. It follows that the AMAA, marketing orders in general, and compelled advertising in particular, do not seek an alignment of bargaining power similar to requiring employers to bargain with certified bargaining representatives. The Secretary admits as much when he acknowledges the implausibility of forcing the public to consume more fruit.

The Secretary's attempt to draw a substantial analogy between the stone fruit advertising program and the rela-

³¹ In *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 519 (1991) the Court explained that the Court's decisions emanating from *Abood* prescribe a case-by-case analysis of what activities a union may, consistently with the First Amendment, charge to dissenting employees: The activities must "(1) be 'germane' to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."

tionship of unions and the employees they represent and integrated-bars and their members is similarly misconceived. The Secretary recognizes that unlike unions and integrated-bars, the constituency of the commodity committees extends beyond those who pay assessments. Pet. Brf. 25, n.16. The committees, as the Secretary argues, seek primarily to benefit the growers — not those who pay the assessments. Pet. Brf. 38. The Secretary's argument ignores that the committees represent inherently competing interests and ignores that committee members compete for sales with those whom the Secretary argues they represent.

The Secretary nonetheless argues in essence that the industry must speak with one voice through "generic" advertising. Quite apart from the record belying this supposition, the Secretary argues that respondents are free to advertise on their own. Assuming, *arguendo*, the Secretary is correct, his reasoning collapses from its own weight. In this context, it would equate to allowing employees to bargain on their own with their employer for wages, hours, and working conditions despite the existence of an exclusive bargaining representative, but still charging those employees union dues under the guise of avoiding free riders. Under these circumstances, the Secretary's analogy to unions and integrated bars unravels. Committees are not the exclusive voice of members they exclusively represent; nor do they carry the concomitant responsibilities and duty of fair representation.³²

³² Furthermore, for union expenditures procedural safeguards are required to guard against impermissible use of funds. See, e.g., *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986). Possibility of rebate is insufficient. *Id.* No such procedural safeguards exist here. Although not done for some time, USDA can criminally sanction handlers for not paying assessments. *Willow Farms Dairy, Inc. v. Benson*, 181 F.Supp. 802, 803-804 (1960) (twenty years since criminal prosecution for failure to make marketing order payments); *but see, Panno v. U.S.*, 203 F.2d 504, 509-510 (1953) (Defendants placed in

The Secretary's reasoning likewise ignores the fundamental principle that precipitates free riding. The Secretary's assertion that the regulatory schemes encompassing unions, integrated-bars, and the commodity committees all have in common no restriction on the contributors' speech (Pet. Brf. 24), ignores that here no exclusive voice speaks for handlers and growers, nor are the growers and handlers necessarily receiving benefits which in return requires mandatory dues to avoid free riders.³³ A union must represent all employees in the bargaining unit and must give the benefits it obtains by that exclusive representation to its members and non-members alike under the agency shop contracts. In *Keller*, 496 U.S. at 12, the Court acknowledged that members of the bar concededly do not benefit as directly from the bar as do employees from their union. But organized bars prefer a large measure of self-regulation instead of regulation by a governmental body with little or no connection to the profession. The integrated-bar gives unique, weighty professional advice to the California Supreme Court on admission to practice, rules of professional conduct, changes in procedural law; and, the bar administers the admission examination. In return for this unique status of attorneys admitted to practice, attorneys pay their share of this professional involvement. *Id.* at 5, 12.

Free riding could occur absent mandatory dues because the exclusivity in these contexts necessarily results in direct receipt of significant benefits. Here, no conferral of benefit from compelled advertising is evidenced. As shown above,

custody of attorney general if default for failure to pay fines). USDA brings collection actions for unpaid assessments. App. 32a. Requiring objectors to defend federal collection actions and bring equitable actions for recovery of monies is not consistent with the procedural safeguards the Court has required under the *Abood* rubric.

³³ Integrated-bar recommended rules restrict attorney advertising. See, e.g., Cal. Rules of Prof. Conduct, Rule 1-400, and only the certified bargaining representative can bargain for employees covered by a union.

compelled advertising does not achieve any of the purported aims; and instead, harms respondents rather than benefitting them. Even under the best of circumstances, not present here, conferral of a benefit from compelled advertising to those assessed will always be speculative. Equating any speculative benefit from compelled "generic" advertising with the concrete, fundamental benefits directly flowing from collective bargaining and integrated-bar activities is insupportable.

Application of the germaneness test the Secretary urges reveals the complete failure of compelled advertising to pass muster.³⁴ Compelled advertising is not germane to orderly marketing or the Secretary's identified interests in enhancing grower returns and increasing overall demand. Orderly marketing is not fostered by promotion of select varieties with the admitted committee aim of reducing the market for fruit from other stone fruit producing states. Overall market demand is not increased by promoting select varieties, it seeks only to enhance returns for select growers. Compelled advertising is the inverse of what occurs in union and integrated bar situations. Union expenditures are germane to the purpose of collective bargaining the closer they are to inuring benefit to the particular bargaining unit of the dissenting employees. See, *Lehnert*, 500 U.S. at 520 (where challenged lobbying expenses relate not to ratification of dissenter's collective bargaining agreement, but to support of profession generally, connection to function as bargaining representative too attenuated). The integrated bar benefits all members equally without focusing on particular clusters

³⁴ The Secretary argues that forced advertising need not have efficacy to be constitutional. Pet Brf. 30. This explains the shift in the government's argument presented to the Appellate Court from the *Central Hudson* test to the *Abood* test it now advances since the record evidence shows compelled advertising does not achieve the government's asserted goals.

of members. The compelled advertising at issue here seeks to benefit particular growers and handlers by pushing select, discrete varieties. Under the germaneness test, the Secretary's reasoning leads to the untenable conclusion that the State Bar could use dues to pay for advertising the top 15 law firms or other select attorneys or firms the way the committees advertise the top selling 15 fruit varieties and other discrete varieties.

Compelled advertising is also impermissible under the germaneness standard when it makes expansion a driving force behind the statutory scheme. A union, for example, cannot constitutionally force its members to pay for organizing efforts aimed to gain more union members or expand overall union power. *Ellis*, 466 U.S. p. 452-453. Similarly, the AMAA was not intended to control production as the Secretary would do by attempting to force an increase in demand.

Finally, compelled advertising significantly adds to the burden on speech inherent in allowing marketing orders — indeed, the significance of the burden comes from compelled advertising, not maturity and size regulations. In this sense, compelled advertising impales itself squarely on the final prong of the germaneness test by significantly adding to any existing burden on First Amendment rights inherent in allowing the marketing order at all. *See, e.g., Lehnert*, 500 U.S. at 519. The Secretary unpersuasively tries to minimize the burden by arguing that the purpose for which the assessments are spent is relevant, but that extraction of the assessments itself is constitutionally irrelevant. Pet. Brf. 21. As noted above, this reasoning ignores that compelled advertising impels respondents to alter their speech. But apart from altering respondents' speech, respondents' ability to engage in their own advertising at all is *directly* diminished by the government's diversion of respondents' monies to fund the compelled program. The purposes for which the

extracted assessments are used makes the corresponding burden on the ability to engage in the same protected expression relevant. *See, Elrod*, 427 U.S. at 355 (plurality) (cost of patronage restrains freedoms of belief and association — public employee not in financial position to support his own political party and party for which patronage requires contributions to keep job, so individual's ability to act and associate with others of his political persuasion is constrained and support for own party diminished); *U.S. v. National Treasury Union*, 115 S.Ct. 1003, 1014 (1995) (regulation prohibiting federal employees from receiving money for speeches imposed significant burden on expressive activity).

Wileman/Kash are each required to contribute \$50,000 and more in each harvest season to support compelled advertising. App. 18a. As the Ninth Circuit found, this is a significant amount of money impacting respondents' ability to engage in their own protected speech. App. 18a; *See, JA 749*. Testimony at hearing confirmed that respondent Gerawan Farming, Inc. averages between \$600,000 and \$700,000 in assessments each harvest season — of which in excess of 50 percent goes to fund compelled advertising. Opp. 355a; JA 564. Cumulatively, respondents pay well over a million dollars in assessments each harvest season. As a result, promotional material respondents otherwise would prefer to create and distribute is substantially curtailed, their ability to project the message they desire necessarily becomes less attainable, and they are severely restricted from engaging in the advertising or promotion that will reach listeners' eyes and ears. Opp. 364a, 369a-372a.

It is constitutionally impermissible under the germaneness test to require respondents to "donate" in excess of a million dollars each harvest season to finance an advertising program directed at improving their competitors' sales.

CONCLUSION

The text of the First Amendment does not provide a touchstone for discerning a reason why commercial speech can be manipulated as in this case by government-backed coercive power more readily than noncommercial speech. No historical tradition exists for such a notion.³⁵ Compelled advertising represents invidious, impermissible intrusion into the free flow of vital commercial information protected by the First Amendment. The Ninth Circuit's decision should be affirmed.

Respectfully submitted

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³⁵ See, brief of *amicus curiae* American Advertising Federation, American Association of Advertising Agencies Magazine Publishers of America, and Direct Marketing Association in support of respondents.

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Supreme Court, U.S.

FILED

SEP 27 1996

No. 95-1184

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
Petitioner

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF FOR RESPONDENTS GERAWAN
FARMING, INC., NILMEIER FARMS,
AND GEORGE HUEBERT FARMS**

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QUESTION PRESENTED

Whether the federal government's imposition of mandatory collective advertising on handlers of California-grown peaches, California-grown plums, and California-grown nectarines violates their rights under the First Amendment.

RULE 24.1(b) STATEMENT

Pursuant to Rule 24.1(b) of the Rules of this Court, respondents Gerawan Farming, Inc., Nilmeier Farms, and George Huebert Farms, provide the following names of parties to this proceeding whose names do not appear in the caption:

Kash, Inc.
 Gerawan Farming, Inc.
 Asakawa Farms, Inc.
 Chiamori Farms, Inc.
 Phillips Farms, Inc.
 Kobashi Farms, Inc.
 Tange Bros., Inc.
 Nagao Farms
 Nilmeier Farms
 Chosen Enterprises
 Wilmer Huebert Farms
 Kobashi Farms
 Nakayama Farms, Inc.
 Mihara Farms

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STATEMENT

This is a challenge to a federal program that requires handlers of particular agricultural products to make payments to an industry committee for the purpose of engaging in collective advertising for the industry as a whole. Respondents are family-run farms in the San Joaquin Valley of central California whose owners have commercial, economic, and sometimes ideological objections to the content of the advertising that they are required to support.

The Court of Appeals for the Ninth Circuit held that the forced advertising program, which is a form of compelled speech, violates respondents' commercial speech rights under the First Amendment. The court held that the program neither directly advances, nor is narrowly tailored to achieve, any substantial government interest, largely because there is no evidence that collective generic advertising is any more effective than the advertising efforts of individual growers and handlers in the marketplace. Pet. App. 19a-20a. We urge this Court to affirm.

We accept the government's summary of the lower court proceedings, and will not burden the Court with repetition. The government's account of the origins and nature of the programs and of the initial administrative phase of this litigation must, however, be supplemented. In particular, the government neglected to inform this Court of the extensive factual findings of Administrative Law Judge Dorothea A. Baker, which are an important part of the record — as the district court noted. Pet. App. 46a (citing *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir.), cert. denied, 464 U.S. 892 (1983); accord *Rowland v. USDA*, 43 F.3d 1112, 1114 (6th Cir.), cert. denied, 115 S. Ct. 2610 (1995)).¹ The challenged programs cannot be understood without additional information concerning their legislative origins and actual operation.

1. Collective advertising programs under federal marketing orders apply to fewer than thirty agricultural products out of the hundreds of fruits, vegetables, and meats produced in the United States. This case involves the California peach, California

¹ The government included neither of the two ALJ opinions in the Appendix to the Petition for Certiorari. The second of these opinions, which contains the most pertinent findings, was included in the Appendix to the Brief in Opposition, and will be cited to that source.

nectarine, and California plum programs.² Other programs apply to cut flowers, beef, pork, dairy products, eggs, walnuts, almonds, tomatoes, avocados, celery, honey, and a handful of other products. No federal advertising program is imposed upon economically similar commodities such as cucumbers, oranges, blueberries, chicken, fish, sweet corn, lettuce, or apricots.³

California is the only state whose peach, plum, and nectarine handlers are required to pay for generic advertising under a federal marketing order, although there are 33 states that produce peaches for commercial distribution, 26 that produce plums, and 28 that produce nectarines. App. to Br. in Opp. 345a. The statute does not authorize the Secretary to establish a collective advertising program for non-California peaches, which comprise half the domestic commercial peach production in the country. See U.S. Br. 31 n.19. The Secretary is authorized to institute collective advertising for nectarines and plums grown throughout the United States, but has confined the programs to California fruit.

The collective advertising programs require three layers of authorization. First, each program is authorized by an act of Congress that is directed at one or more particular agricultural products. These generally take the form of amendments to the Agriculture Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* ("AMAA" or the "Act"), permitting the Secretary to add "paid advertising" to the list of authorized committee powers. Second, in order to promulgate a marketing order, the Secretary

² The California plum order was discontinued in 1991 (56 Fed. Reg. 46368-01 (1991)), but litigation over past assessments is not moot because respondents seek the return of their past payments for compelled advertising.

³ Marketing orders for certain specified fruits and vegetables allow for individual handlers to receive a credit (a reduction in their annual assessment) for their own authorized advertising expenditures. 7 U.S.C. § 608c(6)(I). See, e.g., 7 C.F.R. § 981.41(c) (California almonds); *id.* § 932.45(a)(2) (California olives); *id.* § 989.53(b) (California raisins); *id.* § 982.58(b) (Oregon and Washington hazelnuts). The governing statute does not allow for such credits for the advertising efforts of individual handlers of California peaches, plums or nectarines.

must conduct a formal rulemaking proceeding (7 U.S.C. § 608c(3)), and then obtain approval of the order, generally by either two-thirds of the producers of the commodity or the producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. § 608c(8)-(9). A marketing order must be discontinued if the Secretary determines that it does not effectuate the policies of the Act (7 U.S.C. § 608c(16)(A)(i)), or that a majority of producers does not support it. *Id.* § 608c(16)(B).

Third, the collective advertising program itself is designed and implemented by an industry committee, whose members are appointed by the Secretary. 7 U.S.C. § 608c(7)(C); 7 C.F.R. §§ 916.20, 916.22, 917.16-917.25. These members are, by definition, in direct competition with the other farmers and handlers in the industry. The committees have wide-ranging authority over all aspects of the administration of the marketing orders, including quality, size, and maturity standards as well as advertising, "subject to the continuing right of the Secretary to disapprove [of the committee's rules] at any time." 7 U.S.C. § 608c(7)(C); 7 C.F.R. §§ 916.62, 917.30. Annual budgets and assessments are promulgated by the Secretary in the Federal Register after a brief comment period. According to the findings of the ALJ, "with a few minor exceptions," the committees' recommendations "have been *pro forma* approved." App. to Br. in Opp. 332a.⁴

2. Although the fundamental structure of the marketing order system originated in the New Deal, the requirement of compelled collective advertising is a relatively recent development. Congress authorized the first such program under the AMAA — for cherries — in 1962. Pub. L. 87-703. The nectarine program at issue here was authorized by Congress in 1965 (Pub. L. No. 89-330, § 1(b)) and implemented in 1966; the plum program was authorized in 1965 (*ibid.*), implemented in 1971, and discontinued in 1991; and the peach program was authorized in 1971 (Pub. L. No. 92-120, § 1) and implemented in 1976. See App. to Br. in Opp. 141a-145a.

⁴ Indeed, the ALJ found that "[t]he Secretary * * * has abdicated his statutory duty, through *pro forma* bureaucratic action, of rubber stamping, for the most part, the * * * 'generic' advertising and other expense recommendations, via the Committees." App. to Br. in Opp. 336a.

The legislative histories of the AMAA amendments authorizing the programs at issue contain no explanation as to why the advertising is necessary with respect to these as opposed to any other particular products. The committee report for the plum and nectarine programs explains only that "individual requests [were] made by various producer groups." H.R. Rep. No. 846, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 4142, 4143. The report on the peach program was no more illuminating. See S. Rep. No. 295, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1406, 1407.

The formal rulemaking records through which the programs were instituted contain no evidence that the products or states to which they applied presented any economic condition that distinguished them from other products or states where similar programs were not implemented; no evidence that, in the absence of the programs, the covered producers or states would be impoverished or economically distressed; and no evidence that collective advertising of the covered products would be more effective than freely generated speech by the growers or handlers. App. to Br. in Opp. 146a-147a. The Secretary's explanation for the California plum program is typical:

The record shows that the consensus of the industry is that promotional activities for plums have been beneficial in increasing demand and should be continued. Plums compete for shelf space and retail promotion with many processed and fresh fruits, many of which are now nationally advertised and promoted. In competing for this space and attention, plums should benefit from a promotional program which offers the retailer an attractive quality product which the industry helps sell with an advertising and promotional campaign.

36 Fed. Reg. 8735, 8736 (1971). The justifications for instituting the California peach and California nectarine programs were similar. See 41 Fed. Reg. 14375, 14376-77 (1976) (peaches); 31 Fed. Reg. 5635, 5636 (1966) (nectarines).

The collective advertising programs have been controversial among the growers and handlers, who are the supposed beneficiaries. In the 1991 producer referendum, almost a third of the California peach and nectarine growers (see 56 Fed.

Reg. 46739 (1991)) and nearly half of the California plum growers (56 Fed. Reg. 46368-01 (1991)) voted that the program did not advance their interests.

3. The record shows that there are significant differences in taste, color, and size among different varieties of peaches, plums, and nectarines — and indeed among the same variety of fruit grown on different parcels of land. App. to Br. in Opp. 364a.⁵ Almost all tree fruit is distributed under a brand name, such as respondent Gerawan's brand "Prima®," respondent Wileman's brand "Mr. Sunshine®," or respondent Kash's brand "KASH®." There are no economic or technical obstacles to brand advertising, which is extremely common in the fruit industry (Sunkist oranges, Chiquita bananas, and Dole pineapples are familiar examples). Small farmers can, and do, combine into cooperatives for more efficient marketing (*National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 820-22 (1978)),⁶ or sell to distributors who package and market the fruit under a brand name. See *Cecelia Packing v. USDA*, 10 F.3d 616, 620 (9th Cir. 1993) (Sunkist oranges).

Most often, the advertisements designed by the marketing order committees make no distinction among the many varieties of peaches, plums and nectarines, but promote them all — generically — as "California Summer Fruits." See, e.g., J.A. 428-433, 529-532. Some, however, stress particular characteristics, such as the connection between red color and sweetness (App. to Br. in Opp. 364a), or promote certain varieties. J.A. 531-32. The ALJ found:

Promotion, through the California Tree Fruit Agreement's "generic" advertising program, advances the notion that all California fruit is the same and promotes the slogan that "red is better," which is not necessarily correct as revealed by the evidence herein. That is what is projected by the commercials advertising California fruit.

⁵ California alone produces at least 69 different varieties of peaches (J.A. 390), 61 varieties of plums (*id.* 392), and 80 varieties of nectarines (*id.* 394).

⁶ See the *amicus curiae* brief filed by Sun Maid.

App. to Br. in Opp. 364a. See also *id.* at 387a (the “promotional program implies that all fruit, no matter who the grower, is equally nutritious, tasty and healthful”). Based on the finding that there are significant differences in taste and quality among different varieties and producers, ALJ Baker concluded that this advertising, which “lump[s] all California fruit into a single category,” is “misleading.” *Id.* at 364a.

The record is replete with uncontradicted evidence that the promotional activities of the committees benefit certain growers and segments of the industry (often the members of the committees) at the expense of others (including respondents), forcing the disfavored producers to engage in costly defensive counter-advertising or suffer the consequences. The ALJ expressly found⁷ that the committees — who, she noted, are “[c]ommittees of competitors” (App. to Br. in Opp. 313a) — have violated the marketing orders by having “discussed, evaluated and voted on [issues of importance to the industry] in private clandestine meetings obscured from public scrutiny” (*id.* at 240a); have “illegally discriminated against” respondents in the administration of the marketing orders (*id.* at 205a); and have used assessment monies “in an effort to protect their own special interests and advance their own economic gain” (*id.* at 295a). The ALJ also concluded that respondents suffer harm as a result of the “forced ‘generic’ advertising” program. *Id.* at 361a.⁸

⁷ The quoted findings pertain to various activities of the marketing order committee, in addition to its administration of the promotional program. They are relevant here because they demonstrate that the committee can (and does) use its authority to advance the interests of committee members, at the expense of others (including respondents).

⁸ An antitrust suit was brought against the members and staff of the California Tree Fruit Agreement (a term sometimes used to refer to the administration of the committees) alleging that they “issued and enforced a [maturity] standard, without authorization from the Secretary, to improve their own profitability and diminish the earnings of [their competitors].” *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 333 (9th Cir. 1990). The Ninth Circuit rejected the committee members’ claim of absolute immunity under 7 U.S.C. § 608b, and remanded the case for further proceedings.

Specific examples in the record show how the marketing order committees can wield their power over the advertising program of the entire industry to promote some growers over others. The committee’s nectarine campaign, for example, stressed the connection between redness and sweetness — which may have been helpful to producers of red nectarines, but which worked to the disadvantage of producers of yellow nectarines. App. to Br. in Opp. 364a. The promotion of a proprietary variety of nectarines, “Red Jim,” which happens to be owned by a member of the Nectarine Committee, obviously benefitted that grower over his competitors. *Id.* at 349a; J.A. 531. In a particularly controversial instance, the committee used assessment money to pay for “market tours” by buyer representatives to fruit packinghouses in California — but the only packinghouses on the tour were those owned by committee members. App. to Br. in Opp. 309a-311a; J.A. 495-497. The committees have changed the timing of their television advertisements to coincide with the availability of produce from a committee member. J.A. 633-34. On one occasion, a committee member threatened to use his power “as a standing member of the peach and nectarine board” against the program’s marketing director, who had the temerity to issue a notice promoting several late-season varieties in competition with the member’s own. J.A. 434-437; see *id.* at 439.

Even the decision to emphasize “generic” advertising over brand advertising has significant intra-industry allocative effects. Generic advertising, in addition to its effect on overall demand (if any), creates the perception that all of the products within the category are fungible. App. to Br. in Opp. 334a, 364a-365a. This works to the disadvantage of growers whose marketing strategy is to differentiate their products from lower-quality fruit produced by their competitors, or to emphasize other distinguishing characteristics (such as non-use of pesticides), and requires them to engage in counter-advertising to inform customers that — contrary to the message of the generic ads — not all California fruit really is the same. J.A. 588-589. A policy that is designed to favor generic advertising over the advertising of individual brands also has incidental anticompetitive effects that work to the disadvantage of consumers. The ALJ found that, since producers are inhibited in their ability to inform consumers about the superior quality of

their fruit, they have less incentive to make the investments necessary to improve its quality. App. to Br. in Opp. 365a.

4. In April 1987 and June 1988, respondents Wileman and Kash filed petitions with the USDA pursuant to 7 U.S.C. § 608c(15)(A), challenging various aspects of the marketing orders governing California peaches, plums, and nectarines, including the generic advertising regulations at issue here. Respondent Gerawan filed an administrative petition on August 5, 1988, raising essentially the same issues. The Gerawan petition was consolidated with the Wileman/Kash petitions. In May 1991, after a 19-day hearing in which several thousand pages of exhibits were introduced in evidence, ALJ Baker ruled in favor of respondents on the 1988 petitions. App. to Br. in Opp. 17a-401a.⁹ The ALJ concluded that, in promulgating and administering the marketing orders, the Secretary had, in various respects, failed to comply with the Administrative Procedure Act and other statutory requirements.

Because the ALJ ruled in favor of the handlers on statutory grounds, it was not necessary to decide the First Amendment claims. App. to Br. in Opp. at 393a. The ALJ nonetheless made extensive findings with respect to the generic advertising program. Applying the analysis for regulations of lawful, nonmisleading commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980), the ALJ concluded that (1) the government had not demonstrated a substantial interest in the program, particularly because the funding requirements are imposed only upon handlers in California and not on handlers in other states (App. to Br. in Opp. 365a); (2) there was no evidence in the voluminous record to support a finding that the program benefits the tree fruit industry (*id.* at 366a); and (3) for a variety of reasons, the burdens on speech imposed by the program are more extensive than necessary. *Id.* at 367a-376a.

⁹ The ALJ had earlier ruled in favor of the Wileman/Kash respondents on their 1987 petition. This ruling, which was reversed by the Judicial Officer (J.O.) of the USDA (Pet. App. 113a-274a), did not involve First Amendment issues and thus is not directly relevant to this case.

In September 1991, the J.O. ruled on consolidated petitions for review, as well as on similar claims by 51 other handlers. Without hearing testimony, receiving evidence, or entertaining argument, the J.O. reversed both of the ALJ's decisions and ruled in favor of the Secretary on all issues. Pet. App. 113a-274a.¹⁰

Respondents sought review of the J.O.'s decisions in the United States District Court for the Eastern District of California, pursuant to 7 U.S.C. § 608c(15)(B). The district court affirmed, and the Ninth Circuit reversed solely on the ground that the collective advertising programs violate the First Amendment. By order of the district court, the respondents' assessments for all harvest seasons since 1987 have been placed in a trust fund pending disposition of this case. Pet. App. 7a. That fund presently contains about \$6 million.¹¹

INTRODUCTION AND SUMMARY OF ARGUMENT

In cases involving mere economic regulation, it is well established that the government has broad latitude to favor one industry (or segment of an industry) over another, to disregard consumer welfare, to legislate on the basis of flimsy (and even counterfactual) empirical assumptions and discredited economic theories, with only the minimum of judicial review or interference. That's democracy.

The marketplace of ideas, however, is a different kind of market. It is not subject to control by democratic majorities. The government does not choose the speaker, design the message, or

¹⁰ Several appellate courts have expressed concern that USDA's Judicial Officer appears to routinely reject administrative petitions without regard to their merits. See *Parchman v. USDA*, 852 F.2d 858, 866 (6th Cir. 1988); *Hutto Stockyard v. USDA*, 903 F.2d 299, 305 (4th Cir. 1990). In 1982, according to the Sixth Circuit, after the J.O. rendered a decision against the Secretary, USDA officials "unceremoniously removed him and presented a petition for reconsideration to their hand-picked replacement." *Utica Packing Co. v. Block*, 781 F.2d 71, 78 (6th Cir. 1986). The court condemned the USDA's maneuver as "a manipulation of a judicial, or quasi-judicial, system" in violation of due process. *Ibid.*

¹¹ Of the amount in trust, well over half is attributable to respondents Gerawan Farming, Inc., Nilmeier Farms, and George Huebert Farms.

target the audience. Absent the most compelling of reasons, the government may not appoint one citizen (or committee of citizens) to speak for others, or force unwilling persons to pay for or convey messages they do not freely choose to endorse. Congress has plenary power to regulate commerce, but its power over speech — even commercial speech — is constrained by the First Amendment.

The compelled advertising programs at issue here violate these fundamental premises of our constitutional order. As the Court explained in *Edenfield v. Fane*, 507 U.S. 761, 767 (1993):

The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

“At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Turner Broadcasting System v. FCC*, 114 S. Ct. 2445, 2458 (1994). “Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right.” *Ibid.* (emphasis added).

In Section I, we will demonstrate that the collective advertising programs fail to satisfy all three parts of the constitutional test used by this Court to evaluate interference with commercial speech. In Section II, we will address, and refute, the government’s argument that coerced speech in the commercial context should be evaluated under a far lower standard. Finally, in Section III, we will demonstrate that the collective advertising programs should be subjected to strict scrutiny, which they cannot possibly survive.

ARGUMENT

Central to the First Amendment is the premise that “the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners.” *Riley v. National Federation of the Blind*, 487 U.S. 781, 791 (1988). That is the principle at stake in this case. Rather than allow the men and women who produce and market California

peaches, plums, and nectarines to direct their own appeals to the public in light of the information they believe would be most useful and persuasive to the listeners, the government has established a mandatory collective advertising program for them, substituting its own judgment for theirs about how best to sell their own products.

The only doctrinal novelty in this case is its commercial context. But this Court has repeatedly affirmed that the “free flow of commercial information” — like other kinds of speech — is protected from governmental interference. *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1589 (1995). Debates over the comparative quality of fruit (which varieties are tastiest, which regions of the country produce the best fruit, what is the significance of pesticide use, and the like) are important both to individual consumers and to “the proper allocation of resources in a free enterprise system.” *Ibid.* (quoting *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976)). None of the reasons that justify less stringent constitutional protection for commercial speech applies to this program, and (as we shall demonstrate below) the justifications offered by the government are plainly inadequate to sustain it.

The principal effect of the collective advertising programs under review is to stifle advocacy and competition. By forcing competitors to combine their messages in a joint advertising program, the government fosters the impression that differences among products are inconsequential, to the benefit of those who do not wish to compete in marketing or in quality. It stifles the very debate over product characteristics that the Free Speech Clause is intended to foster. The collective advertising programs inhibit competition in marketing because the drumbeat of ads touting the “generic” qualities of fruit hampers respondents and other producers in their ability to tell the public about the distinctive and superior quality of their products (with the further effect of reducing the incentive of producers to improve that quality).

The government has not identified any characteristics unique to these products that might justify a departure from the usual First Amendment premise that speakers and listeners, rather than the government, should determine the content of speech. To be sure, the government talks of the need to enhance producer incomes, the existence of economies of scale in advertising, and the problem of

free riders; but these are characteristics shared by almost every industry in America. If the government can assume control over the advertising of these products on the basis of such ubiquitous considerations, it could replace the "free flow of commercial information" with government-imposed uniformity throughout the economy.

Fortunately, as we shall show, the First Amendment stands as a clear bar to that result.

I. THE COMPELLED ADVERTISING PROGRAMS CANNOT BE SUSTAINED UNDER THE TEST GENERALLY APPLIED TO COMMERCIAL SPEECH

In holding the compelled advertising programs for California peaches, nectarines, and plums unconstitutional, the Ninth Circuit applied the constitutional standard for commercial speech articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980):

First, the asserted government interest behind the restrictions must be substantial. Second, the restrictions must directly advance that interest. Third, the program must not be more extensive than necessary to serve that interest.

Pet. App. 16a. In recent decisions, this Court has emphasized that the party defending restrictions on commercial speech bears a heavy burden of proof. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71 (citing numerous cases).¹² The government's arguments in support of the mandatory advertising program fall far short of satisfying that burden.

¹² As explained in greater detail below (at 36-37), constitutional free speech protections are no less stringent for programs of compelled speech, like this one, than for programs that restrict speech.

A. The Government Has No Substantial Interest In Collectivizing The Advertising Of Randomly Selected Products

1. The government contends that the collective advertising programs "were intended to address the devastating effects of depressed consumption and unstable market forces that prevailed at the time of their enactment" (U.S. Br. 26), and argues that the legislative history of the 1954 amendments to the AMAA "amply demonstrates the importance of the program's objectives." *Ibid.*; see also *id.* at 35.

That sounds important. But is it credible? This Court has insisted that when the government seeks to justify a restriction on speech "as a means to redress past harms or prevent anticipated harms," it "must demonstrate that the recited harms are real, not merely conjectural." *Turner Broadcasting System v. FCC*, 114 S. Ct. 2445, 2470 (1994); see *Edenfield*, 507 U.S. at 770-71. If a restriction is justified by the needs of a particular industry, the government must "adequately show[] that the economic health of [that industry] is in genuine jeopardy." *Turner Broadcasting*, 114 S. Ct. at 2470.

The Solicitor General's argument comes nowhere near that standard of proof. The government presented no evidence during the course of this litigation in support of a claim that demand for these products is "depressed" or the market conditions faced by these growers "devastating." Congress made no such finding when it authorized "paid advertising" for these products, and the Secretary made no such finding when he promulgated the programs after formal rulemaking. Indeed, the only rationale for the programs provided in the Federal Register was that there was a "consensus" in the industry that advertising would be "beneficial." 36 Fed. Reg. 8735, 8736 (1971) (plums); see 41 Fed. Reg. 14375, 14376-77 (1976) (peaches); 31 Fed. Reg. 5635, 5636 (1966) (nectarines). If the industries were suffering from the "devastating" conditions described by the Solicitor General, the Secretary surely would have mentioned them when he instituted the programs.

Moreover, there is no evidence that producers of comparable products who operate without the "benefit" of collective advertising

(Georgia peach farmers, for example, or Virginia apple growers) "have fallen into bankruptcy, * * * curtailed their [farming] operations, or suffered a serious reduction in operating revenues as a result of their being [allowed to advertise their own products in their own way]." *Turner Broadcasting*, 114 S. Ct. at 2472.

The Solicitor General's only citation in support of his theory is to the district court opinion. U.S. Br. 26 (citing Pet. App. 89a). The district court, in turn, relied entirely on the legislative history of the 1954 Amendments to the AMAA, a statute whose principal provisions extended agricultural price supports for a few years after the Korean War in light of depressed post-war conditions.¹³ The legislative reports make no reference to peach, plum, or nectarine growers, and were written roughly 20 years before the collective advertising programs at issue here were enacted. The "bleak description" this legislative history paints of "the American farmer" after the Korean War (Pet. App. 89a) bears no more relation to the circumstances of California fruit farmers in 1996 (or even in 1971 or 1965, when the collective advertising programs for these fruits were enacted) than *THE GRAPES OF WRATH* bears to wheat farmers in Oklahoma today.

In short, the *sole* support for the Solicitor General's theory is a legislative report written (1) at a different time, (2) predicated on different economic conditions, (3) about different products, and (4) in support of different policies. If this is sufficient to justify a restriction on speech, then the restraints of the First Amendment are just words, devoid of meaning or consequence.

2. Stripped of its dust-bowl rhetoric, the Solicitor General's argument reduces to the claim that the government has a substantial interest in "enhancing returns to peach and nectarine growers." U.S. Br. 35.¹⁴

¹³ See H. Rep. No. 1927, 83d Cong., 2d Sess., reprinted in 1954 U.S.C.C.A.N. 3399, 3401 (attributing farm problems to "the vast expansion of our agricultural output * * * during World War II" and the renewed "surge of production" during the "Korean conflict").

¹⁴ The government also refers to "maintaining * * * orderly marketing conditions," promoting marketing and distribution, and "avoiding the problem of free riders." U.S. Br. 35. These "wider" objectives are,

This Court has *never* upheld a restriction on the freedom of speech where the purpose of the restriction was no more lofty than enhancing the economic interests of a favored subclass of producers. The clearest parallel is *Turner Broadcasting*, where the Court reviewed the constitutionality of "must-carry" rules that required cable TV operators to carry the signals of certain local broadcasters. If enhancing the incomes of favored companies were a sufficiently important governmental interest in itself, then *Turner Broadcasting* would have been an easy case: no one disputed that the must-carry rules served the economic interest of the local broadcasters. But that was not enough. Rather, the Court called for evidence that the "dropped or repositioned broadcasters would be at serious risk of financial difficulty." 114 S. Ct. at 2472. This was because the underlying purpose of the must-carry rules was not to protect the broadcasters as such, but to preserve the *public* interest in "free, over-the-air local broadcast television," which is a "governmental purpose of the highest order" because of its connection to the free flow of ideas and an informed citizenry. *Id.* at 2469, 2470.

Here, petitioner makes no pretense that the *public* interest in inexpensive, healthful, and easily available food would be jeopardized by ending the collective advertising programs. Indeed, the principal purpose of the entire marketing order system is to raise the price of food and hence the incomes of producers, largely at the expense of consumers. *Block v. Community Nutrition Institute*, 467 U.S. 340, 342 (1984). Promoting favored segments of an industry is undoubtedly a sufficient ground to sustain mere economic regulation (see *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935)), but this Court has never allowed *freedom of speech* to be infringed in the service of such a cause.

There has been no showing that the products promoted by mandatory collective advertising programs (which include beef, eggs, and cheese) are particularly healthful; that the producers of the covered products are especially impoverished, virtuous, or

however, just means to achieve the goal of enhancing returns to the growers.

otherwise worthy of extraordinary governmental solicitude; or that it is necessary to favor these economic actors (as opposed to any others) because their prosperity is linked to any other, wider, public interest. The government has not explained why California peach growers are more worthy of this kind of federal assistance (if it is assistance) than Georgia peach growers, why peaches and nectarines need this help more than apples or oranges, or why the government has any legitimate interest in persuading people to eat more almonds, olives, dates, and beef but not more fish, chicken, or cucumbers. These programs constitute "naked preferences" for selected, politically favored industries (and indeed, for the segments of these industries that favor generic marketing over product differentiation and quality or price competition). Whatever may be the legitimacy of naked preferences in other constitutional contexts (see Cass Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984)), they do not supply a sufficient basis for abridging the freedom of speech.

The totally *ad hoc* manner in which the various compelled advertising programs are administered further undermines the proposition that they are needed to further an important government interest. For example, there is no way to explain (nor does the government attempt to explain) why the Act allows the Secretary to compel advertising for California peaches, papayas, grapes, dates, onions, and celery (7 U.S.C. § 608c(6)(I)), but not for Georgia peaches, kiwifruit, apricots, melons, or raspberries. Nor can the government explain why, given the statutory authority to do so, the Secretary has implemented compelled advertising through the marketing orders for peaches from California, winter pears (7 C.F.R. § 927.47), papayas (*id.* § 928.45), dates (*id.* § 987.33), and Vidalia onions from Georgia (*id.* § 955.50), but not in the marketing orders for Bartlett pears from Oregon or Washington (*id.* § 931.45), or onions from South Texas (*id.* Pt. 959) or from Idaho (*id.* Pt. 958). There is simply no rhyme or reason behind the implementation of compelled advertising for some of these products and not others; certainly nothing in the record offers any clue.

Moreover, the enormous degree of discretion that is delegated from Congress to the Secretary, and then from the Secretary to the committees, casts considerable doubt on the government's assertion that there is an interest at stake that is of any serious concern to the

government. The regulatory scheme leaves it almost entirely to the discretion of the Secretary whether to promulgate a marketing order provision for compelled advertising (7 U.S.C. § 608c(6)(I)), and all of the details of such programs are dictated by committees that are comprised of members of the industry. 7 C.F.R. §§ 917.35(b), 916.30(c). If the government interest in maintaining these programs is substantial, it is hard to understand why Congress left the decisions concerning whether, in what manner, and how much to advertise, in the hands of members of the industry.

3. To advance a coherent argument that "enhancing the returns to peach and nectarine growers" (U.S. Br. 35) is a substantial public interest, sufficient to justify infringements on respondents' freedom of speech, the government would have to explain why the *benefit* to these favored people (if the program is a benefit) outweighs the *detrimental effects* on other people. It is far from clear (as discussed *infra*, pages 21-31) that the collective advertising programs truly work to the advantage of the industries they purport to assist. But *if they do work*, then they necessarily have negative effects on others.

First, the programs work to the disadvantage of producers of competitive products, who are also part of the national agricultural economy and hence (we would assume) of no less interest to the federal government than the growers of California peaches, plums, and nectarines. See U.S. Br. 37-38 (the objectives of the program "relate to the economic well-being both of the industry and of the Nation as a whole"). If the compelled advertising is successful in persuading consumers that "California peaches are the sweetest" (see U.S. Br. 31 (explaining that "the advertising promotes California fruit as unique")), this must mean consumers are persuaded that peaches grown in Georgia, South Carolina, or other states are less sweet, and therefore presumably less desirable.¹⁵

¹⁵ A more likely — but presumably unintended — consequence of the advertising is to benefit non-California growers at the expense of California growers, as the ALJ concluded. App. to Br. in Opp. 393a. Since most retailers do not identify the state of origin of the fruit they sell, ads that promote "California" peaches or plums will most likely have the effect (if any) of promoting *all* peaches and plums. This is equally irrational from a federal point of view. Why force California producers

The Solicitor General does not seem to take this into account. What conceivable federal interest is served by a program that says that California peaches are better than Georgia peaches?¹⁶

More generally, the Secretary has found on the record that the California tree fruits "are marketed in a highly competitive situation * * * with a host of processed and fresh fruits," and that the compelled advertising program would help these products compete for shelf space with their competitors. 31 Fed. Reg. at 5636. Does it not follow that this will place the competitive fruits — products grown all over the United States — at a disadvantage in *their* (equally worthy) struggle for limited shelf space? By the same token, the advertising run by the beef committee (if it works) presumably induces customers to shift consumption to beef from competitive products, such as chicken. The government has not revealed the social welfare calculus it uses to reach the conclusion that net social welfare is increased when consumption is shifted from the products of one set of farmers to another.¹⁷

Second, the programs work to the disadvantage of growers and producers who want to compete more vigorously by producing distinctive or higher-quality fruit, or fruit with other characteristics

to pay the cost of advertising that promotes fruit from all the producing states? Under this view of the effects of the program, the government has created, not alleviated, a free rider problem.

¹⁶ We could imagine that a state program might be defended on this ground, but for the federal government to force its citizens to trumpet the virtues of one state's produce over another's is indefensible on any theory of national interests.

¹⁷ An independent economic study of the collective advertising program concluded that, if the "negative cross-advertising effects" (meaning the effects of advertising on products in competition with the advertised product) are taken into account, those effects "make it almost impossible to justify *mandatory* assessments." Dermot Hayes & Helen Jensen, *Generic Advertising Without Supply Control: Implications of Mandatory Assessments*, in W. Armbruster & J. Lenz, *COMMODITY PROMOTION POLICY IN A GLOBAL ECONOMY* 90, 103 (1993). None of the studies or other record support relied on by the government takes these effects into account.

(such as non-use of pesticides) that set it apart from the competition. By skewing advertising in the direction of generic advertising, the collective advertising programs inhibit brand differentiation and force producers who wish to compete to expend resources in counter-advertising to combat the notion that all California fruit is the same. As the ALJ observed:

Throughout the years, [respondents] have developed cultural practices which have enabled them to develop and harvest an extremely high quality fruit. * * * They have invested substantial time and vast sums of money in developing these cultural practices. By being forced to promote a "generic" advertising program their ability to promote their own labels is substantially curtailed. * * *

If, as a result of the "generic" advertising assessments being imposed, [respondents] are unable to promote their fruit through its specific brand name advertising, their competitive advantage is lost. In fact, there would be no incentive for them to continue advancing their cultural practices when their fruit would, from a consumer's standpoint, be no different from that in the mainstream.

App. to Br. in Opp. 364a-365a. The Solicitor General has not explained why the interests of these producers must be subordinated to the interests of their nondistinctive competitors.

Most conspicuously, the government totally disregards the interests of consumers, who presumably should be part of the public interest calculus. See *44 Liquormart v. Rhode Island*, 116 S. Ct. 1495, 1507 (1996) (the purpose of regulating commercial speech is to "protect consumers"). Consumer welfare is injured — not advanced — by these programs, in at least three distinct ways.

The most immediate effect on consumers is to reduce their access to information about the products that individual competitors would otherwise provide. A program that skews advertising in favor of more generic messages necessarily decreases the relative share of advertising that focuses on differences between products within the advertised category. Often this is the most useful information from the consumer's point of view. For example, some respondents would publicize their decision not to use

pesticides (App. to Br. in Opp. 387a), an issue that — for obvious reasons — is unlikely to feature in the collective advertising sponsored by the committees. Indeed, the differences among the varieties and producers of California fruits are so significant that the ALJ concluded that the message conveyed by the collective generic advertising — that all California fruits are fungible — is actually “misleading” to consumers. *Id.* at 364a.

Second, the suppression of competition in marketing will affect the quality of the produce. If it is more difficult for producers to make the public aware of the distinctive qualities of their fruit, they will have less incentive to invest resources in producing a superior product. As the ALJ found, on the basis of the record below:

The grower and/or handler who minimizes his expenses by ignoring cultural practices, and cuts corners wherever he can, receives the same “benefit” (if any) from the [collective] advertising program. Growers who take pride in their product and expend large sums of money in the continual improvement of that product * * * are unable to improve their market position because they are unable to educate the consumer as to their superior product. The handler and/or grower with a mediocre product is thus subsidized by the industry, and the long term interests of the industry are being jeopardized by the United States Department of Agriculture’s encouragement of mediocrity.

App. to Br. in Opp. at 370a.¹⁸

¹⁸ The economic point made by the ALJ — that brand advertising stimulates product improvements to the benefit of consumers — has been confirmed in numerous federal government reports. See John E. Calfee, *How Should Health Claims for Foods Be Regulated?* (FTC Bureau of Economics, Sept. 1989); Pauline Ippolito & Alan Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market* (FTC Bureau of Economics Staff Report, Aug. 1989); V.S. Freimuth, et al., *Health Advertising: Prevention for Profit*, 78 Amer. J. of Pub. Health 557, 557-61 (1988); David A. Kessler, *The Federal Regulation of Food Labeling: Promoting Goods to Prevent Disease*, 321/11 New Eng. J. of Med. 717, 717-25 (1989).

The final blow is to the consumers’ pocketbooks. The government does not hide the fact that the advertising is intended to enable producers to raise prices. See U.S. Br. 36 (relying on study purporting to show that consumers aware of the generic advertising paid higher prices for the fruit). Consumers may wonder why their government has an interest in *that*. See App. to Br. in Opp. 147a-148a (discussing consumer group opposition to the program).

In short, the claim that these programs serve important public purposes is wholly unsupported.

B. The Government Has Failed To Demonstrate That The Compelled Advertising Programs Directly Advance The Asserted Interest In Promoting Consumption Of California-Grown Peaches, Plums, And Nectarines

To satisfy the second part of *Central Hudson*, the government must demonstrate “not merely that its regulation will advance its interest, but also that it will do so ‘to a material degree.’” 44 *Liquormart*, 116 S. Ct. at 1509 (plurality) (quoting *Edenfield*, 507 U.S. at 771). Without detailed proof on this issue, the reviewing court would be required “to engage in the sort of speculation or conjecture that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the [government’s] asserted interest.” *Id.* at 1510. The Solicitor General’s argument that the compelled advertising program significantly advances an important government interest (*whatever* that interest is) rests entirely on such speculation and conjecture.

The ALJ, describing the record in this case, stated:

There have never been any research projects conducted which establish that forced “generic” advertising has benefitted the tree fruit industry particularly to the extent of the assessments collected therefrom. There is lacking evidence incorporated in the Secretary’s rulemaking record which indicates that California tree fruit sales (or profits to the growers and handlers) have increased as a result of the forced “generic” advertising program.

App. to Br. in Opp. 366a. See also *id.* at 370a-371a (observing that the record “does not contain data reflecting the direct impact of different advertising strategies on profitability and increase[d]

sales, if any, attributable thereto, as opposed to population growth and other factors"); *id.* at 375a ("There is no evidence that handler or grower profits increased significantly and in proportion to the 'generic' advertising program"); *id.* at 333a (criticizing the government's "lack of data revealing the impact of advertising on profit").

The government attempts to overcome the glaring lack of support in the record by flatly asserting that it is "axiomatic * * * that promotional advertising leads to increased consumption of the advertised product or service." U.S. Br. 35 (citing cases). This misses the point. Even assuming advertising can stimulate demand, at least to some extent,¹⁹ the question remains: Why would a government-mandated generic advertising campaign serve the interests of the industry or the public better than the advertising that would be conducted voluntarily by individual firms? As the Ninth Circuit held (Pet. App. 20a), there is nothing in the record here to support a finding "that the generic advertising program is better at increasing consumption than individualized advertising."

There is no logic to the government's suggestion (U.S. Br. 37-38) that the program can "substantially advance the government's interests" under *Central Hudson* even if the record does not support the proposition that the program achieves some effect that would be unavailable to handlers and producers left to their own devices. If private, voluntary advertising is as effective as collective advertising through government compulsion, the program cannot fairly be said to advance the government's interest "in a direct and material way." *Edenfield*, 507 U.S. at 767.

1. The Solicitor General maintains that there are certain "market defects" inherent in the California tree fruit industry that the government has an interest (and an ability) to repair through compelled advertising. The government asserts that, without mandatory collective advertising, the market would not produce

¹⁹ The efficacy of generic advertising, especially in the case of well-known, long-established products, is a disputed question among researchers. See, e.g., the conflicting studies in H. Kinnucan, S. Thompson & H. Chang, eds., *COMMODITY ADVERTISING AND PROMOTION* (1992).

sufficient "generic" advertising — advertising that "increases the size of the pie" as opposed to winning a larger share for certain producers. But there is nothing in the record to support the notion that the industry needs more — or for that matter, less — generic advertising than producers would use in a voluntary system. As the ALJ observed, "[t]he evidence is devoid of any comprehensive research program that would answer" such questions as "the extent to which 'generic' advertising may or may not benefit the industry." App. to Br. in Opp. 334a.

The virtue of generic advertising, according to the government, is that it benefits "the entire industry" (U.S. Br. 39). But this depends entirely on how narrowly or broadly the term "industry" is defined. Ads for "California peaches" do not promote "the entire industry," but only that part located in California. Similarly, ads that (misleadingly) stress the superior quality of red nectarines (see App. to Br. in Opp. 364a) do not promote "the entire industry"; they are a detriment to producers of yellow nectarines (who nonetheless are compelled to pay for advertising that badmouths their product). Indeed, since various products are in competition with each other within the fruitgrowing industry or the meat industry (as the Secretary found), it is plain that campaigns for particular fruits or particular meats do not "increas[e] demand across the entire industry" (U.S. Br. 39), but (if at all) only for those segments organized into marketing order committees.

The government insists, however, that because of "economies of scale" and the "free-rider" problem, the "benefits of collective action would be virtually impossible to achieve in the absence of mandatory assessments." U.S. Br. 26, 27. It further speculates that, absent government coercion, collective promotional activities would "collapse for lack of participation." U.S. Br. 27. This doomsday scenario is refuted by the experience of private marketing efforts in the agricultural sector. When convinced it would be useful, members of various agricultural industries have not hesitated to form cooperatives in order to collectively market their products. Among these are some of the most widely recognized and successful brand names in the world — Sun Maid Raisins, Ocean Spray Cranberries, Land-O-Lakes Butter, and Sunkist Oranges (a cooperative marketing organization with over

6,500 members and annual revenues of over \$1 billion). Sunkist 1994 Annual Report. See "The Sunkist Adventure" (Farmer Cooperative Service, USDA (1975)). All of these are *voluntary*, independent cooperatives whose collective advertising efforts are undertaken with no government compulsion at all.²⁰

More fundamentally, the government's professed need to force "free riders" to join in the advertising program is scarcely credible as a substantial *public* interest. On the shelves of every grocery store and pharmacy in America, you can find "generic" products from companies who do not engage in advertising and therefore are able to offer their products to the consumer at a lower price. Such producers are "free riders" on the promotional efforts of their branded competitors. But the presence of these generic goods is generally viewed as a boon to the consumer — not as an evil that must be stamped out. According to the government's logic in this case, generic product producers should be required to pay into a joint industry advertising fund, controlled by the dominant companies. While this might well be in the interest of the dominant producers, it is hard to see how the public interest would be advanced. To prevent "free riders" is to impede competition based on reduction of marketing costs, to the detriment of consumers.

²⁰ Congress has long recognized the effectiveness of agricultural cooperatives and has acted to encourage their formation. See, e.g., 7 U.S.C. § 610(b)(1) (the Secretary shall "accord such recognition and encouragement to * * * cooperative associations * * * as will tend to promote efficient methods of marketing and distribution"); 12 U.S.C. § 1141a(3) (enacted in 1929) ("[i]t is declared to be the policy of Congress to promote the effective merchandising of agricultural commodities * * * by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting * * * cooperative associations and other agencies"); 7 U.S.C. § 291 (Capper-Volstead Act of 1922) (encouraging cooperatives by providing limited antitrust immunity for such organizations); see also *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 826 (1978) ("By allowing farmers to join together in cooperatives, Congress hoped to bolster their market strength and to improve their ability to weather adverse economic periods and to deal with processors and distributors").

Moreover, the government has offered no reason to suppose that industry advertising presents any more serious free rider problems than those posed whenever a degree of cooperation within an industry may be worthwhile. Almost every industry has one or more trade associations that provide a variety of services and conduct a variety of activities, which no individual firm could undertake and which benefit the industry as a whole. Under the government's reasoning, any trade association with clout in Congress should be able to obtain legislation to coerce unwilling members of the industry to pay for their activities. Non-members, after all, are "free riders," and the government has a "substantial interest" in the economic well-being of every industry. The government's argument proves too much.²¹

2. In its brief, the government relies on two studies that purport to show that consumers who are aware of the California tree fruit advertising campaigns either purchase more, or pay higher prices for, fruit. U.S. Br. 36. These studies could serve as elementary texts in fallacious reasoning.

Most obviously, while the studies purport to find a correlation between awareness of the advertising and propensity to buy fruit, they tell us nothing about causation. It is very common to find that users of a product pay more attention to ads for that product than non-users do. That does not mean that the ads are responsible for their decision to use the product. More likely, the causation runs in the opposite direction: users pay more attention to the ads because as users, they are more interested in the product and are on

²¹ It does not increase confidence in the government's argument that the brief is self-contradictory. At some points, the government argues that handlers must be required to participate in the program because they all benefit and should not be allowed to be free riders. U.S. Br. 26-27. At other points, confronted with evidence that handlers do not in fact benefit from the program, the government argues that the purpose of the program is to benefit growers (not handlers) and that "[t]he court of appeals' scrutiny of the programs' comparative impact on respondents and other handlers thus ignores an important aspect of the government's interest." *Id.* at 38 (emphasis in original). This suggests that the rationale for the program is not prevention of "free riding" but redistribution of income from handlers to growers.

the lookout for information about it. The popular expression for this phenomenon in the marketing profession is: "Volvo owners watch Volvo ads."²²

Second, the studies do not consider the possibility that demographic differences account for the correlation. To give one example (among many), the "awareness" measure was determined by showing consumers a portion of a commercial and asking them to describe, from memory, material not included in the excerpt. J.A. 411. Obviously, this is a test of memory and not just of exposure to the advertising. Memory, in turn, tends to be correlated with intelligence and intelligence with income. The studies may have proved nothing more than that people with good memories, high intelligence, and high incomes buy more fruit at higher prices than people with poor memories, lower intelligence, and lower incomes.

Third, the studies are inconsistent in their inferences from data. When correlations run in the "right" direction, the NPD/Nielsen study attributes the effect to advertising. When they run in the wrong direction (for example, by showing that persons aware of the advertising purchase *less* fruit (J.A. 406)), it assumes there must be some other explanation. *Id.* at 406-07. Similarly, it appears to be the view of the Carmelita researchers that advertising is responsible for increases in purchases, but that advertising is irrelevant to declines in purchases. Compare J.A. 419 (giving advertising credit for increases in purchases of nectarines and pears) with *id.* at 425 (absolving advertising of responsibility for declining purchases of peaches and plums). Nothing of probative value can be gleaned from such studies.

Even if the studies were not so obviously flawed, they do not provide impressive support for the government's position. The NPD/Nielsen study concluded that there were "no major differences" between the two groups (those who were aware and those who were unaware of the advertising) with respect to early

²² See Gerald Wilde, *Effects of Mass Media Communications on Health and Safety Habits: An Overview of Issues and Evidence*, 88 *Addiction* 983, 989 (1993).

season buying habits (J.A. 406),²³ and that consumers aware of the advertising actually purchased *less* fruit per occasion than those who were not aware of the ads. *Ibid.* The Carmelita study found that, despite the advertising campaign, the average frequency of purchasing peaches and plums had declined from the previous year, and that advertising "cannot * * * do much to overcome" any of the principal reasons for failing to purchase fruit. J.A. 425.

More fundamentally, the studies do not even purport to compare the effectiveness of generic advertising to more focused individual marketing efforts, or the effectiveness of the advertising conducted by government-mandated committees to that conducted by handlers or cooperatives. Nor do they indicate anything about the relative return on investment in advertising, which would be relevant to whether to have more or less of it. It may be "axiomatic" that advertising will stimulate demand, as the Solicitor General says, but it requires *proof* that generic advertising is better than brand advertising, that a single advertising campaign devised by a government-appointed committee of competitors is better than a diversity of campaigns by profit-oriented businesses, and that more (or different) advertising is needed than the market would produce.

The Solicitor General complains that part of respondents' objection to the collective advertising program is simply "disagreement[] as to the best strategy for promoting the consumption of the[ir] goods." U.S. Br. 34. But the converse is also true. The government's support for the program is based simply on its espousal of the *opposite* marketing strategy. We seriously doubt that the government is a better judge of good marketing strategies than individual, profit-driven businesses, investing their own funds. But more fundamentally, it cannot possibly be thought a sufficient basis for abridging the freedom of speech that the government disagrees with the producers about their best marketing strategy. We submit that the government does not — *plainly, patently, and obviously does not* — have the right to

²³ One of the Solicitor General's theories is that the collective advertising program is necessary to attract first time customers early in the season. U.S. Br. 40-41.

take over the advertising efforts of an industry, protected under the Free Speech Clause, simply because it thinks a different marketing strategy (more generic advertising) would be more effective at increasing net producer income.

Neither the rulemaking record, the studies, nor anything else lends credence to the government's claim that compelled "generic" advertising increases consumption of peaches, plums, or nectarines more than the alternative promotional strategies that individual members of these industries would use if left to their own devices.

3. The Solicitor General speculates that collective advertising achieves results for the California tree fruit industry that it could not attain without the government's help. These theories are nothing more than after-the-fact rationalizations of a fundamentally irrational government program. Unsurprisingly, none of the explanations withstands even the most deferential scrutiny.

For example, relying on the 1989 RMC Study (J.A. 511-528), the government states that a mandatory program is needed to enable the joint promotion of the several tree fruits in the same advertising campaign. Such treatment, it says, has a "synergistic effect on consumption" and is "precisely the type of generic advertising in which individual handlers of a particular fruit will not engage." U.S. Br. 39 (citing J.A. 523-524).

This is a slender reed. First, it cannot account for the beef, egg, walnut, cherry, almond, or cut flower programs, none of which involves multiple products. Second, far from justifying the tree fruit campaign, the RMC Study concluded that "[t]he grouping of peaches, plums, nectarines, and Bartlett pears is essentially an artificial one imposed by the pragmatic considerations of the California Tree Fruit Agreement." J.A. 519. In plain English: the committee structure has not been created because these four fruits should be advertised together; the fruits are advertised together because that is the way the marketing order committees are structured. Third, since the program for plums was terminated in 1991 (56 Fed. Reg. 46368-01 (1991)), and the program for California pears was suspended in 1994 (59 Fed. Reg. 10053 (1994)), the explanation is now obsolete. Finally, there is no factual basis for supposing that individual producers will not engage in joint product advertising, which is extremely common in

American marketing. Indeed, as the record shows, respondents feature multiple fruits in their own advertising. J.A. 537-544. The government's helping hand is not needed to enable complementary products to be advertised together.

The government also contends (citing the same study) that compelled advertising is needed to combat "pervasive ignorance" regarding proper ripening techniques for these fruits. U.S. Br. 40; see also J.A. at 524-525 ("[m]ost consumers are virtually ignorant of proper ripening techniques for tree fruits"). Since the government's advertising programs have been in effect for *decades*, surely the only conclusion to be drawn from this is that the programs have been an utter failure so far.

Relying again on the RMC Study, the government states that "over 90% of each fruit's total volume of sales is drawn from repeat purchasers, and * * * the highest percentage of repeat purchasers was found among customers who first purchased the fruit during its first four weeks of availability during the season." U.S. Br. 40. In a particularly precarious stretch of logic, the government asserts that it is therefore necessary to compel handlers of both early and late-season varieties to pay for advertising early in the season in order to increase the pool of potential repeat purchasers for everyone's benefit. However, the more obvious conclusions to be drawn from the RMC data are that (1) people who like peaches, plums, and nectarines are prone to buy them when they first become available each season, and (2) people who like these fruits have tried them before, and thus each time they purchase a peach they are repeat purchasers.²⁴

Finally, government compulsion does not directly advance the government's asserted interest (assuming it is a legitimate interest) in preventing some handlers from free riding on the advertising efforts of others (U.S. Br. 26-27) "because of the overall irrationality of the Government's regulatory scheme." *Coors Brewing Co.*, 115 S. Ct. at 1592. As discussed above (at 2),

²⁴ Nor can the government base its argument on the seasonal or perishable nature of these fruits, since the government also compels handlers of such nonperishable items as walnuts, honey, and olives to pay for advertisements, and those products are on the shelves year-round.

33 states handle peaches, yet California is the only one in which handlers are subject to compelled payments for advertising. As the Ninth Circuit correctly noted, "[i]f the Secretary is concerned about free-riders, there are already plenty of them in other states." Pet. App. 21a.²⁵

These examples represent the Solicitor General's best efforts to conjure up reasons why the compelled speech programs might achieve results that would otherwise be unattainable. None comes close to satisfying the government's burden to justify an infringement on respondents' First Amendment rights.

4. One set of interests that the compelled advertising programs certainly *do* advance are those of the politically connected members of the industry who sit on the committees. These members have broad authority over the administration of the marketing orders, including all decisions regarding the size and uses of the advertising and promotional budget. The record is clear that the committees have used mandatory assessment money in a variety of ways that confer competitive advantages upon the committee members vis-a-vis their competitors. See *infra*, pages 6-7.

Petitioner may argue that these abuses are aberrational, but they are not. They are the logical and inevitable outcome of a system in which politically influential members of an industry are granted control over important business decisions (here,

²⁵ The government attempts to justify this patent irrationality in the regulatory scheme by claiming that the geographical limitation of the compelled advertising program is in keeping with the AMAA requirement that marketing orders be restricted "to the smallest regional production areas * * * practicable." U.S. Br. 47 (quoting 7 U.S.C. § 608c(11)(B)). This answer, however, does not reduce the irrationality of the system; it just shows that the irrationality is inherent in the statutory scheme. If the collective advertising programs are restricted to subnational production areas, then it is inevitable that they will produce geographical free-riders and other interstate anomalies. Imagine one group of citizens forced to proclaim "California peaches are the sweetest" and another group forced to proclaim "No, Georgia peaches are the sweetest." Will the government claim there is a substantial federal interest in compelling contradictory messages of this kind?

advertising) of their competitors. Allowing the producers on the marketing order committee to direct the advertising campaigns for the entire industry makes no more sense than to allow the owners of six professional football teams to direct the recruitment efforts of the entire NFL. We suppose a story about market defects and free riders could be concocted to support that idea. (If recruiting were left to individual teams, they would underinvest in enhancing the reputation of a football career vis-a-vis basketball or hockey, and some teams would "free ride" on the promotional efforts of the others. But would anyone be surprised if the best players went to the owners on the recruiting committee?

The record demonstrates that compelled advertising "directly advances" the interests of those who shape the message, decide when and where it will be delivered, and control the purse strings — but not the interests of growers, handlers, or the public.

C. The Compelled Advertising Program Is Not Narrowly Tailored To Achieve The Government's Asserted Purpose

The government's compelled advertising programs are the very model of a haphazardly applied regulatory program that burdens First Amendment rights. There is no apparent reason why the programs have been imposed on the products on which they have been imposed, why they have not been imposed on apparently comparable products, why there are credits for brand advertising for some products but not others, or why generic advertising (rather than more focused promotion) is thought necessary to achieve the government's stated purposes. It is manifest that, in designing the advertising programs, neither Congress nor the Secretary gave *any* consideration to achieving a constitutionally satisfactory fit between the government's means and ends.

The programs therefore cannot possibly satisfy the final part of the *Central Hudson* test, which requires a close fit between ends and means and places the burden on the government to demonstrate "that its restriction on speech [is] no more extensive than necessary." 44 *Liquormart*, 116 S. Ct. at 1510 (plurality opinion). Under this test, as the government acknowledges (U.S. Br. 45 (citing *Coors Brewing Co.* and 44 *Liquormart*)), a regulation of

commercial speech is invalid where the government could advance its asserted interest through non-speech-based regulation.

If the industry is in need of government assistance, that can be accomplished through financial subsidies, tax incentives, or any of the myriad other means by which the government routinely acts to favor or disfavor a given sector of the economy. See *Turner Broadcasting*, 114 S. Ct. at 2480 (O'Connor, Scalia, Ginsburg, Thomas, JJ., concurring in part) (rather than must-carry, Congress could "subsidize broadcasters that it thinks provide especially valuable programming"); 44 *Liquormart*, 116 S. Ct. at 1519 (Thomas, J., concurring) ("directly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be"). As American agricultural policy readily demonstrates, it is not just possible, but is a long-established policy, to promote the goal of "enhancing producer incomes" through price supports and subsidies.

Moreover, since the theory underlying the compelled advertising programs is that economies of scale and free rider problems make it difficult for individual firms, in the aggregate, to engage in sufficient levels of advertising for the industry, the most obvious less restrictive alternative has already been enacted: laws facilitating agricultural cooperatives. As already noted, co-ops are very effective in marketing agricultural products, achieving economies of scale, and excluding free riders.²⁶

Alternatively, if the government believes that "increased public consumption" is the most effective way to promote the interests of the California fruit industry, there is no constitutional impediment to the government spreading the word itself through the use of taxpayer funds. Since the public would foot the bill, such a program would invite debate as to the desirability of subsidizing the California fruit industry in the first place. The government should not be permitted to avoid such public scrutiny by relying on compulsion of commercial speech. See 44 *Liquormart*, 116 S. Ct. at 1507-1508 (plurality) (commercial speech regulations "impede

²⁶ See *supra*, pages 23-24.

debate over central issues of public policy"); *Central Hudson*, 447 U.S. at 566 n.9 (regulation of commercial speech in order to pursue a non-speech related policy "could screen from public view the underlying governmental policy").

Finally — as the Ninth Circuit held — the burden that the program imposes on the handlers' First Amendment rights could be substantially lessened by the adoption of a credit program similar to that under the California Almond marketing order. See *Cal-Almond, Inc. v. USDA*, 14 F.3d 429 (9th Cir. 1993); 7 C.F.R. § 981.441(c). Under that system, each handler would be required to expend the same amount each year on advertising as under the current system, but handlers would be permitted to pay instead for their *own* advertising if the government's ads are deemed to be objectionable in any respect. Mandatory advertising with a credit option still constitutes compelled speech, but it obviously burdens the handlers' First Amendment interests to a lesser degree, while still accomplishing the government's asserted goal of assuring continued advertising "at a constant rate." U.S. Br. 43.²⁷

II. THE GOVERNMENT'S ARGUMENTS FOR A LOWER LEVEL OF CONSTITUTIONAL SCRUTINY SHOULD BE REJECTED

Perhaps recognizing that the marketing orders in this case cannot withstand the *Central Hudson* test,²⁸ the Solicitor General

²⁷ The government contends that a credit system would not work in the California peach, plum and nectarine industries because these markets are more fragmented than the almond industry. U.S. Br. 47. Because the almond industry is dominated by a single brand, the government says, it is equally benefitted by either brand or generic advertising. This argument fails to explain why the paid advertising programs for hazelnuts, walnuts, and olives — none of which is dominated by a single player — also have credit systems. It also reconfirms the fundamental irrationality of the system, since there is no free rider problem to overcome in an industry, like almonds, with a single dominant producer. The interesting question is not why the almond program allows brand credits, but why there is an almond program at all.

²⁸ The government argued in both the district court and the court of appeals that the constitutionality of the assessments for generic advertising

devotes a substantial portion of his brief (at 18-34) to arguing that *Central Hudson* applies only where commercial speech is "suppress[ed] or ban[ned]" and not where private parties are compelled by the government to "fund collective activities having an expressive component." *Id.* at 18.²⁹ In the latter context, the Solicitor General maintains, this Court dispenses with the *Central Hudson* test altogether and asks merely whether the "subsidized expressive activities" are somehow "germane" to the government's regulatory objectives. *Ibid.*; see also *id.* at 24, 28-29. The government would thus avoid not only the need to show that coerced speech in the commercial context "directly advances" or is "narrowly tailored" to the legislative purpose (replacing that exacting inquiry with what the government describes as a loose standard of "germaneness"), but also the need to show that the legislative purpose involved is "substantial." This would, in effect, legitimate any and all coercions of speech in the commercial context, no matter how manipulative, since it is hard to imagine any such requirements that would not be "germane" to some legitimate "regulatory objective." Under the government's logic, for example, Congress could pass a law directing that all television advertisements by American automakers contain a large, flashing subtitle stating "Buy American." That would presumably be "germane" to the various federal programs attempting to redress our trade imbalance.³⁰

"must be analyzed under the three part test of [*Central Hudson*]." Br. in Opp. App. 5a; see *id.* 2a.

²⁹ To read the government's brief, with its repeated references to the target of respondents' complaint as "collective activities" that have "an expressive component" (U.S. Br. 14, 18), one could easily come away with the mistaken impression that this case is one involving *expressive conduct*. See *United States v. O'Brien*, 391 U.S. 367 (1968). Contrary to the government's repeated suggestion, however, the "conduct" that respondents object to being compelled to endorse and underwrite is speech itself.

³⁰ The government also repeatedly attempts to downplay the incursion on respondents' speech rights by stressing that respondents are being forced only to pay "assessments" that finance the objectionable speech,

The Solicitor General offers no principled justification for this astonishing enlargement of governmental power over the commercial marketplace of ideas. It has long been a bedrock of First Amendment jurisprudence that "freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (quoting *Wooley*, 430 U.S. at 714). See also *Hurley v. Irish-American Gay Group of Boston*, 115 S. Ct. 2338, 2347 (1995) ("'Since all speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'" (emphasis in original) (citation omitted); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977). The Court has drawn inspiration from Thomas Jefferson's words: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Abood*, 431 U.S. at 234 n.31.

The government can manipulate or distort the marketplace of ideas just as effectively by commandeering private persons to advocate its message against their will as by preventing them from speaking their own minds. While the *commercial nature* of the speech in this case *may* dictate a lower standard of review (an issue we address below), the Solicitor General has suggested no convincing reason why the government should be given any wider latitude to *coerce* than to *forbid* commercial speech. Both are, *prima facie*, abridgements of the freedom of speech.

not to communicate the messages themselves. But that distinction was rejected by this Court in the very cases on which the government elsewhere relies. See, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) (plurality) ("By utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as 'an instrument for fostering public adherence to an ideological point of view he finds unacceptable.'" (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977))); *Keller v. State Bar*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). See also *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality).

In support of its position, the government invokes a line of cases involving challenges to the use by labor unions or integrated bars of mandatory member and nonmember contributions to support political and ideological activities with which the contributors disagree. U.S. Br. 18-34. This argument is flawed at every turn.

A. First, the Solicitor General simply ignores precedent inconsistent with his position. In analogous contexts, this Court has flatly rejected the idea that "the First Amendment interest in *compelled speech* is different than the interest in *compelled silence*." *Riley v. National Federation of Blind*, 487 U.S. 781, 796 (1988) (emphasis added); *ibid.* ("the difference is without constitutional significance"); see also *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (stating that "involuntary affirmation could be commanded only on *even more immediate and urgent grounds* than silence") (emphasis added).

"Our lodestars in deciding what level of scrutiny to apply to a compelled statement," the Court has explained, "must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Riley*, 487 U.S. at 796. In *Riley*, the State argued that a law compelling the disclosure of fees by professional charitable solicitors (plainly an example of coerced speech) should be analyzed as a regulation of commercial speech, while the plaintiffs argued that the speech was at least partly political. Although the case involved compelled speech rather than restrictions on speech, every member of the Court agreed that the level of scrutiny hinged on whether the speech was commercial or political. No member of the Court suggested that there is a third, even lower, level of scrutiny that applies to compelled commercial speech. Similarly, in *Turner Broadcasting*, the Court carefully considered whether to apply rational basis, intermediate, or strict scrutiny; and not one of the five separate opinions for the Court hinted that some lesser standard of review was appropriate because compelled speech rather than restrictions on speech was at issue.

The Court routinely reviews compelled speech claims in the commercial context under the standards applicable to commercial speech restrictions. See 44 *Liquormart*, 116 S. Ct. at 1506 (because of the nature of commercial speech, "the State may require commercial messages to 'appear in such a form, or include such additional information, warnings, and disclaimers, as are

necessary to prevent its being deceptive'" (quoting *Virginia Pharmacy Bd.*, 425 U.S. at 772 n.24); *In re R.M.J.*, 455 U.S. 191, 201 (1982) ("a warning or disclaimer might be appropriately required * * * in order to dissipate the possibility of consumer confusion or deception"); *Coors Brewing Co.*, 115 S. Ct. at 1594 (Stevens, J., concurring) (mandatory disclosure requirements are often justified in the commercial arena in order to insure that consumers are not misled by incomplete information).

The Solicitor General's argument thus flies in the face of substantial precedent.

B. The *Abod* line of cases is easily distinguishable. Those cases involved challenges to compulsory financial support of collective activities whose primary purpose was neither the suppression or promotion of particular ideas — namely, the conduct of collective bargaining and the regulation of the legal profession. The Court held that these purposes are sufficiently important to justify the incidental effects on First Amendment rights. At the same time, the Court held that unwilling persons cannot be forced to support speech that is *not* directly related to those collective activities. The *Abod* cases did not suggest that a program, like this one, whose very purpose is the promotion of government-favored ideas, could withstand constitutional scrutiny merely because it is "germane" to a "regulatory purpose."

Moreover, even the requirement of compulsory contributions for the purpose of collective bargaining was upheld only after the Court had concluded that these activities were "justified by the government's *vital policy interest*" in labor peace. *Lehnert*, 500 U.S. at 519 (emphasis added). See also *Keller v. State Bar*, 496 U.S. 1, 11 (1990) (explaining that an integrated bar "undoubtedly performs important and valuable services for the State by way of governance of the profession"); *Lathrop v. Donohue*, 367 U.S. 820, 864 (1961) (Harlan, J., joined by Frankfurter, J., concurring in the judgment) (noting that integrated bar furthers "substantial state interest" and satisfies "highly significant state need"). In light of this Court's explicit recognition of the importance of the government's interest in the *Abod* cases, the government cannot use these cases as an excuse for dispensing with the necessity of showing that its interest is substantial or important.

C. — Even if the *Abood* framework, properly understood, is applied to this case, the collective advertising programs cannot be sustained. Contrary to the Solicitor General's argument, the *Abood* cases did not establish a constitutional test approving all compelled speech that is "germane" to the government's "regulatory objective." U.S. Br. 32. Instead, the Court articulated a three-part test *at least if not more* stringent than the *Central Hudson* test the Solicitor General seeks to avoid. Mandatory exactions may be used in the labor context only to fund those activities that (1) are "germane" to the union's collective-bargaining activities; (2) are justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) do not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. *Lehnert*, 500 U.S. at 519.

A comparison of these factors with their counterparts under *Central Hudson* demonstrates the relative stringency of the *Abood* framework. To begin with, the requirement that the challenged regulation serve a vital policy interest is, on its face, more demanding than *Central Hudson*'s "substantial" interest test (447 U.S. at 566). In addition, the "germaneness" test urged by the Solicitor General has, in practice, been applied with equal rigor to *Central Hudson*'s "direct advancement" prong. See *Ellis v. Railway Clerks*, 466 U.S. 435, 451-54 (1984). Finally, the question whether a particular use of mandatory union dues "significantly add[s] to the burdening of free speech" (*Lehnert*, 500 U.S. at 519) implicates precisely the same concerns as does the *Central Hudson* "narrow tailoring" requirement. The compelled advertising involved in this case does not satisfy the *Lehnert* test.

The government conspicuously fails to identify any "vital policy interest" that compares in any way to the public interest in "labor peace" underlying the Court's reasoning in the *Abood* line of cases. In *Abood*, the Court held that the First Amendment could tolerate certain incidental infringements on the associational rights of dissenting non-union members only because "exclusive union representation" is a "central element in the congressional structuring of industrial relations." *Abood*, 431 U.S. at 220 (citing National Labor Relations Act, Railway Labor Act, and numerous cases). As the Court explained, its emphasis on the role of

exclusive union representation "reflects familiar doctrines in federal labor laws":

The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

Id. at 220-21 (citations omitted).

To point out the obvious, there is no "familiar doctrine" in federal law that producers in any given industry require a regime of forced, collective speech in order to accomplish peace or prosperity for themselves or the public. Those who are forced to join in the collective speech in this case are *competitors*, not co-workers. There is no need for them to speak with a single voice. Rather than even attempt to identify a "familiar doctrine" supporting this program, the Solicitor General instead concocts, *after the fact*, various lawyerly rationalizations as to why the public interest rides on compelled collective advertising. As discussed in the previous section, those justifications are wildly speculative and unsupported either in the record of this case or in the legislative or administrative records at the time the programs were established.

The collective advertising program is therefore not germane to any vital public function analogous to the collective bargaining activities in *Abood*. Arguably, the marketing order committees' regulatory functions (setting size, quality, and appearance standards for fruit) are analogous to the regulatory functions of the integrated bar in *Keller*, but any connection between those regulatory functions and the collective advertising programs is plainly too "attenuated" (*Lehnert*, 500 U.S. at 520) to satisfy First Amendment scrutiny. The regulatory and advertising functions of the market order committees are logically and operationally independent. The committees performed their regulatory functions for thirty years before the "paid advertising" provisions were enacted, and many

marketing orders still function without any advertising program. While the *Abood* line of cases might support the constitutionality of using mandatory assessments to pay the costs of the marketing order committees' regulatory functions, it does not support a separate program of advertising.

Nor is the problem of "free riders" here comparable to the "free rider" problem in *Abood*. Contrary to the government's suggestion (U.S. Br. 21-24, 26-28), the mere possibility that a collective activity (including speech) might confer a benefit on a person does not make the beneficiary a "free rider." "Free riders" of that description abound in our interconnected world. The distinctive feature of the labor laws is that the union is forced by law to assume the legal responsibility of fair representation for each and every worker. See *Ellis*, 466 U.S. at 452 ("The free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members").

In any event, as discussed above (at 25 and n.21), compelling respondents to pay the challenged contributions would not eliminate the "free rider" problem even as the government conceives it. Under the government's view of the statute, "the marketing orders are designed in large measure for the benefit of the producers (farmers)." U.S. Br. 25 n.16. The handlers, however, are the ones required to pay for the advertising. Thus, according to the government, part of the purpose of the statutory scheme is to foster "free riding" (by farmers at the expense of handlers). Moreover, the geographic focus of the marketing orders ensures that, for example, the handlers of Georgia peaches (whose marketing order does not include provision for generic advertising) will "free ride" at least in part on the compelled messages funded by the handlers of California peaches (whose marketing order does). As the Ninth Circuit commented: "If the Secretary is concerned about free-riders, there are already plenty of them in other states." Pet. App. 21a.

Finally, the compelled contributions in this case, like those struck down in the labor union and integrated bar contexts, add significantly to the burdening of free speech that is already inherent in the marketing orders. In fact, apart from the compulsory funding of the advertising, there is no impairment of First

Amendment rights caused by the regulatory scheme. Because of the substantial *incremental* incursion on First Amendment rights involved here, the mandatory contributions fail the third test under *Lehnert*.³¹

III. GOVERNMENTAL COMPULSION OF NONFACTUAL ADVOCACY FOR THE PURPOSE OF MANIPULATING CONSUMER OPINION IS SUBJECT TO STRICT SCRUTINY

Because the government has not demonstrated any substantial interest in support of the programs at issue here, the programs constitute an impermissible regulation of commercial speech. However, the programs suffer from an even more fundamental defect. Their sole and central purpose — to manipulate consumer perceptions — is a constitutionally invalid purpose for regulating

³¹ An *amicus curiae* brief urges this Court to reverse the Ninth Circuit on the ground that the compelled advertising here is "government speech" and thus not subject to First Amendment challenge. Br. *Amici Curiae* for the National Association of State Departments of Agriculture *et al.*, at 4. That argument was not made in the court below, and was expressly waived in the Petition for Certiorari. Pet. 21-22 n.14. It should therefore not be considered. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 532 n.13 (1979).

Nor does the argument have merit. The advertising in question promotes products produced and sold by private persons; it is paid for entirely by those private persons with no contribution from the Treasury; it is designed by a committee made up of representatives of the industry; and it is identified to the consumer as produced by the "California Tree Fruit Agreement," whose name indicates an "agreement" among tree fruits producers and gives no hint that the speaker is the U.S. government. The government here is "requir[ing] a publicly identified group" of narrow scope — the handlers — to "contribute to a fund earmarked for the dissemination of a particular message associated with that group," a scheme that plainly creates a "coerced nexus" between the handlers and the subsidized messages. *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). *Amici's* argument (at 5, 10-14) that government action sufficient to be "state action" should be treated as "government speech" must be rejected, since it would render virtually any compulsion of speech by a state actor immune from scrutiny under the First Amendment.

commercial speech. See generally 44 *Liquormart*, *supra*. The government's reliance on this interest takes this case outside of traditional commercial speech doctrine and requires the application of strict scrutiny.

A. In its commercial speech cases, this Court has repeatedly stressed the valuable contribution that such speech makes to the proper functioning of a market economy and to the dissemination of information that is of vital importance to consumers. In *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), the Court observed that "the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system." *Id.* at 1589 (quoting *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976)). "[A] 'particular consumer's interest in the free flow of commercial information,'" the Court noted, "'may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'" 115 S. Ct. at 1589 (quoting *Virginia Bd. of Pharmacy*, 425 U.S. at 763). When the government forces producers to pool their advertising efforts in a single campaign, run by a politically appointed committee, the result is the very antithesis of the "free flow of commercial information."

This Court has relaxed the degree of constitutional scrutiny in commercial speech cases from strict to intermediate scrutiny where the government has compelled disclosures of uncontroversial, purely factual information, for the protection of the public. As the Court explained in *Hurley*, "the State may at times 'prescribe what shall be orthodox in commercial advertising' by requiring the dissemination of 'purely factual and uncontroversial information.'" 115 S. Ct. at 2347 (citations omitted) (emphasis added). This power to require a commercial speaker to disclose "purely factual and uncontroversial information" derives from the government's interest in "preventing deception of consumers" and from the notion that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). See also 44 *Liquormart*, 116 S. Ct. at 1508 ("It is the State's interest in protecting consumers from 'commercial harms'

that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech'" (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)).³²

The government's regulation of advertising in this case, however, is not limited to "purely factual and uncontroversial information"; nor is it justified by the need to prevent deception.³³ The compelled advertising here accordingly finds no support in the rationale underlying relaxed scrutiny for disclosure requirements of a commercial nature.

B. Aside from their commercial context, the collective advertising programs have all the hallmarks of impermissible speech regulation that ordinarily would entail strict scrutiny.

First, the very purpose is to alter the *content* of the speech that would be produced in the absence of government intervention. It is well established that "the State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated' rather than the 'commercial aspect of [it].'" 44 *Liquormart*, 116 S. Ct. at 1506 (quoting *Linmark*

³² The government also may restrict commercial speech concerning illegal conduct. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386-87 (1973).

³³ Indeed, according to the ALJ's findings, it is the *government* in this case that is engaged in disseminating to consumers commercial speech that is "misleading." App. to Br. in Opp. 364a. The ALJ found:

Promotion, through the California Tree Fruit Agreement's "generic" advertising program, advances the notion that all California fruit is the same * * *. That is what is projected by the commercials advertising California fruit. * * * [T]o lump all California fruit into a single category is *misleading* and [respondents] have stressed their philosophical objections of their advertising assessments being directed to such a message. (Tr. 2960). The [government] has not adduced any evidence to show why the United States Department of Agriculture would have a legitimate purpose in having the consumer believe that all California fruit are the same, *when they are not*.

Ibid. (emphasis added).

Associates, Inc. v. Willingboro, 431 U.S. 85, 96 (1977)); accord *Turner Broadcasting*, 114 S. Ct. at 2459 ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as are content-based restrictions).

The compelled advertising programs alter the content of speech both directly and indirectly. As previously explained, the programs compel respondents to pay for and be associated with commercial messages whose content they object to. It is undisputed that, but for the coercion, respondents would not engage in this speech. As this Court has made clear, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795.

But it goes even beyond that. In order to communicate the message they wish to convey concerning their products — including the idea that their products are of superior quality — respondents must engage in counterspeech to neutralize the government's conflicting message. See U.S. Br. 20 (suggesting that if they do not like the committees' advertisements, respondents' remedy is "to advertise their own products, to criticize their competitors' products, and even to criticize the generic advertisements created pursuant to the marketing orders"). Cf. *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 9 (1986) (holding unconstitutional a law that "forces speakers to alter their speech to conform with an agenda they do not set"). Thus, the compelled advertising programs not only force respondents to say what they wish to avoid saying, but indirectly require respondents to redouble their efforts to convey the messages they wish to be heard.

As if all of that were not enough, the government's defense of the compelled speech hinges exclusively on speech content. See U.S. Br. 16 (referring to "government's interest in a broad-based commercial message"). We are told that respondents should be compelled to join in the collective advertising precisely because of its supposed *communicative effect* — its persuasive impact on consumers of California peaches, pears, and nectarines.

Second, the collective advertising programs have the purpose and effect of compelling *advocacy* or *persuasion* (and not merely disclosure of "purely factual and uncontroversial information").

This goes beyond the range of purposes for which the government is given greater latitude to regulate commercial speech. See 44 *Liquormart*, 116 S. Ct. at 1507 (plurality); *id.* at 1516-18 (Thomas, J., concurring). One of the "'commonsense differences' that exists between commercial messages and other types of protected expression," the Court has explained, is "the greater 'objectivity' of commercial speech." *Id.* at 1506 (quoting *Virginia Board of Pharmacy*, 425 U.S. at 771 n.24); see also *Friedman v. Rogers*, 440 U.S. 1, 10 (1979) (justifying commercial speech regulation on the ground that "commercial speech is more objective, hence more verifiable, than other varieties of speech"). Requirements to disclose objective facts and information thus fall within the justification for differential treatment of commercial speech. When the government requires advocacy of an opinionated sort ("California fruit is the sweetest"), however, this rationale for relaxed constitutional scrutiny simply does not apply.

Third, in its most recent decisions, this Court has condemned attempts by government to influence the choices of consumers by deciding what information they should hear. See, e.g., 44 *Liquormart*, 116 S. Ct. at 1505 (plurality); *Coors Brewing Co.*, 115 S. Ct. 1588. Several members of the Court have expressed doubt as to whether commercial speech regulations designed only to manipulate consumer choices can ever survive First Amendment scrutiny. See 44 *Liquormart*, 116 S. Ct. at 1507 (plurality opinion of Stevens, Kennedy, Ginsburg) (where commercial speech regulations are not directed toward the "preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands"); *id.* at 1515-16 (Thomas, J., concurring) (where a speech restriction is enacted "to keep legal users of a product or service ignorant in order to manipulate [consumer] choices in the marketplace, * * * such an 'interest' is *per se* illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech"); *Coors Brewing Co.*, 115 S. Ct. at 1596-97 (Stevens, J., concurring) (because statute was not directed toward preservation of a fair bargaining process it "should be subjected to the same stringent review as any other content-based abridgment of protected speech").

The compelled advertising in this case, of course, *is* designed only to manipulate consumer choices. That is its alpha and its omega. And while it is not designed to keep consumers ignorant, it has the effect of communicating the inaccurate — or, as the ALJ termed it, “misleading” (see *supra*, n.33) — impression that all California fruits are alike. By skewing the information marketplace in favor of one type of advertising — generic advertising — the programs obscure the differences between products, making it more difficult for producers to call attention to, and consumers to learn about, distinctions that are relevant to consumer choice. As discussed above, it is the differences between products — such as differences in sweetness, maturity, healthfulness, price, or the use or non-use of pesticides — that often are of greatest interest to consumers. Enforced advocacy of this sort, neither factual in nature nor designed to protect consumers, warrants the same degree of scrutiny — even though it involves commercial speech — as that accorded to talk about politics, sports, weather, gossip, sex, or the funny papers.

Indeed, this case is the mirror image of *44 Liquormart*. In *44 Liquormart*, the government *restricted* commercial speech about alcohol prices in order to *discourage* public consumption (a policy with dubious empirical basis, inconsistent application, and numerous less restrictive alternatives). Here, the government is *compelling* commercial speech in order to *encourage* public consumption (likewise, a policy with dubious empirical basis, inconsistent application, and numerous less restrictive alternatives). In *44 Liquormart*, the Court unanimously held the state law unconstitutional. This law deserves the same fate, for the same reasons.

Finally, in contrast to government regulation that requires disclosure of objective and verifiable facts and information, compelled advocacy on issues of opinion, which involves appeals to the public's emotions, memories, biases, tastes, and opinions, necessarily becomes intertwined in issues of wider cultural or ideological significance. See Kozinski & Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 635, 644-48 (1990). The power to restrict commercial advertising inevitably has ideological ramifications, whether the purpose is to reduce demand for contraceptives (see *Bolger v. Youngs Drug Products Corp.*, 463

U.S. 60 (1983)) or to increase demand for beef. Governmental collectivization of advertising inevitably puts the government into the position of making choices about ideologically charged messages — choices that, in our constitutional system, should be left to private actors. See *United States v. Frame*, 885 F.2d 1119, 1147 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990) (Sloviter, J., dissenting) (“Although beef promotion may be less ideological than the motto ‘Live Free or Die,’ I am less persuaded than the majority is that beef promotion does not implicate ideological concerns”).

Television and radio advertisements do not appear in a cultural or ideological vacuum, but appeal to, express, and reinforce ideas and images with significance beyond the particular products. For example, a major strategy of the tree fruit committees is to create a mood of nostalgia (and in some cases patriotism) by conjuring up homespun images of listeners' and viewers' first encounters with the fruits. See J.A. 429 (radio advertisement) (“When you bite into a big, juicy peach, what memories come to mind?” * * * “The first time you danced with a girl, one Fourth of July?”). See generally J.A. 444 (committee presentation stating that “nostalgia can be an effective consumer ‘hot button’ for selling the fruits”). Yet the promotion of nostalgia has broad political and cultural significance — as a comparison of the convention acceptance speeches of Bob Dole and Bill Clinton illustrates.

More pointed examples of the ideological component of advertising of the kind challenged here are not difficult to locate. The beef promotion program devotes a substantial portion of its budget to combatting what a representative of the National Cattlemen's Association calls the “transparent vegetarian agenda” — an effort that its supporters admit must be kept “less visible” than the usual marketing efforts in order to be “effective.” Charles Lambert, *An Analytical Framework for Policy Issues: Response*, in W. Armbruster & J. Lenz, *COMMODITY PROMOTION POLICY IN A GLOBAL ECONOMY* 105, 107 (1993). Is it an appropriate role for the government to compel citizens to pay for a clandestine campaign to discredit vegetarianism?

Similarly, the Florida Citrus Board was forced to decide on several different occasions whether to continue to use controversial figures as public spokespersons. In 1980, the Board fired singer

Anita Bryant after her extremely controversial opposition to a Miami gay rights ordinance. In 1993, the Board fired Burt Reynolds in the wake of his highly-publicized divorce; in 1994 the choice of Rush Limbaugh as the Board's spokesman drew protests from numerous civil rights groups; and in 1995, the Board attempted to run promotional ads for "O.J." during telecasts of the O.J. Simpson murder trial. (The ads, which consisted of a flashing message — "Get O.J." — were rejected by Court Television as "inappropriate.") Gannett News Service, Jan. 24, 1995.³⁴ These are all ideologically significant choices.

To give another example, the use of sexual imagery is a pervasive and controversial issue in modern advertising, with profound consequences for the culture's conception of the role of women. Each time a marketing order board decides on an advertising strategy that may involve sexual imagery, it is making an ideological statement. Rodney Chang, president of respondent Kash, was not being trivial when he complained about an ad for peaches (for which he was required to pay, and which would be associated in the public's mind with his product) that featured a young girl in a wet bathing suit with the announcer intoning "remember the taste * * * so cool, juicy * * * taste them and see." App. to Br. in Opp. 356a; J.A. 530.

Our point is not that these programs are unconstitutional as applied, in that they force unwilling citizens to pay for ads denigrating vegetarians, associating their products with controversial public figures whom they may find ideologically obnoxious, or using morally questionable sexual imagery. The opposite decisions (to refuse to hire Rush Limbaugh, for example, or to hew to a "politically correct" portrayal of women) might be equally controversial. The point is that the government should not be involved in these ideologically-charged decisions. The government's attempt to trivialize the free speech interests in this case by denying the ideological subtexts of commercial messages

³⁴ A well-known advertisement of the 1920s presented signatures by labor leader Samuel Gompers, British author and socialist H.G. Wells, and the presidents of U.S. Steel and the B. & O. Railroad as testimony to the quality of the Parker Pen. Rudolph J.R. Peritz, *COMPETITION POLICY IN AMERICA, 1888-1992*, at 106 (1996).

should be rejected. Because the speech at issue *does* have an ideological component, the government's action in compelling respondents to support it should be subjected to strict scrutiny.

In short, this governmental attempt to exercise control over speech should be subjected to strict scrutiny, which it cannot possibly survive. The compelled advertising programs are based squarely on the government's desire to promote a particular message, based on its communicative impact; the compelled speech consists of persuasion regarding matters of opinion; the purpose is to manipulate consumer behavior rather than to protect consumers; and administration of the programs needlessly implicates the government in controversial choices of serious ideological and cultural import. To apply a less stringent standard of review to such a program is to strain the "commercial speech" doctrine far beyond its logic.

C. Moreover, it cannot be said that "the long accepted practices of the American people" permit the government to launch and conduct compelled advertising campaigns of the kind at issue here. 44 *Liquormart*, 116 S. Ct. at 1515 (Scalia, J., concurring). As the *amicus curiae* brief of the American Advertising Federation in this case demonstrates, neither the opinions of the framers of the First Amendment nor the historical practices of the state and local governments justifies a sharp distinction between commercial and noncommercial speech in First Amendment doctrine. Outside of efforts to protect consumers against misleading speech and regulation of speech that facilitates illegal transactions, the commercial marketplace of ideas in this country has been unfettered. Indeed, under the common law framework for speech regulation, which lasted until constitutionalization of the field after the 1920s, commercial speech may even have enjoyed a greater degree of protection than political speech. Speaking of the period before 1920, one historian has written:

Whether motivated by concern about the destruction of property or some other threat associated with state police power, the Court granted political majorities broad powers to regulate political speech. When the speech involved commercial enterprise, however, the Court was less likely to look for some "bad tendency" or "clear and present danger."

In short, commercial speech was seen as less dangerous and thus more worthy of protection.

Rudolph J.R. Peritz, *COMPETITION POLICY IN AMERICA*, 1888-1992, at 106 (1996).

The particular form of interference with freedom of speech at issue here has even less historical pedigree than other restrictions on commercial speech. Our research has not uncovered any instance in the nation's history, other than agricultural marketing orders, in which the government has assumed control over the advertising of private products for the ostensible benefit of an industry. The first such program at the state or federal level was initiated in 1954.

An interference with freedom of speech so recently devised, so haphazardly applied, so devoid of empirical or logical support, and so injurious to the "free flow of commercial information" on which consumers and producers both depend, cannot be sustained.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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September 27, 1996

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Supreme Court, U.S.
FILED

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No. 95-1184

In the Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. Respondents do not appear to defend the court of appeals' holding that the imposition of an assessment on handlers "hamper[s]" respondents' own speech because it deprives them of money that they could otherwise spend on their own advertising endeavors. See Pet. App. 18a; see also Resp. C.A. Br. 11.¹ Respondents persist, however, in characterizing the generic advertising provisions

¹ Insofar as the Wileman respondents may continue to pursue that line of argument (see Wileman Br. 49), we have explained (Gov't Br. 20-21) that the fact that the marketing order assessments diminish the amount of money that respondents might otherwise spend on other activities—including private advertising efforts—is constitutionally irrelevant.

of the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U.S.C. 601 *et seq.*, and the Secretary's marketing orders as ones that "suppress[]" or "stifle" their speech. Gerawan Br. 20, 11; see also *id.* at 10-11, 18, 19, 42-44; Wileman Br. 34. As we demonstrate in our opening brief (Gov't Br. 20, 44-45), the generic advertising programs do not regulate, restrict, or suppress respondents' private advertising efforts; the AMAA expressly provides that "[n]o order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product." 7 U.S.C. 608c(10). Rather, *in addition to* the diverse commercial advertising that respondents and other individual handlers might choose to disseminate through private efforts, the marketing order provisions ensure that commercial advertising directed at increasing overall demand for the covered commodities—on behalf of growers, as well as handlers generally—also reaches the public.

The generic advertising programs thus do not impair the First Amendment interest in "the informational function of advertising." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). To the contrary, they substantially further that interest.² While the system of mandatory

² The Gerawan respondents contend (Gerawan Br. 19) that the generic advertising programs "reduce [consumers'] access to information about the products that individual competitors would otherwise provide," and thereby "skew[] advertising in favor of more generic messages [and] necessarily decrease[] the relative share of advertising that focuses on differences between products within the advertised category." That reasoning is flawed. By providing for advertising that encourages consumption of the specified commodities generally, while allowing respondents to engage in whatever advertis-

assessments for advertising on behalf of all growers and handlers covered by a particular marketing order may implicate First Amendment values (despite its commercial content) under decisions such as *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), it does not fall within the category of *restrictions* on commercial speech that this Court has addressed in *Central Hudson* and its progeny.

2. The Gerawan respondents contend that "[t]he *Abood* line of cases is easily distinguishable" because "[t]hose cases involved challenges to compulsory financial support of collective activities whose primary purpose was neither the suppression nor promotion of particular ideas—namely, the conduct of collective bargaining and the regulation of the legal profession." Gerawan Br. 37. That contention is incorrect. The regulatory framework established by the Act and the Secretary's marketing orders has the nonspeech-related purpose of establishing stable and orderly marketing conditions and enhancing returns to growers. See Gov't Br. 3, 26, 35. The Act and its enabling regulations establish an array of mechanisms designed to achieve that end, including minimum quality and maturity standards, grading and inspection requirements, production research, marketing research, and development projects. 7 U.S.C. 602(3). The generic

ing they choose, the generic advertising programs employ "the remedy [of] more speech, not enforced silence," *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), to effectuate their objectives. Nor do the generic advertising programs penalize respondents for engaging in their own speech. Compare *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating Florida statute requiring newspapers to carry candidate's reply to attacks on candidate's character published by the paper). Any incidental difficulty that respondents experience in advancing their private commercial message does not implicate the First Amendment.

advertising activities that are at issue here are but one element of the "marketing research and development projects" authorized by Congress, 7 U.S.C. 608c(6)(I), and are part of a far broader regulatory system that does not principally concern speech.

Nor are the labor activities at issue in the union context less expressive or ideological in nature than are the promotional activities at issue here. Collective bargaining, contract administration, and grievance adjustment are inherently expressive endeavors. When union officials represent an employee in contract talks or grievance proceedings, for example, they necessarily engage in speech on the employee's behalf, funded in part by that employee's contributions. As this Court has recognized, moreover, a union's expressive activities on behalf of an employee frequently have an ideological component to which the employee may object. See, *e.g.*, *Abood*, 431 U.S. at 222-223; Gov't Br. 32-33 & nn. 20 & 21.³ So long as those activities are germane to the union's statutory duties of collective bargaining, contract administration, and grievance adjustment, however, the First Amendment does not bar a system of compulsory employee contributions to support them. *Abood*, 431 U.S. at 232.

It follows a fortiori from *Abood* and related cases that the industry-funded advertising programs under agricultural marketing orders are constitutional. The advertising programs involve pure commercial speech, since they propose commercial transactions in commodities that respondents voluntarily offer for sale; the advertising is non-ideological in nature; it is part of a larger regulatory

³ The same is true of integrated bar associations, which are responsible, among other things, for enforcing ethical standards for the legal profession. See *Keller v. State Bar of California*, 496 U.S. 1, 16 (1990).

framework that does not principally concern speech; and that regulatory framework (including its advertising program) is intended to benefit producers and the agricultural sector as a whole, not merely the handlers that pay the assessments. Nor does the "pro-consumption" message of generic advertisements meaningfully differ for present purposes from the "pro-labor" message of employee-funded union speech. Respondents offer no persuasive reason to depart from the well-established analytical framework for reviewing compulsory collective-payment arrangements.⁴

The Wileman respondents argue (Wileman Br. 43-45) that the reasoning of *Abood* rests solely on the principle of exclusive representation embodied in the labor laws. The Wileman respondents ignore, however, that the Court has applied *Abood*'s "germaneness" inquiry to the

⁴ The Gerawan respondents incorrectly contend (Gerawan Br. 36) that this Court has rejected the application of *Abood* and related cases "[i]n analogous contexts." None of the cases that they cite involved compulsory financial contributions toward collective activities having an expressive component. See, *e.g.*, *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988) (state statute requiring fundraisers to, *inter alia*, disclose financial information to donors); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (state regulation requiring children in public schools to salute the American flag); *Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 114 S. Ct. 2445 (1994) (federal statute requiring carriage of local broadcast stations on cable systems); 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (state statutes prohibiting advertisement of liquor prices); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) (federal statute prohibiting beer labels from displaying alcohol content). The Court has made clear that arrangements such as the one at issue here must be reviewed under the "germaneness" test. See Gov't Br. 18-19, 23-25. See also *Carroll v. Blinken*, 957 F.2d 991, 996-997, 999-1003 (2d Cir.) (applying *Abood* and its progeny to use of mandatory student activity fees to fund organization engaged in ideological activities), cert. denied, 506 U.S. 906 (1992).

integrated-bar setting, *Keller*, where attorney-members are free to speak out on questions involving "the quality of the legal service available to the people of the State," 496 U.S. at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality opinion)), notwithstanding their membership in the bar association. Moreover, by allowing private advertising by producers and handlers while ensuring that generic commercial advertising is disseminated, the programs at issue here are *less* restrictive of speech than are the "agency-shop" arrangements that this Court has upheld in prior cases.

3. The Gerawan respondents suggest (Gerawan Br. 15-16) that because generic advertising programs have not been utilized with respect to every commodity or region, their use can never be justified by important governmental objectives. The union and integrated-bar cases plainly refute that argument. Not all workplaces are unionized, nor has every State authorized an "agency shop" arrangement for its public employees.⁵ See R. Theodore Clark, Jr., *A Guide to the Changing Court Rulings on Union Security in the Public Sector: A Management Perspective*, 14 J. L. & Educ. 71, 71 n.1 (1985) (identifying 20 States that had then adopted such arrangements). The Court nonetheless has held that compelled employee funding of union representation, where Congress or a State has found the need to provide for it, serves the important governmental interests in promoting labor peace and avoiding the risk of "free riders." See, e.g., *Abood*, 431 U.S. at 222, 224; *International Ass'n of Machinists v. Street*, 367 U.S. 740, 778 (1961). The governmental interest, in other words, is in facilitating

⁵ The National Labor Relations Act leaves regulation of the labor relations of state and local governments to the States. See 29 U.S.C. 152(2).

the activities of the union when the employees concerned have chosen to be represented by a union.

Similarly here, the governmental interest is in facilitating privately initiated activities under a marketing order when the producers concerned have chosen to be covered by one. Mandatory assessment obligations may arise only where there is supermajority support within the covered industry—a marketing order must generally be approved either by two-thirds of the producers of a commodity, or by the producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. 608c(3)-(4), (8) and (9)(b).⁶ This particularized process ensures that marketing order obligations—including assessments for generic advertising—extend no further than is necessary to serve the government's important policy objectives.⁷

⁶ Frequently, as in this case, marketing orders are subject to periodic referenda, see 7 C.F.R. 917.61(e), and must be terminated if majority support within the industry no longer exists. See 7 C.F.R. 917.61(c). The Secretary must also terminate or suspend an order "whenever he finds that such provisions do not tend to effectuate the declared policy of the act." 7 C.F.R. 917.61(b). See also Gov't Br. 6 n.3 (Section 501(e) of the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 1031—enacted on April 4, 1996—requires commodity committees to fund periodic, independent evaluations of generic promotion programs, and to make the results available to the Secretary and to the public). The commodity committees recommend particular advertising expenditures to the Secretary by a majority vote, 7 C.F.R. 917.35, at meetings in which industry members may participate.

⁷ As we have explained (Gov't Br. 45-48), distinctive marketing order characteristics, such as the allowance of credit for qualified private advertising in certain markets, are based on industry-specific conditions. Individual marketing orders for each industry are, in turn, fashioned and adopted through the rulemaking and industry-ratification processes described herein. To the extent that respondents seek to undermine the importance of the governmental interest by

We have demonstrated here (Gov't Br. 25-28, 35-42), that the challenged generic advertising programs serve important public interests in orderly marketing conditions and enhanced returns to growers, and that Congress's use of industry assessments represents a valid determination that mandatory financial participation, when approved by the requisite percentage of producers, will "distribute fairly the cost of these activities among those who benefit, and * * * counteract[] the incentive that [market participants] might otherwise have to become 'free riders.'" *Abood*, 431 U.S. at 222. Moreover, because it is both region-specific and commodity-specific, the marketing order framework is, in significant respects, more narrowly drawn to serve Congress's objectives than are the "agency shop" arrangements that the Court approved in *Abood* and related cases. Before a marketing order may be implemented in a particular industry, the Secretary of Agriculture must engage in formal rulemaking proceedings, 7 U.S.C. 608c(3)-(4), and craft an order precisely "designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production" of the covered commodity. 7 U.S.C. 608c(6)(I); 7 C.F.R. 916.45, 917.39. See, e.g., 41 Fed. Reg. 14,377 (1976) (amending marketing order for peaches and pears) ("The evidence indicates that provisions for paid advertising activities for peaches and pears and vesting authority therefor in the Peach and Pear Commodity Committees would place the peach and pear industries in a better position to advance the interest of

relying on the fact that the AMAA provides for generic advertising on a commodity-specific basis and therefore does not apply to all commodities (see Gerawan Br. 15-16), we note that Congress has now provided for generic advertising programs with respect to all regulated commodities. Federal Agriculture Improvement Reform Act of 1996, § 518(b), 110 Stat. 1043.

growers, and this would tend to effectuate provisions of the act and the order."); 36 Fed. Reg. 8735, 8736 (1971) (amending order for plums). The marketing orders that emerge from that process must be restricted "to the smallest regional production areas * * * practicable." 7 U.S.C. 608c(11)(B).

4. Respondents cite *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), for the proposition that, in addition to being germane to an important governmental objective, the generic advertising activities must not "significantly add to the burdening of free speech." Gerawan Br. 38 (quoting *Lehnert*, 500 U.S. at 519); see also Gerawan Br. 41; Wileman Br. 44 n.31. That contention misreads *Lehnert*. There, the Court considered the constitutionality of employee-funded activities that were outside of the union's statutory duties as the representative of employees within the bargaining unit.⁸ It was in that context that the Court required that the challenged activities "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519; see also *Ellis v. Railway Clerks*, 466 U.S. 435, 440 (1984) (considering the validity of charging to dissenting employees the costs of, *inter alia*, conventions, union publications, social activities, and "litigation not involving the negotiation of agreements or

⁸ The expenses at issue in *Lehnert* were attributable to the costs of:

(1) lobbying and electoral politics; (2) bargaining, litigation, and other activities on behalf of persons not in petitioners' bargaining unit; (3) public-relations efforts; (4) miscellaneous professional activities; (5) meetings and conventions of the parent unions; and (6) preparation for a strike which, had it materialized, would have violated Michigan law.

500 U.S. at 514.

settlement of grievances"). The *Lehnert* plurality repeatedly affirmed that a union's speech in performance of its responsibilities in the areas of collective-bargaining, contract administration, and grievance adjustment need only be germane to the government's interests in labor peace and avoiding free riders—even insofar as that speech contains an ideological component. See, e.g., *Lehnert*, 500 U.S. at 517 ("[A]n employee's free speech rights are not unconstitutionally burdened because the employee opposes positions taken by a union in its capacity as collective-bargaining representative."); *ibid.* ("[The union] cases make clear that expenses that are relevant or 'germane' to the collective-bargaining functions of the union generally will be constitutionally chargeable to dissenting employees."); see also *id.* at 520 (union lobbying activities designed to obtain ratification of public employment contracts properly chargeable to dissenting employees); *Ellis*, 466 U.S. at 456. Because the assessments at issue here may be expended only toward activities designed to "promote the marketing, distribution, and consumption" of covered commodities, 7 U.S.C. 608c(6)(I), they are necessarily germane to Congress's important objectives.

5. Respondents mischaracterize the nature of the "free rider" problem that supports the use of mandatory assessments. See *Gerawan Br.* 40; *Wileman Br.* 25. As we explain in our opening brief (*Gov't Br.* 27-28), the free rider problem speaks not only to the concern that some participants will unfairly benefit from the collective efforts of others, but, more fundamentally, to the risk that important collective programs will collapse from lack of participation absent mandatory support. Accordingly, the fact that some entities outside of the covered class may benefit from a collective program does not detract from the urgency of the free rider problem. See,

e.g., *Lehnert*, 500 U.S. at 519, 522-524 (plurality) (rejecting the contention that dissenting employees may never be charged for a union's collective-bargaining activities on behalf of *another* bargaining unit).

In any event, respondents' fairness arguments are unavailing. The *Gerawan* respondents contend (*Gerawan Br.* 40-41) that fairness considerations underlying the "free rider" principle are disserved by the generic advertising programs because (1) handlers of the same commodities in regions not covered by an advertising program benefit from the program to which respondents contribute; and (2) producers also benefit from the programs. See also *Wileman Br.* 25, 45. As to the former contention, it requires no leap of imagination to understand why Georgia peach handlers, for example, do not benefit from advertisements for *California*-grown peaches, see, e.g., *J.A.* 530 (DX 301(b)); *J.A.* 396 (DX 303), to the same extent that California peach handlers do. As to the latter contention, Congress concluded that the most practicable method of recovering the costs of administering all aspects of a marketing order is through assessments made against handlers, and the structure of the marketing orders contemplates that handlers will pass on to producers a significant portion of all assessments, whether used for advertising or for other purposes. Respondents offer no reason to doubt the validity of that basic economic assumption.

6. Respondents' contention (e.g., *Wileman Br.* 7, 14-25) that the generic advertising programs are intended to convey the message that particular brands are superior to others is unfounded.⁹ We demonstrate in our

⁹ Respondents rely extensively on findings by the administrative law judge (ALJ) that did not pertain to First Amendment claims and were expressly or implicitly rejected by the Judicial Officer (JO), the

opening brief that the generic advertising programs are intended to promote California tree fruits generally, in order to encourage overall consumption. See Gov't Br. 25-26, 36, 38-42. The record does not support respondents' claim of an illicit purpose behind the programs. The advertising materials produced by the Committees, moreover, clearly demonstrate their generic purpose.

For example, the television and radio advertisements to which respondents object (Wileman Br. 18) convey the desirability of the entire class of "California peaches, plums and nectarines." J.A. 396; see also J.A. 397-400, 530. The programs' extensive "point-of-sale," press, and educational materials are similarly all-inclusive. See, e.g., Wileman II DX 382 (promotional materials, including brochure informing readers that "[n]early 500 varieties of peaches, plums and nectarines are shipped from April through November"); Wileman II DX 380 (press materials, including cover letter informing editors that "[o]ver 90% of all nectarines are grown in California, in over 150 varieties, from May through September"); Wileman II DX 383 (educational materials regarding California tree fruits generally). Those materials adhere precisely to the Committees' statutory mandate.

district court, and the court of appeals in disposing of respondents' non-constitutional claims. See, e.g., Gerawan Br. 3 & n.4, 5-9, 17 n.15, 19; Wileman Br. 19-21. As the district court observed, the JO's decision represents the final decision of the Secretary for purposes of judicial review, 7 U.S.C. 608c(15)(A); 7 C.F.R. 2.35, and "the reviewing court's deference is to the agency and not to the ALJ." Pet. App. 46a (citing *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1486 (9th Cir. 1984)). The courts below properly rejected the ALJ findings on which respondents now seek to rely. See, e.g., Pet. App. 46a n.4 (rejecting respondents' allegations of bias by the JO); compare Gerawan Br. 3 & n.4.

The Wileman respondents place great weight (Wileman Br. 19-20) on the "Varieties Brochures" produced by the Committees. See J.A. 531, 532. Those are charts made available to retailers that list the major varieties (not brands) that are available during specific time periods. Because the major varieties (such as Bartlett pears and Queen Ann plums) are highly available and are, as a group, produced by a vast majority of growers, the brochures benefit the overwhelming majority of growers in that respect, in addition to conveying the more general message that a wide variety of California tree fruit is available during the entire season. They are not intended, however, to promote particular brands. See Pet. App. 72a ("No advertising by specific brand is allowed."); see also Wileman II Tr. 4885 (Testimony of Jonathan Field) ("Those varieties [appearing in the Varieties Brochures] are the major varieties shipped, generally—we try to take varieties that cross over the breadth of the industry, not specific to any one handler."). In the rare instance in which, as in 1989, a proprietary variety packed by a single handler appeared on the chart (J.A. 531, 532), it was because that variety had achieved significant volume, irrespective of proprietary interests. See Wileman II Tr. 4888, 4885-4886.

Similarly, whenever visual advertising materials are used, some representative fruit must be selected. Such examples necessarily do not exemplify every attribute of every variety that is available on the market. There is no indication in this case, however, that the generic ads, viewed in the aggregate, convey the message that consumers should purchase certain brands or varieties of California tree fruits to the exclusion of others.¹⁰ Fur-

¹⁰ There is also no merit to the Wileman respondents' contention (Wileman Br. 20-21) that the generic advertising programs "project[] a

ther, even if we assume, *arguendo*, that certain generic advertisements might be perceived by some to have an incidental message regarding distinctive fruit characteristics, that inadvertent effect would not invalidate the government's otherwise valid objectives. Congress reasonably could conclude that the similarities among varieties of a commodity (*e.g.*, peaches or nectarines) covered by a particular marketing order outweigh the differences among those varieties, and therefore justify quality control and other measures, including generic advertising, that stabilize and promote the market for the commodity as a whole. Such groupings do not raise independent First Amendment concerns, any more than do the determinations of what groups of employees will be included in a bargaining unit represented by a union that is supported by mandatory dues.

7. We demonstrate in our opening brief (Gov't Br. 18-24) that the *Central Hudson* test is inapplicable where, as here, mandatory assessments are used to fund collective activities having an expressive component. But even if respondents were correct that the *Central Hudson* test is applicable, we have established that the generic advertising programs satisfy that test.

a. Respondents cannot refute Congress's "common-sense judgment," *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993),¹¹ that generic advertising of peaches, plums, and nectarines leads to increased consumption of those commodities, and has an attendant stabilizing effect on market conditions. See *Central Hud-*

particularized message that red nectarines * * * are better than other varieties." In the portion of the court of appeals' opinion that respondents cite for that proposition (Pet. App. 15a n.6), the court merely repeated respondents' allegations as to the existence of such a bias. Those allegations have no support in the record.

son, 447 U.S. at 569; *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986).¹¹ Instead, respondents echo the court of appeals' flawed holding (Pet. App. 20a) that the generic advertising programs, to be constitutional, must be demonstrably *more* effective at increasing demand than is individual brand advertising. See, *e.g.*, Gerawan Br. 22; Wileman Br. 22. As we have explained (Gov't Br. 37-39), that holding misapprehends *Central Hudson*'s requirement that restrictions on commercial speech "directly advance[]" the governments substantial interests. 447 U.S. at 566.

Because the generic advertising programs do not restrict or supplant handlers' private advertising efforts, those efforts may continue irrespective of the challenged programs. See, *e.g.*, Pet. App. 39a ("[Respondents] concede they are presently advertising on their own."). The pertinent question under *Central Hudson* thus is whether the addition of a base level of generic advertisements to the diverse cacophony of private brand advertising significantly advances the government's important interest in establishing orderly market conditions through increased demand. We amply demonstrate in

¹¹ Respondents point to purported shortcomings of certain studies in the record that affirm the unremarkable conclusion that advertising a product leads to increased consumption of that product. See Wileman Br. 17, 22-23; Gerawan Br. 25-28. Respondents also point to purportedly adverse studies that are not in the record and were not considered by the courts below. See, *e.g.*, Gerawan Br. 18 n.17, 20 n.18, 22 n.19. The court of appeals, however, correctly concluded that the generic advertising programs "undoubtedly" have "increased peach and nectarine sales." Pet. App. 17a. See also *id.* at 20a ("the Secretary has demonstrated that advertising increases consumption of peaches and nectarines"). Respondents' methodological objections to particular studies do not alter the strong evidence of causation in this case, nor do they justify the court of appeals' legal errors in analyzing that evidence. See Gov't Br. 29-32, 36-39.

our opening brief that that criterion is satisfied. See Gov't Br. 38-39.¹²

b. The Wileman respondents cite their various disagreements with the Committees' promotional strategies (Wileman Br. 26) as evidence that the generic advertising programs are "more extensive than is necessary," *Central Hudson*, 447 U.S. at 566, to serve the government's interests. *Central Hudson*, however, does not deprive the Committees of the flexibility necessary to operate their programs on a day-to-day basis. See Gov't Br. 43-44. This Court's decisions require "a fit that is not necessarily perfect, but reasonable." *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2380 (1995) (quoting *Board of Trustees of SUNY v. Fox*, 492 U.S. 469, 480 (1989)). Here, the challenged programs do not ban or restrict respondents' private speech, and they are precisely focused on the consumer demand that is essential to achieving the government's goals. The programs are "not broader than Congress reasonably could have determined to be necessary," *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 539 (1987), to accomplish its objectives. They therefore satisfy the third element of the *Central Hudson* test. See *Board of Trustees v. Fox*, 492 U.S. at 480.¹³

¹² Respondents' arguments with respect to their economic interests reaffirm our position (Gov't Br. 38-42) that generic and brand advertising are not equally effective at advancing the government's objectives. See Wileman Br. 27 n.20 ("Respondents are not concerned with increasing demand 'across the industry.' They are interested in promoting their own product and increasing demand for their specific brand label.").

¹³ As the Gerawan respondents acknowledge (Gerawan Br. 24 n.20), Congress has attempted to encourage voluntary collective marketing efforts by facilitating the formation of agricultural cooperatives. See, e.g., 7 U.S.C. 614(b)(1); 12 U.S.C. 1141a(3). The

Contrary to the Gerawan respondents' suggestion (Gerawan Br. 32), a system consisting solely of subsidies to producers would not effectively achieve the government's regulatory objectives. As we explain in our opening brief (Gov't Br. 28), the AMAA's regulatory framework, including the generic advertising component, advances the broad economic goals of "maintain[ing] * * * orderly marketing conditions for agricultural commodities," 7 U.S.C. 602(1), and "promot[ing] the marketing, distribution, and consumption" of covered commodities, 7 U.S.C. 608c(6)(I). Promoting returns to producers¹⁴ is but one element of those broader objectives.¹⁵ While direct subsidies would serve the narrow goal of enhancing economic returns to producers, and are sometimes employed to influence agricultural economies, they are an artificial and temporary economic measure that cannot alone accomplish the AMAA's

California tree fruit industry contains no cooperative that is large enough to obviate the need for assessment-funded generic advertising.

¹⁴ The Gerawan respondents refer to this objective pejoratively as a desire to "enhanc[e] the economic interests of a favored subclass of producers." Gerawan Br. 15. The legislative history of the AMAA makes clear, however, that Congress's concern with the economic interests of farmers springs from their important role in the Nation's economy. See Gov't Br. 26; Pet. App. 89a.

¹⁵ The Gerawan respondents err in suggesting (Gerawan Br. 19-21) that the government's interests in this case include purported secondary effects such as decreased consumption of commodities not covered by the marketing order. Even if the record supported the existence of such extraneous consequences—which it does not—the government need not refute every adverse effect of a challenged policy, so long as its articulated justifications are sufficiently important ones and are advanced by the challenged policy. Cf. *Florida Bar v. Went For It, Inc.*, 115 S. Ct. at 2376 (focus of *Central Hudson* inquiry is on "the precise interests put forward by the [government]") (quoting *Edenfield v. Fane*, 507 U.S. 761, 768 (1993)).

broadier goals of stable and orderly market conditions through sustained consumer demand. The generic advertising programs are crafted precisely to achieve those goals.¹⁶

8. The Gerawan respondents advance the extraordinary proposition (Gerawan Br. 41-42) that increasing consumer demand for commodities in order to stabilize economic conditions—an objective these respondents disparage as a desire “to manipulate consumer perceptions” (*id.* at 41)—is a “constitutionally invalid purpose” that subjects the marketing order provisions to strict scrutiny. This Court’s decisions make clear that influencing consumer preferences and conduct is a permissible goal, and that provisions that pursue that goal through the regulation of commercial speech are not subject to strict scrutiny. See, e.g., *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1591 (1995) (deeming “substantial” government’s interest in dissuading consumers from purchasing beer based on its high alcohol content); *Posadas*, 478 U.S. at 341 (deeming “substantial” Puerto Rico’s interest in “the reduction of demand for casino gambling by [its] residents”); *Florida Bar*, 115 S. Ct. at 2376 (deeming “substantial” Florida’s interest in, *inter alia*, improving the public’s perception of the legal profession).¹⁷

¹⁶ The possibility that Congress or a state legislature may address wages and other working conditions directly, through regulation, does not undermine the constitutionality of statutes that also provide for those subjects to be addressed by private ordering through a system of union representation supported by mandatory dues.

¹⁷ In 44 *Liquormart*, the principal opinion stated that “when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.” 116 S. Ct. at 1507 (emphasis added). See also *id.* at 1515-1520 (Thomas, J., concur-

The Gerawan respondents assert (Gerawan Br. 43) that “[a]side from their commercial context,” the generic advertising programs “ordinarily would entail strict scrutiny.” Whatever the accuracy of that assertion, it has no relevance to this case because the speech at issue here is purely commercial. The Court has repeatedly recognized “the ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-456 (1978); see also *Central Hudson*, 447 U.S. at 562. Accordingly, the Court has held that “[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.” *Id.* at 562-563; *Fox*, 492 U.S. at 477; *Florida Bar*, 115 S. Ct. at 2375.

Nothing about the communication at issue here removes it from that “subordinate” category of expression, *Fox*, 492 U.S. at 2375. The agricultural transactions that are the focus of the AMAA have long been subject to extensive federal regulation, see *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939); *Zuber v. Allen*, 396 U.S. 168, 174-176 (1969) (discussing federal regulation of commodity transactions prior to enactment of the AMAA), and the advertising at issue here plainly “propose[s] a commercial transaction.” *Fox*, 492 U.S. at 473-474; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). The programs clearly are not subject to strict scrutiny.

ring in part and concurring in the judgment). That approach is inapposite here because the generic advertising programs entail no prohibition of speech, let alone a complete prohibition; there is no “paternalistic” attempt, *id.* at 1510, to shield the public from truthful information.

9. For similar reasons, the Wileman respondents' contention (Wileman Br. 30) that mandatory assessments for generic advertising are "presumptively invalid" is also unavailing. The Court has upheld certain bans on commercial speech where such prohibitions directly advance substantial interests and are not more extensive than necessary to serve those interests. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (upholding State's complete ban of off-site billboard advertising); *Florida Bar, supra* (upholding state bar rules that prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident); *Edge Broadcasting Co., supra* (upholding federal statutes prohibiting radio broadcast of lottery advertising by licensees in nonlottery States). The Court likewise has upheld, under the "germaneness" test, compelled contributions toward collective expression, even where that expression contained an ideological message with which the contributor strongly disagreed. E.g., *Aboud*, 431 U.S. at 222-223. There is no basis for respondents' contention that the generic advertising programs—which involve neither the suppression of speech nor the financial support of ideological expression—are "presumptively invalid" under the First Amendment.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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MOTION FILED
JUL 26 1996

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No. 95-1184

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL R. GLICKMAN, SECRETARY, OF AGRICULTURE,
v. *Petitioner,*

WILEMAN BROS. & ELLIOTT, INC., et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*
AND BRIEF *AMICI CURIAE* FOR THE
WASHINGTON APPLE COMMISSION,
IDAHO POTATO COMMISSION,
CALIFORNIA KIWIFRUIT COMMISSION,
THE ALMOND ALLIANCE,
CALIFORNIA STONE FRUIT COALITION AND
AMERICAN MUSHROOM INSTITUTE,
IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.4, the Washington Apple Commission, Idaho Potato Commission, California Kiwifruit Commission, The Almond Alliance, California Stone Fruit Coalition and American Mushroom Institute hereby respectfully move for leave to file the attached brief of *Amici Curiae* in support of Petitioner. The consent of the counsel for the Petitioner has been obtained. The consent of counsel for the Respondent has been requested but was not given, necessitating this motion.

The interest of the *Amici* in this case arises from the fact that the Washington Apple Commission, Idaho Potato Commission and California Kiwifruit Commission ("Program *Amici*") are commodity promotion and research programs similar to those at issue in the instant case.

The Almond Alliance, California Stone Fruit Coalition and American Mushroom Institute ("Industry *Amici*") are organizations consisting of producers and handlers of agricultural commodities directly affected by commodity promotion and research programs similar to those at issue in the instant case.

Among the Program *Amici* are those currently the subject of pending litigation in which the issue is nearly identical to that involved in the instant case. *California Kiwi-fruit Commission v. Moss*, 45 Cal.App.4th 769 (Cal. App. 3d Dist. 1996), rehearing denied, June 17, 1996, petition for review filed June 28, 1996. Similarly, members of the Industry *Amici* are directly affected by programs currently involved in such litigation, including the programs at issue in the instant case. See also *Cal-Almond, Inc. v. United States Department of Agriculture*, 14 F.3d 429 (9th Cir. 1993) ("*Cal-Almond I*") and *Cal-Almond, Inc. v. United States Department of Agriculture*, 67 F.3d 874 (9th Cir. 1995), petition for cert. filed May 20, 1996 *sub nom. United States Department of Agriculture v. Cal-Almond, Inc., et al.*, Case No. 95-1978 ("*Cal-Almond II*"); and *In re: Donald B. Mills, Inc., a California Corporation, d.b.a DBM Mushrooms*, MPRCIA Docket No. 95-1, Decision filed April 26, 1996 (appeals pending before USDA Judicial Officer).

In the instant case the Courts have focused only on the federal marketing orders directly involved, and on the impacts of these programs on the respondents. The *Amici* are uniquely situated to assist this Court in understanding the breadth and scope of the issue now before it.

The Program *Amici* are all mandatory producer funded agricultural commodity promotion and research programs similar to those at issue in the instant case. They are also representative of the hundreds of these programs operating throughout the country. For these reasons they are well qualified to present information to this Court relative to the nature and pervasiveness of these programs. They are also possessed of the ability to ex-

plain how these programs work to advance the governmental interest which led to their creation. The Program *Amici* can also present first-hand information relative to the impacts of the decision below.

The Industry *Amici* are uniquely positioned to assist this Court in understanding the support commodity promotion and research programs generally enjoy and the view of the majority of those who pay assessments to these programs as to the need for the programs. Members of the Industry *Amici*, as individuals serving on the boards of directors of these programs, are also in a natural position to provide information regarding the impact of the decision below on the day-to-day operation of these volunteer boards.

The parties did not present the perspective of the *Amici* in the Court below. Given the similarities between the programs of which the Program *Amici* are representative and the programs at issue in the instant case, the interests of all the *Amici* will be affected by this Court's decision. Because their interests are directly involved and their views will not be represented to the Court by either party, *Amici* respectfully move for leave to file the attached brief presenting the identified interest and perspective and addressed solely to that purpose.

Respectfully submitted,

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BRIEF AMICI CURIAE

Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, the Washington Apple Commission, Idaho Potato Commission, California Kiwifruit Commission, The Almond Alliance, California Stone Fruit Coalition and the American Mushroom Institute, respectfully submit this brief *Amici Curiae* in support of the Petitioner. This brief is presented with the consent of the attorney for the Petitioner. The consent of the attorney for the Respondents was requested but not given.

DECISION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *Wileman Bros. & Elliott, Inc. v. Espy*, is reported at 58 F.3d 1367 (9th Cir. 1995).

INTEREST OF THE AMICI CURIAE

The Washington Apple Commission, Idaho Potato Commission and California Kiwifruit Commission (hereafter collectively referred to as the "Program *Amici*") are all mandatory producer funded agricultural commodity research and promotion programs similar to that at issue in the instant case. All three Program *Amici* operate under authority granted by their respective state legislatures. As such they are uniquely situated to assist the Court in understanding: (1) the scope and structure of these valuable programs; (2) the importance of these programs to the agricultural economy; (3) the need for the mandatory nature of these programs; and (4) the devastating impact on these programs of a decision to allow the "test" articulated by the Ninth Circuit to stand.

The Almond Alliance is a group of persons engaged in the growing and processing of almonds. The Alliance's members are directly affected by the Almond Board of California, a federal marketing order issued pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. § 601, *et seq.*) (Hereafter "AMAA"). The

Almond Board of California is the subject of a case related to the decision below, *Cal-Almond, Inc. v. United States Department of Agriculture*, 14 F.3d 429 (9th Cir. 1993) ("*Cal-Almond I*") and *Cal-Almond, Inc. v. United States Department of Agriculture*, 67 F.3d 874 (9th Cir. 1995) ("*Cal-Almond II*"), petition for cert. filed May 20, 1996 sub nom. *United States Department of Agriculture v. Cal-Almond, Inc., et al.*, Case Nos. 95-1978 and 95-1879.

The California Stone Fruit Coalition is a group consisting of producers of peaches, nectarines and plums, organized to support the marketing orders at issue in the *Wileman* case. The Coalition members are directly affected by the marketing orders at issue here.

The American Mushroom Institute is a national non-profit trade association that represents mushroom producers, processors, buyers, and others involved in providing services and supplies for the mushroom industry. Headquartered in Washington, D.C., its membership includes over 100 commercial-size mushroom farms in the United States, which represent over ninety percent (90%) of domestic mushroom production. AMI and its members have a clear and substantial interest in the Supreme Court's decision in the instant case and in the pending challenge to the producer-funded mushroom promotion program created pursuant to the Mushroom Promotion, Research and Consumer Information Act of 1990, Pub. L. No. 101-624, 104 Stat. 3855, 7 U.S.C. §§ 6101-6112. The Mushroom Council is the subject of an administrative decision based on the *Wileman* test in which the AMI has intervened. *In re: Donald B. Mills, Inc., a California Corporation, d.b.a DBM Mushrooms*, MPRCIA Docket No. 95-1, Decision filed April 26, 1996 (appeals pending before USDA Judicial Officer).

The Almond Alliance, California Stone Fruit Coalition and American Mushroom Institute (hereafter "Industry

Amici") members believe the continued ability to work collectively is essential to the well being of their industries. They are uniquely situated to assist the Court in understanding, from the perspective of those who pay the assessments that fund these programs, why the programs must be mandatory if they are to remain effective. Many of these individuals are also directly involved in administering these programs and shaping their policies. As a result, they know from first hand experience the havoc and confusion wrought by the "test" articulated by the Ninth Circuit in the instant case.

The programs put at risk by the decision below are widespread and play a significant role in the success of many segments of the agricultural economy in the United States. According to a work published in 1993, there were at that time more than 300 mandatory commodity research and promotion programs operating in the United States. Forker, O. D. and R. W. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs*. New York: Lexington Books (1993), p. 81.

The Program *Amici* are merely a representative sample of the numerous programs that exist throughout the United States. The federal programs for dairy and beef reach virtually every state while forty-three states operate legislatively authorized programs of their own. *Id.*, 140-141, Table 5-16. The combined budgets of these programs in 1993 was approximately \$700 million. *Id.*, 102-103, Table 5-1. The farm revenue derived from the commodities subject to the programs is in excess of \$100 billion. H. W. Kinnucan, *Economics of Mandated Commodity Programs: An Overview and Guide to the Literature*, (1995) 2.

The promotional aspects of these pervasive programs, the activities most threatened by the decision below, account for 65-75% of program expenditures. *Id.* Given the magnitude of this activity across the nation, it is not surprising that slogans such as "Pork, the Other White

Meat"; "Beef, its What's for Dinner"; and "Got Milk?" are so well known. Nor is it unusual that we should be so familiar with the images of the "California Dancing Raisins" and celebrities sporting "milk mustaches."

While these advertising slogans and promotional efforts tend to capture the public imagination, there is much more to these commodity programs. Research sponsored by American cattle producers through assessments paid to the Cattlemen's Beef Board demonstrated that beef was leaner than originally thought, providing valuable consumer information to millions throughout the country. A similar program undertaken by the American Egg Board lead to a conclusion that eggs contained much less cholesterol than previously thought. Research by the National Dairy Board lead to significant consumer education regarding the value of dairy products as a source of dietary calcium.

Not only has this research been of tremendous value to the promotional efforts for the products involved, and hence to producers, it has generated significant benefit to consumers in the form of nutritional information resulting in more informed choices. Finally, as will be discussed in detail below, these extremely important activities are unlikely to occur in the absence of a mandatory commodity promotion and research program.

The *Amici* believe the value of these programs will be largely lost if the decision below is allowed to stand. The multi-faceted benefits derived from the programs was overlooked by the Ninth Circuit which focused narrowly on the personal profit to a single individual. This is a significant departure from the approach used by this Court in analyzing cases involving compelled financial support for collective activity in other segments of the economy. See e.g., *Keller v. State Bar*, 498 U.S. 1 (1990) (Upholding compelled payments to an integrated bar) and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (Confirming the validity of compelled support of exclusive collective bargaining representatives).

In this line of cases, this Court has established a two-step analysis. First, consistent with *Railway Employees Dep't. v. Hanson*, 351 U.S. 225 (1956), compelled financial support of collective activity in a commercial setting is valid *per se* where the statutory scheme is a reasonable legislative response to a substantial government interest. *Id.* at 233-234. Then resort may be had to the chargeable activities test most recently articulated in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991).

The distinction between the two steps is critical in the opinion of the *Amici* to ensure that "germaneness" is not used to determine the validity of the compelled financial support scheme, but is instead limited to the question of whether specific challenged activities may be fairly charged to a dissenting individual. See *Ellis v. Railway Clerks*, 466 U.S. 292, 294 (1986) ("(The challengers) do not contest the validity of the union shop as such, nor could they (citing *Hanson*). They do contend, however, that they can be compelled to contribute no more than their pro rata share of (germane expenses).").

The *Amici* believe that the same analysis is appropriately applied to the agricultural sector of the American economy, and strongly urge this Court to so hold.

STATEMENT OF THE CASE

The *Amici Curiae* adopt the statement of the case in the Petitioner's brief.

SUMMARY OF ARGUMENT

In deciding as it did, the Ninth Circuit misidentified the true nature of these programs and the governmental interests they are authorized to address. The result is an unreasonably rigorous standard which:

1. Provides no finality to the question of the constitutionality of these programs. Under the *Wileman* test a program may be valid one year and invalid the next, even if the program has not substantively changed. Similarly,

a program may be unconstitutional as to one producer or handler and at the same time be constitutional as to another.

2. Gives no guidance to the programs as to how to conduct themselves to avoid impermissible constitutional infringement. Under the Ninth Circuit's *Wileman* test, the validity of a program appears to turn as much on the marketing skills, luck or imagination of the challenger as on any attribute of the challenged program. *Wileman*, *supra*, 58 F.3d at 1379-1380.

3. May have eliminated the ability of producers and handlers to create new programs, or make significant changes to existing ones.

4. Treats agriculture in a manner significantly different from other segments of the economy regarding mandatory financial support of collective activity and the ability to eliminate the incentive to "free ride", i.e., enjoy the benefits without paying a fair share. In so doing, the *Wileman* test casts considerable doubt on sixty years of Congressional and State legislative policy which has provided significant benefit to the economy, consumers, and those within the agricultural industries affected.

ARGUMENT

I. PROGRAM OVERVIEW.

Any meaningful analysis must begin with an understanding of how these programs are created, the legislative purposes they are intended to address, what they do, and why they must be mandatory. The *Amici* will provide a general overview in this regard.

A. The Programs Are Created in Response to Industry Requests, Exist at the Sufferance of Those Who Pay the Assessments and Operate Under Government Supervision.

Generally, the process of creating a commodity research and promotion program begins with authorizing legislation enacted in response to requests from the af-

ected industry. This may be in the form of a broad general authority as in the AMAA under which the executive branch appointee responsible for agricultural issues (i.e., the Secretary of Agriculture or Director of a State Department of Agriculture)¹ may, upon industry request or on his or her own initiative, issue an order creating a program, subject to industry vote. See e.g., The Agricultural Enabling Act of 1961 (Chapter 15.65 of the Revised Washington Code) (hereafter "Wash. Rev. Code"); and The California Marketing Act of 1937 (Part 2 (commencing with Section 58601) of Division 21 of the California Food and Agricultural Code) (hereafter "Cal. Food & Agric. Code").

In the alternative, at either the Federal or State level, the legislative authorization may be specific to a particular commodity. See e.g., the Mushroom Promotion, Research and Consumer Information Act of 1990, as amended, 7 U.S.C. §§ 6101-6112; Wash. Rev. Code § 15.24.010, *et seq.* (Washington Apple Commission); Idaho Code §§ 22-1201, *et seq.* (Idaho Potato Commission); and Cal. Food & Agric. Code §§ 68001, *et seq.*, (California Kiwifruit Commission). In some cases the programs are created directly by act of the Legislature. See e.g., Wash. Rev. Code § 15.24.010 and Idaho § 22-1202. Other statutes establish the structure of the program and direct the secretary to put the proposed program to an industry vote. See e.g., 7 U.S.C. § 6105 and Cal. Food & Agric. Code § 68091.

Whether authorized by general statute or a commodity specific act of Congress or a State legislature, the programs will be empowered to engage only in specific limited activities. These may vary slightly from program

¹ For ease of reading and clarity, references to the executive branch appointee responsible for agricultural issues will be to the "secretary" and means both the U.S. Secretary of Agriculture as well as the chief executive of any state department of agriculture. Where necessary, specific references will be to the "U.S. Secretary" or the "State Secretary."

to program, but typically involve: generic promotion to maintain and expand existing markets and open new ones; production research to increase efficiency and develop new and value added uses for the commodity; market research to identify opportunities and guide the promotion efforts, and dissemination of consumer education information regarding handling requirements and nutritional qualities. See, e.g., 7 U.S.C. § 6104; Wash. Rev. Code § 15.24.070; Idaho Code § 22-1207; and Cal. Food & Agric. Code § 68081.

Once any required industry vote or referendum has been held, the secretary will tally the votes and determine whether the requisite majority has voted in favor of implementing the program.² Upon making the required findings, the secretary will certify the program which may then commence operations, including the collection of assessments.

Once created, the program will typically include a board consisting of producers, handlers, or both, which will operate under secretarial oversight. See, e.g., 7 U.S.C. § 6104 and Cal. Food & Agric. Code §§ 68051-68052. The programs often include provisions for termination through a variety of mechanisms, including regular referenda, petition processes through which producers or handlers can force an interim referendum; and in many cases the power of the secretary to terminate or suspend a program. See, e.g., 7 U.S.C. § 6105; and Cal. Food & Agric. Code, §§ 68132, 68133.

² The required majority varies from program to program. See, e.g., 7 U.S.C. § 6105 (requiring approval by a majority of those voting, which majority on average produces and imports a majority of the mushrooms annually produced and imported.); and Cal. Food & Agric. Code, § 68092 (requiring 40% voter turnout, and favorable votes of either: (1) 65% of those voting who produced at least a majority of the volume produced by those voting, or (2) a majority of those voting who produced at least 65% of the volume produced by those voting.)

B. The Programs Are Intended to Advance Industry-Wide Interests Rather Than Providing Benefit to Any Specific Individual Within the Industry, and Their Effectiveness Should Be Judged Accordingly.

In enacting the AMAA, Congress declared these programs to be necessary to prevent:

. . . [D]isruption of the orderly exchange of commodities in interstate commerce [which] impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure. . . . 7 U.S.C. § 601.

The Washington legislature echoed these concerns in adopting that state's Agricultural Enabling Act of 1961, declaring that the programs authorized by the Act were necessary to:

. . . [P]rovide methods and means . . . for the maintenance of present markets and for the development of new and larger markets, both foreign and domestic, for agricultural commodities produced within this state and for the prevention, modification or elimination of trade barriers which obstruct the free flow of such agricultural commodities to market; . . . [and] eliminate or reduce economic waste in the marketing and/or use of agricultural commodities; . . . [and] restore and maintain adequate purchasing power for the agricultural producers of this state. . . . Wash. Rev. Code § 15.65.040.

The State of Idaho cited a similar desire to make its industry more efficient and competitive in an expanding agricultural market in the legislative enactment creating the Idaho Potato Commission.

Economic waste is being fostered in the potato industry of the state of Idaho by the lack of proper advertising and dissemination of information necessary for the development and promotion of the sale of potatoes grown in the state of Idaho . . . [and] The purpose of this act is to expand the markets and increase consumption of potatoes produced in this

state thereby promoting the general welfare of our people. Idaho Code § 22-1201.

A nearly identical concern was expressed by the California Legislature in 1937 when it declared these programs to be necessary to "alleviate conditions which result in an unreasonable and unnecessary economic waste of the agricultural wealth of this state" and "prevent producers from retaining a fair return from their labor, their farms and the commodities which they produce." Cal. Food & Agric. Code § 58651. The State underscored this intent and reaffirmed the need for these programs in 1995 with the passage of Assembly Bill 1563 (Stats. 1995, c. 727) which reads in part:

[These programs] [a]re now more necessary and valuable than ever before as a result of declining support from the federal government and the increasing competition attributable to the global marketplace. Cal. Food & Agric. Code § 63901.

Congress similarly spoke to the continuing need for these programs in the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 1029, declaring:

It is in the national public interest and vital to the welfare of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, government supervised, generic commodity promotion programs established under commodity promotion laws. *Id.*, Section 501(b)(1).

Finally, shortly after the decision below was handed down, the California State Legislature made clear that the interest identified by the Ninth Circuit, putting a dollar in the pocket of an identified individual, was not consistent with the history of these programs. It declared that commodity research and promotion programs operating in the state:

Are intended to provide benefit to the entire industry and all of the people of this state. The commissions and councils are not enacted, and are not intended,

to produce measurable benefit on an individual basis, and their successes should be evaluated accordingly by analyzing the extent to which the commissions and councils have improved the overall conditions for the particular commodity subject to the commission's or council's jurisdiction. Cal. Food & Agric. Code § 63901(c).

Here too, the California State Legislature mirrored the intent of Congress which declared:

The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor. The Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 1029, Section 501(b)(2).

A well considered governmental plan to provide benefit to the nation or a specific state, its people, and its overall economy, through expanding aggregate demand for a particular commodity underlies all of these programs. Congressional and Legislative pronouncements regarding the need and desirability of mandatory commodity promotion and research programs as the vehicle for implementing that plan echoes throughout the statutory enactments creating the programs. See e.g., 7 U.S.C. § 6101; Wash. Rev. Code § 15.24.010; Idaho Code § 22-1201; Cal. Food & Agric. Code §§ 68001-68005, inclusive.

C. The Programs Accomplish Their Legislative Mandate Through Activities Which Produce Direct Returns to the Industry, Provide Valuable Consumer Benefits and Reduce the Need for Government Support.

The methods employed by the programs are as varied as the commodities they represent. Although the vast majority devote the lion's share of their budgets to promotion, that activity takes many forms. Further, although it plays a smaller roll in terms of dollars spent, research is an important function as well.

It is essential to view all of these activities as part of a whole. Research often provides the material that is featured in promotional efforts. New uses or discoveries regarding the nutritional properties of a particular commodity are common products of program research.

The new information thus developed is then available for consumer education which benefits all of society by creating a more informed buying public. See *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976) ("It is a matter of public interest that [market] decisions, in the aggregate, be intelligent and well informed.") In addition, the research funded by these programs frequently provides a synergistic effect in making the promotional activities more effective.

1. *Many program activities producing both consumer and producer benefits would not exist in the absence of mandatory assessments for collective action.*

Perhaps the best understanding of how these programs work can be seen from real-life success stories. In the March 4, 1993 edition of the *New England Journal of Medicine* there appeared an article entitled, "Effects of Walnuts on Serum Lipid Levels and Blood Pressure in Normal Men", J. Sabate and Others (Loma Linda University). The article concludes that:

Incorporating moderate quantities of walnuts into the recommended cholesterol-lowering diet while maintaining the intake of dietary fat and calories decreases serum levels of total cholesterol and favorably modifies the lipoprotein profile in normal men. The long-term effects of walnut consumption and the extension of this finding to other population groups deserve further study. *New England Journal of Medicine*, 328:603.

Also appearing on page 603 is a footnote indicating that the study that produced these results was supported by a grant from the California Walnut Commission, a commodity promotion and research program operating

under state law. Cal. Food & Agric. Code §§ 77001, *et seq.* In fact, through the Commission's grant, funded by mandatory assessments, the California walnut industry as a whole contributed \$125,000 to the completion of the study.

Not surprisingly, the results of the Loma Linda University study have become a centerpiece of the Commission's foreign marketing strategy. In addition, the Commission's sister agency, the California Walnut Marketing Board has made extensive use of the results in marketing walnuts domestically.³

In July, 1993 market research conducted throughout the United States revealed the significant impact of the Loma Linda research. In telephone interviews conducted in December, 1992, 39% of those contacted described walnuts as being high in fat. Six months later, and three months after publication of the *New England Journal of Medicine* article, only 27% continued to believe walnuts were high in fat and fully 68% attributed positive health attributes to walnuts. *California Walnut Tracking Study for USA*, The Rose Organization, July 1993. Preliminary results from a survey recently completed indicate that the activities of the program are continuing to provide benefits as now just 17% consider walnuts to be high in fat. The importance of this can be seen from findings in the same survey indicating that three-fourths of those responding indicated they are now eating healthier than in recent years.

³ The California Walnut Commission was authorized by the State Legislature through the enactment of Chapter 16 of the Statutes of 1987. The Commission has a broad mandate regarding research and other activities but is authorized to engage only in foreign marketing to expand the export markets for California grown walnuts. The California Walnut Marketing Board is a federal marketing order issued pursuant to the AMAA. In addition to its other powers, it is authorized to undertake domestic marketing only. The two programs work in tandem sharing resources, including management personnel.

Given these trends, it is not surprising then that none of those interviewed in December 1992 (before the Loma Linda study was published) who indicated they were buying more walnuts than they had in the past, listed health as a reason for the increase. By comparison, in June 1993 (after the study was published) 16% gave health as a reason for their increased consumption. Again, research shows the trend continuing in response to the ongoing efforts of the program as the study just completed now shows that 19% point to health considerations as their reason for buying more walnuts.

These successful efforts on behalf of California's walnut producers provide an excellent example of how a mandatory commodity promotion and research program produced a significant consumer benefit, and at the same time developed a powerful marketing tool to boost overall demand for the benefit of producers. Consumers were provided with important dietary information, while producers were given the tools to position their product more favorably in the eyes of increasingly health conscious buyers.

Perhaps most importantly, the walnut industry success is exactly the kind of thing that would be unlikely to occur in the absence of a mandatory program. While it may be possible that a single producer or handler might have been able to fund the study, the critical question is would he or she be willing to bear the entire cost of a project that, if successful, will provide his or her competitors with a free marketing tool.

The walnut experience is not an isolated incident. In recent years the egg industry has faced a number of challenges. Perhaps paramount among them has been the cholesterol issue. As food scientists turned their attention to cholesterol and its link to heart disease, the public perception of eggs went from a wholesome staple to a food to be avoided by all health conscious consumers.

In response, the American Egg Board along with state programs like the California Egg Commission, funded research regarding the methodologies used to determine

cholesterol content. The program also expended funds on research regarding the types of cholesterol present in eggs and their effects on health.

The first return to the industry from this investment came when the United States Department of Agriculture was persuaded to reevaluate the scientific protocol by which cholesterol content was determined. The updated protocol lead to a finding that eggs contain approximately 22% less cholesterol than originally thought.

Armed with this new information, the egg programs worked with dietitians and nutritionists to develop guidelines for consumers as to what level of egg consumption is consistent with a healthy diet. This information was then presented to influential organizations in the health field with the result that the American Heart Association increased its recommended weekly consumption of eggs.

In this same category are the efforts undertaken by the marketing orders at issue in the instant case. They have engaged in educational efforts at both the retail and consumer levels to help retailers present the best possible fruit for sale and assist consumers in selecting and storing fruit. These activities have produced measurable benefits across the nation. One retailer in New York reported an increase in sales of more than 20%. This same retailer reported that the information from the marketing orders enabled it to provide better service to consumers.

2. The programs also engage in a variety of activities which produce direct measurable benefit to the entire industry.

Obviously, the legion of success stories that exist regarding the more than 300 programs operating nationally cannot be presented here. There are however, a few more notable examples that the *Amici* believe must be brought to this Court's attention.

Research sponsored by the Beef Board demonstrated that beef is leaner and lower in both cholesterol and calories than consumers originally believed. This work led to the development of new products and formed the

foundation for a revamped marketing and promotion program which has been measured to have produced a return to producers of \$5.71 per dollar invested in advertising. Forker, O.D. and R.W. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs*. New York Lexington Books (1993) p. 206-212.

During the period from 1984-1990, promotion efforts carried out by the National Dairy Board resulted in dairy farmers receiving \$.46 more per hundredweight than they would have in the absence of the \$.15 per hundredweight assessment. The success also provided a general benefit to the nation's economy by significantly reducing the amounts of surplus dairy products needing to be purchased by the government through its price support program. Forker, O.D. and R.W. Ward, *Commodity Check-off Programs: A Self-Help Marketing Tool for the Nation's Farmers? Choices*, Fourth Quarter, 1993, 24-25. See also, U.S.D.A., AMS. *USDA Report to Congress on the National Dairy Promotion and Research Program and the Fluid Milk Processor Promotion Program*. July 1995.

The cotton industry has realized similar results. Industry funded research efforts undertaken by the Cotton Board turned around what many believed to be a dying industry. In the 1970's synthetic fabrics dominated the marketplace to the point that by 1975 cotton's retail share of the apparel and home fabric market was only 34%. By 1988 that share had increased to 51% largely as a result of promotion based on research into fabric production. Forker, O.W. and R.W. Ward, *Commodity Marketing: The Economics and Measurement of Generic Programs*. New York Lexington Books (1993) p. 122. It has been determined that in addition to significantly boosting the demand for cotton, every dollar invested in promotion has reduced price support outlays from the federal government anywhere from \$2.46 to \$6.02. Ding, L. and H.W. Kinnucan. *Market Allocation Rules for Non-Price Promotion: U.S. Cotton*. Paper in review with *Journal of Agriculture and Resource Economics*.

The activities of the Washington Apple Commission between 1986 and 1991 produced a 12.9% higher market price than would have been realized without the program. This accomplishment represented a return of \$133.76 million on an investment of \$17.5 million, or \$6.63 per producer dollar invested. Forker, O.D. and R.W. Ward, *Commodity Checkoff Programs: A Self-Help Marketing Tool for the Nation's Farmers? Choices*, Fourth Quarter, 1993, 24.⁴ Additionally, consumer attitude surveys indicate that people aware of the Commission's advertising are two and one-half times more likely to purchase Washington Apples than are people unfamiliar with the Commission's advertising, and one in three consumers look for Washington Apples when grocery shopping.

The California Avocado Commission provides an example of how these programs can be essential when market conditions are less than favorable. A recent tracking study showed the produce markets to be in tumult. More than two-thirds of those interviewed indicated that lettuce prices were higher than the year before and 40% of those interviewed indicated that as a result, they were buying less lettuce. The survey also indicated 16% were buying fewer avocados because of the increased prices of other fruits and vegetables.

⁴ The Washington Apple Commission provides a vivid example of how these programs benefit producers, the industry and the overall economy. Despite the fact that due to transportation costs Washington Apples are nearly always the most expensive in a given market, Washington is the nation's largest apple producer. In 1995, Washington accounted for 50% of United States apple production. In the past twenty-five years the state's production has increased from 33 million cartons to 135 million cartons annually. Washington Apples are marketed in more than 50 countries and the state's producers enjoy a 90% share of American apple exports. The Commission is supported by assessments from approximately 3,200 producers who on average farm 50 acres of apples. The industry provides total annual employment to nearly 82,000 people. The apple crop is Washington's most important agricultural commodity with a farm gate value expected to exceed \$1 billion in 1995-1996. In 1994-1995 the apple industry contributed more than \$1.4 billion to the State's economy.

In an attempt to stem the tide and maintain their existing markets, the Commission engaged in some intensive promotional activities, stressing the availability of quality California avocados. Studies comparing markets in which the advertising took place to those where it did not, indicated dramatic impacts. In the markets where there was no advertising the number of those who reported buying avocados at least once a month dropped 15%. In contrast, the number in the markets receiving the Commission's message remained constant. Similarly, the number of those reporting that they were eating more avocados declined 10% in the no advertising markets while increasing 5% in the targeted markets. Further, the studies indicated significant increases in consumer awareness of California as a source of high quality avocados as a result of the advertising campaign.

D. History Demonstrates That the Programs Must Be Mandatory to Counteract the Economic Incentive to Free Ride, i.e., Reap the Benefits of Collective Activity Without Paying a Fair Share of the Cost.

The marketing of agricultural products has changed dramatically over the years. Commercialization of the industry and the need to market commodities to urban populations far removed from the farm has required an increase in the sophistication of marketing efforts. The necessity for more effective and efficient marketing techniques is heightened by growing awareness on the part of consumers regarding nutrition and expanding competition caused by an increasingly global marketplace. Commodity promotion and research programs have evolved to assist producers and handlers in meeting these challenges.

In the first few decades of this century, strong, single commodity cooperatives provided a partial answer. However it soon became apparent that the efforts of the cooperatives were being undermined by those who chose not to participate. This problem was aggravated by the Great Depression and the fact that the agricultural sector of the economy was recovering more slowly than the industrial community.

Congress recognized the need for action and enacted the Agricultural Adjustment Act of 1933.⁵ Pub. L. No. 10, 48 Stat. 31 (codified as amended in scattered sections of 7 U.S.C.). This Act authorized commodity interests to form voluntary programs to advance their economic interests. As with cooperatives, however, these voluntary efforts were plagued by those who benefited from the programs' efforts but chose not to financially support the programs. This "free-rider" problem led to the enactment of the AMAA in 1937. See generally, Garoyan, *Marketing Orders*, 23 U.C. Davis L. Rev. 697 (1990); see also Neff, S.A. and G.E. Plato, *Federal Marketing Orders And Federal Research And Promotion Programs: Background for 1995 Farm Legislation*, USDA. ERS. Agr. Econ. Rpt. No. 707, May 1955, p.2.

The history of state efforts in this regard mirrors the federal experience. Early on, producers and handlers saw the need for cooperative efforts, only to have their initial successes eroded by the recalcitrant minority who enjoyed the improved market conditions without making an equitable contribution to the effort. As with the federal government, this situation led California to enact statutory provisions authorizing mandatory commodity programs to deal with the "free-rider" problem. See Shimomura, *A New Look at the California Marketing Act of 1937*, 5 U.C. Davis L. Rev. 190 (1972).

This fundamental unfairness of the free-rider and the tendency of free-ridership to undermine the initial success of voluntary efforts can be seen from the history of the

⁵ Although these programs represent the evolution of more than sixty years of legislative policy, it is important to note that the majority of the programs operating today have been created in the past 25 years. See GAO, RCED, *Generic Promotion Of Agricultural Products, Balancing Producers' and Consumers' Needs*. GAO/RCED 94-63. (1993) p. 3. and Lenz, J.E., O.D. Forker and Susan Hurst, *U.S. Commodity Promotion Organizations: Objectives, Activities and Evaluation Methods*. Cornell University (1991) p. 5. Further, the same report indicates that as the global marketplace develops these programs will become increasingly important. *Id.* at 1.

Washington Apple Commission. Prior to the formation of this very successful mandatory commodity promotion and research program in 1937 there were several attempts to establish a voluntary program. In 1926 a small scale advertising campaign was attempted, but the effort was plagued by insufficient funding. Two years later, in 1928 the Washington Boxed Apple Bureau was formed. The Bureau enjoyed initial success, but by 1934 voluntary participation had dropped to the point that the effort was no longer viable.

The inequity of the free-rider situation sits at the very heart of the history of these programs. It is, however, still very much a real problem today. In the mid-1980's the American Egg Board operated a commodity promotion and research program which allowed those paying into the program to seek a refund. At the outset, in 1977 the requested refunds amounted to 9.3% of collections. The refund percentage grew steadily each year, exceeding 20% in 1980, 30% just two years later in 1982, 40% in 1985 and finally peaking at 51% in 1987.

With a substantial portion of those in the industry electing not to pay into the program, the issue came to a head and a decision was made to either repeal the refund provision or shut down the program. On October 31, 1988, Congress passed amendments to the Egg Research and Consumer Information Act repealing the refund provision. Thereafter, but prior to the referendum approving the program without the refund provision, the amount of assessment refunded dropped to 40.5%.

USDA amended the order under which the American Egg Board operated to reflect the Congressional action on January 1, 1989, and a referendum was held on the implementation of the now mandatory program. Despite the fact that at one point more than half of those paying assessments asked for refunds, 84% voted in favor of the mandatory assessment.

The experience of the American Egg Board provides a clear example of the "free-rider" problem. A majority of

those who had been requesting refunds voted in favor of the mandatory program. This is a clear indication that these people had not been seeking refunds because they were in any way opposed to the program, but rather, were doing so to avoid placing themselves at a competitive disadvantage relative to those who were enjoying the benefits of the program without paying their fair share of the cost.

The erosion of voluntary support for the American Egg Board also demonstrates what has been referred to as the "unraveling phenomenon" that occurs when one individual sees another gaining a competitive advantage by reaping the benefits of the collective effort without paying a fair share. This leads to an incentive to join the "free riders" in order to avoid being placed at a competitive disadvantage, and to perhaps gain an edge on those who continue to support the voluntary effort. See Nelson, R.G. *Applications of Experimental Economics to Problems in Commodity Promotion*. In *New Methodologies for Commodity Promotion Evaluation Research*. Harry Kaiser and Henry Kinnucan, Editors, Ithaca, New York: National Institute for Commodity Promotion Research and Evaluation. Cornell University, forthcoming.

Just as the success stories presented above are not unique to a single commodity, the "free rider" problem is also wide spread. In May, 1995 the U.S. Department of Agriculture noted that programs created in the 1980's and 1990's tended to differ from their earlier counterparts in that the newer programs did not include refund provisions. The USDA also noted that Congress was amending many of the earlier program statutes to eliminate the refund provisions. According to USDA, the changes would "eliminate the so-called free riders" . . . (who) gain "the benefits of a . . . program without paying any of the cost." In fact, the report went so far as to suggest that mandatory assessments and elimination of the free-rider problem may be crucial to maintaining viable commodity programs. Neff, S.A. and G.E. Plato. *Federal Marketing Orders and Federal Research and Promotion Programs*,

Background for 1995 Farm Legislation. USDA, ERS. Agr. Econ. Rpt. No. 707, May 1995, p. 10.

The approach taken by Congress and State Legislatures in dealing with the free rider problem in the agricultural setting is exactly the same as that used to address free ridership relative to collective bargaining and the integrated bar. Those subject to the commodity promotion and research programs are required only to pay assessments. They are under no compulsion to associate with or participate in the program in any other way. Commodity promotion and research laws create no obligation to "belong" to a group, swear an oath, or participate in meetings or elections. The only compulsion is the payment of assessments to ensure that those who benefit from the program pay a fair share of its costs.

The *de minimis* nature of the burden resulting from compelled financial support of collective activity has been acknowledged by this Court and distinguished from laws imposing more intrusive obligations. Compare *Railway Employees Department v. Hanson*, *supra*, 351 U.S. 225 (Compelled financial support of collective bargaining representative valid) and *Lathrop v. Donohue*, 367 U.S. 820 (plurality opinion) (1961) (Compelled financial support for integrated bar valid) with *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (Compelled pledge of allegiance to engender national unity invalid).

II. THE CONTINUED VIABILITY OF THESE SUCCESSFUL PROGRAMS IS THREATENED BY THE DECISION BELOW WHICH PROVIDES NO GUIDANCE, MAY HAVE ELIMINATED THE POSSIBILITY OF NEW PROGRAMS, AND IS BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THE GOVERNMENT INTEREST INVOLVED.

Perhaps the aspect of the Ninth Circuit's decision that is most difficult to understand is the finding that the programs had successfully carried out their Congressional mandate and yet at the same time failed to advance the government's interest. Specifically, the Ninth Circuit iden-

tified the enhancement of returns to producers to stabilize the health of the industry as a substantial government interest. *Wileman*, *supra*, 58 F.3d at 1378. The Ninth Circuit then found that the promotional efforts of the California peach and nectarine marketing orders had "undoubtedly" increased demand for the products. *Id.* Despite the findings and clear legislative pronouncements to the contrary, the Ninth Circuit determined that comparative efficacy was the appropriate measure (i.e., that the interest to be advanced was that of putting an additional dollar in the pocket of an identified individual). *Id.*

This misidentification of the interest to be advanced led to the creation of an overly stringent standard of review. The *Wileman* test is the judicial equivalent of "how high is up." It compares two endpoints that are completely different and one of which may exist only in the mind of the challenger. This comparative efficacy analysis not only creates an impossibly high standard of review, it has sown the seeds of confusion throughout the agricultural industry.

Comparison to some hypothetical situation that may or may not have ever existed creates a standard virtually impossible to satisfy. Obviously, no matter how effective a program has been, some individual can speculate that he or she could have done better with the money he or she paid in assessments, and therefore, the program is unconstitutional. The difficulty of such an approach can be seen from the *Wileman* decision itself where a program that had "undoubtedly" increased sales was compared to what one party *claimed* it would have done and another party *suggested* would have been more beneficial. *Id.* at 1378-1379.

In other words, even though the programs of the Washington Apple Commission produced a return of \$6.63 for every dollar invested, under the *Wileman* test any producer could suggest that his or her approach would have been more beneficial and the obviously successful program would be shut down. Similarly, any walnut producer could prevail against the California Walnut Com-

mission by claiming that the nutrition-based effort was nice, but that he or she would have stressed flavor and been more effective.

The Ninth Circuit's decision to invalidate a long-standing program that enjoyed broad industry support and had "undoubtedly" increased sales based on unsubstantiated claims is troubling to the Amici. More disturbing is the fact that while the Ninth Circuit said the program had to be more effective than the individual, it never considered the question "More effective at doing what?"

The simple truth is that generic programs have very different aims from those advanced by individualized efforts. Referring to the Cotton Board example summarized above, research into the production of cotton fabric may not provide an immediate benefit to any individual producer. Accordingly, it may be assumed that some producers could advance their individual interests more effectively than the Cotton Board did by investing assessments in such research. It is difficult to believe, however, that even those producers who sell for uses other than appeal and household fabric did not benefit from increased prices when cotton's share of those markets jumped from 34% to 51%.

As explained, no single entity in the walnut industry would have been likely to fund the Loma Linda University Study that turned out to be such an overwhelming success. There is very little incentive for a producer to be the sole investor in a project that will provide significant benefit to his or her competitors. Nonetheless, it seems reasonable to assume that even the most ardent free rider has benefited from the information developed by the study.

In the final analysis, the individual is concerned with gaining competitive advantage and increasing his or her market share. The individual often does this at the expense of others in the same business. When Coca-Cola advertises one of its goals is to increase its share of the soft drink market. Any success in this regard will come

at the expense of others in the industry (i.e., Coke sells more; Pepsi sells less). This shift in market share produces little net economic benefit to the industry or economy as a whole. The same number of colas are produced and sold. In contrast, commodity promotion and research programs work to increase or maintain the overall size of the market for the commodity. This effort generally creates greater opportunity for individuals in the industry. The approach has the potential to produce significant net economic benefit with an increase in both the volume produced and the volume sold.

Stated another way, the individual is primarily striving for a larger share of the existing industry "pie", while the generic programs focus on making the "pie" larger or maintaining it for all affected individuals. Given the dramatically different goals of individual and generic efforts, any comparison is not only impossible it is also meaningless. One might as well ask whether the sky is bluer than the tree is green. It is precisely for this reason that the Ninth Circuit erred in finding a program giving credit against assessments for qualified individual advertising to be a more narrowly tailored alternative to the mandatory generic program. *Wileman, supra*, 58 F.3d 1379-1380.

For the programs themselves, the decision below has raised more questions than it has answered. The test provides no guidance on how these programs should comport themselves to remain safely within the limits of the First Amendment. The rule now seems to be: "Implement the most effective program you can and hope no one claims he or she can be more effective."

The Ninth Circuit's *Wileman* decision provides no finality to these claims. Under the *Wileman* test, a program's validity appears to depend more on the marketing skill or imagination of the challenger than on any aspect of the program itself. As a result, a program may be constitutional as to one producer and unconstitutional as to his or her neighbor. For similar reasons, it is entirely possible that a program being challenged by the same

person in successive years might be found constitutionally valid one year and invalid the next. Given the natural fluctuations in agricultural markets, this could be the outcome even where there had been no change to the program.

Finally, while it may be highly questionable whether any existing program can be expected to pass the *Wileman* test, it appears plainly impossible for any new program to do so. A new program will have no track record and cannot reasonably be expected to demonstrate that plans, which have yet to be implemented, are more effective than anything, much less more effective than some hypothetical that may exist only in the mind of a challenger.

This problem with the *Wileman* test has manifested itself in a number of challenges currently pending at various levels of the judicial or administrative process. Most recently, an Administrative Law Judge relied on the *Wileman* test and found the relatively new Mushroom Council to be unconstitutional. *In re: Donald B. Mills, Inc., a California Corporation, d.b.a. DBM Mushrooms*, MPRCIA Docket No. 95-1, Decision filed April 26, 1996. Key to the administrative decision was the following finding:

Econometric modeling is a precise method of measuring the effectiveness of a promotion program. The Mushroom Council's program cannot be measured econometrically because it began mainly in 1995, and several years data is necessary to conduct a complete analysis. *Id.* at 7 (internal citations omitted). See also *id.* at 13.

Despite the fact that the Administrative Law Judge found the efforts of the Mushroom Council to have been "impressive and commendable," he apparently felt compelled to strike down the program simply because it was new. *Id.* at 12.

In a similar decision, another Administrative Law Judge ruled that the revamped programs of the Almond Board of California, a federal marketing order issued

under the AMAA violated handlers' First Amendment rights. *In re: Cal-Almond, Inc., et al.*, 94 AMA Docket No. F&V 981-1, Decision filed June 15, 1995. Although the Almond Board of California had been around for many years, it was treated as a new program because it had made major changes to its promotional programs. Despite a history of effectiveness and the presentation of evidence of the effectiveness of analogous programs, the Administrative Law Judge found that the efficacy of the new program was uncertain and untested. He then concluded that:

A similar lack of evidence of the effectiveness of proposed generic advertising recently caused the United States District Court for the Eastern District of California to grant a preliminary injunction when it applied *Cal-Almond I* to the California state program for advertising apples. *Id.* at 15, citing *Bidart Bros., Inc. v. California Apple Commission*, No. CV-F-94-6018-OWW, slip op. at 14 (E.D. Cal. December 1, 1994).

These two decisions have caused deep concern throughout the industry as programs and those who depend upon them are left wondering whether a change in advertising agencies or a decision to adopt a new promotional strategy eliminates years of proven effectiveness. Further concern is the question of when a program must demonstrate effectiveness. Given the time involved in implementing a promotional effort, and studying the market impacts, it may be physically impossible to demonstrate effectiveness immediately upon launching a revised campaign.

This state of affairs leaves the Amici wondering: (1) Can there ever be another new program? (2) How can a program change its activities in response to changing market conditions? (3) If a program does not change in response to market forces, how can it demonstrate efficacy? In short there appears to be little a program can do to plan for the long term and expect to survive scrutiny under the *Wileman* test.

In addition to the uncertainty, the decision below has generated questions among those who depend upon these programs. They are left struggling to understand why Congressional efforts to deal with the free-rider problem in the agricultural sector of the economy have been treated so differently than have similar statutory schemes in other areas of the economy.

This situation is exacerbated by the fact that this Court has repeatedly acknowledged that compelled support in the collective bargaining context can result in significant infringements on First Amendment freedoms. See *International Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education*, *supra*, 431 U.S. 209, 222 ("An employee may . . . have ideological objections to a wide variety of activities undertaken by the union. . . .") and *Ellis v. Railway Clerks*, *supra*, 466 U.S. 435, 455-456 ("(B)y allowing the union shop at all, we have countenanced a significant impingement on First Amendment rights.")

In contrast, any infringement resulting from the mandatory assessments under a commodity research and promotion program is relatively minor. As the Third Circuit Court of Appeals noted:

In comparison with the broad constitutional incursions arising from agency and union shop agreements and countenanced in *Hanson*, *Street*, and *Abood*, the Beef promotion act's interference with First Amendment rights appears slight. *United States v. Frame*, 885 F.2d 1119, 1136 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

Also of concern is the fact that when a lawsuit is filed attacking the validity of a commodity promotion and research program under the *Wileman* test, the first strategy of the challengers is to seek a preliminary injunction creating an escrow account into which the challengers assessments are paid. See, e.g. *Bidart Bros., Inc. v. California Apple Commission*, *supra*. The practical effect is to economically cripple the program before any test can be applied or judgment entered.

The initial burden can be great enough to cause a small program to simply terminate its operations rather than spend the bulk of its resources on litigation. This outcome is avoided under the approach taken in the cases involving compelled financial support of unions and integrated bars where the fundamental question of constitutionality has been settled. See, *Ellis v. Railway Clerks*, *supra*, 466 U.S. 435, 439 ("(The challengers) do not contest the validity of the union shop as such, nor could they (citing *Hanson*, *supra*)").

The problems in the decision below can be seen from the application of the *Wileman* test in the closely analogous union shop setting. Every employee within a represented group could claim that left to his or her own devices, he or she would have used different strategies from those used by the union to negotiate a better individual compensation package as compared to the bargaining unit contract secured by the collective bargaining agent. Despite the obvious parallel, no Court has ever required a union to prove that its activities are more effective than would be those of the individual in the absence of the union.

From the decision below, it appears that commodity programs are to be subjected to a degree of scrutiny greater than that applied to the union shop. This is difficult to understand when by all accounts compelled support in the collective bargaining context works a much greater infringement on constitutionally protected freedoms. This approach is at odds with the common sense and logic underlying most constitutional doctrines which impose limitations on government action in proportion to the rights involved.

CONCLUSION

The foregoing makes clear that the programs placed at risk by the decision below are extremely important to the continued success of American agriculture. It has been demonstrated time and again that they have been successful in accomplishing the objectives established for

them by Congress and State legislatures. Their continued viability is directly tied to the elimination of the free-rider problem. Congress and the States have addressed this issue in exactly the same fashion as they have for collective bargaining and integrated bars, by mandating that all of those within the benefited class pay their fair share.

It is equally clear that the decision below has caused significant disruption of the programs by exacerbating the uncertainty first created by the Ninth Circuit's holding in *Cal-Almond I*. Specifically, the decision below:

1. Is at odds with 40 years of decisions from this Court concerning the compelled support of unions and integrated bars, thereby subjecting agriculture to a different standard than that applied in other sectors of the economy.
2. Relies on a version of the commercial speech test which is inconsistent with any analysis ever embraced by this Court.
3. Establishes an impossibly stringent test with neither legal nor logical justification.
4. Leaves commodity promotion and research programs exposed to continuing costly litigation.

In the wake of *Wileman*, the *Amici* question whether there is any set of facts regarding efficacy that a program could produce that a challenger could not overcome by mere speculation. As a result of *Wileman*, all programs now face immense uncertainty and, potentially, "death by attrition" as a result of multiple lawsuits under a standard that encourages vexatious claims and dilatory tactics so as to increase the cost of litigation and divert resources from effective programs.

For all of the reasons set forth herein, the *Amici* respectfully request this Court to reverse the judgment of the Ninth Circuit.

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MOTION FILED
JUL 26 1996

(14)

No. 95-1184

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DANIEL R. GLICKMAN, Secretary,
United States Department of Agriculture,
v. *Petitioner,*

WILEMAN BROTHERS & ELLIOTT, INC., *et al.,*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
AND BRIEF AMICI CURIAE FOR THE
NATIONAL ASSOCIATION OF
STATE DEPARTMENTS OF AGRICULTURE,
THE NATIONAL MILK PRODUCERS FEDERATION,
AND THE
NATIONAL CATTLEMEN'S BEEF ASSOCIATION, INC.
IN SUPPORT OF PETITIONER**

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to S. Ct. Rule 37.4, the National Association of State Departments of Agriculture, National Milk Producers Federation, and National Cattlemen's Beef Association, Inc., move for leave to file the attached brief amici curiae in support of the petitioner. Petitioner has consented to the filing of this brief, but respondents have refused consent, necessitating this motion.

Founded in 1915, the National Association of State Departments of Agriculture ("NASDA") is a nonprofit, nonpartisan association of public officials comprised of the executive heads of the fifty state Departments of Agriculture and those from the territories of Puerto Rico, Guam, American Samoa, and the Virgin Islands. NASDA's purpose is to better American agriculture

through the development and promotion of sound public policy at the state, territorial, and federal levels and to communicate the vital importance of agriculture to the economy and general welfare of the people of the United States. Many of NASDA's members—the Commissioners, Secretaries, and Directors of the Departments of Agriculture at the state and territorial level from throughout the country—are charged by their respective governments with the responsibility of administering generic commodity promotion programs funded by mandatory assessments similar to the federal programs at issue in this case.

The National Milk Producers Federation (“NMPF”), founded in 1916, is the principal national representative for dairy producers and for the milk marketing cooperatives they own and operate. Milk producers receive substantial benefits from advertising authorized and conducted by the Dairy Promotion and Research Board, an entity created under the Dairy Promotion and Research Act, 7 U.S.C. §§ 4501 *et seq.* The Dairy Promotion and Research Board spends millions of dollars annually promoting dairy products, and these expenditures play an important role in the continuing success of the domestic dairy industry.

The National Cattlemen's Beef Association, Inc. (“NCBA”), which traces its lineage back to 1898, is a Colorado nonprofit corporation that acts as the primary national representative of the domestic cattle industry. Its primary corporate purposes are to protect the cattle industry in the United States, promote the importance of the cattle industry, and provide an official and united voice on issues of importance to cattle producers and feeders. The membership of the NCBA includes participants from all sectors of the cattle and domestic beef industry. NCBA members benefit directly from the promotion programs undertaken by the Cattlemen's Beef Promotion and Research Board, an entity created under

the Beef Promotion and Research Act, 7 U.S.C. §§ 2901 *et seq.*

The structure and operation of the Dairy Promotion and Research Board and the Cattlemen's Beef Promotion and Research Board are similar to that of the Nectarine Administrative Committee and Peach Commodity Committee at issue in this case. Indeed, NCBA is a party in *Goetz v. Glickman*, No. 96-3120 (10th Cir.), currently pending on appeal, which involves, *inter alia*, a First Amendment challenge to the Beef Promotion and Research Act, similar to the challenge at issue in this case. A similar First Amendment challenge to the Dairy Promotion and Research Act is pending before the Department of Agriculture and the courts. See *In re Gallo Cattle Co.*, NDPRB Docket No. 96-1 (U.S.D.A., filed April 16, 1996), *review pending*, *Gallo Cattle Co. v. USDA*, No. CIV-S-96-1146 DFL JFM (E.D. Cal., filed June 18, 1996). In addition, many of the state generic commodity promotion programs administered by NASDA members throughout the country are similar in operation and effect to the programs challenged in this case.

Government-established generic commodity promotion programs funded by mandatory assessments of the sort at issue in this case are a characteristic feature of the American agricultural economy, at both the federal and state levels. See *Pet. for Cert.* at 25-30. The constitutional analysis endorsed by the Ninth Circuit in this case poses a direct threat to the continuing viability of those programs. Amici do not disagree with the views of the Solicitor General set forth in the petition for certiorari, but believe that respondents' First Amendment challenge can be resolved on a more basic level. For the reasons set forth in the attached brief, amici believe that this case involves government speech rather than government regulation of private speech. Such government speech does not violate the First Amendment rights of those reason-

QUESTION PRESENTED

Amici will address the following question:

Whether the commercial advertising undertaken by the Nectarine Administrative Committee and the Peach Commodity Committee—entities established pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601 *et seq.*, to achieve specified governmental objectives, whose members are appointed by the Secretary of Agriculture and whose activities are subject to his supervision and control—is government speech for purposes of the First Amendment.

ably compelled to fund it, even if they happen to disagree with the government's views.

The Solicitor General has indicated that he will not rely on a "government speech" argument before this Court "as an independent ground of decision," although he has stated that the United States "nevertheless believe[s]" that the constitutionality of government-established generic commodity promotion programs funded by mandatory assessments is "reinforced" by the degree to which they further governmental objectives, are characterized by governmental involvement in their development and administration, and involve only an attenuated connection between the generic advertising and individual producers or handlers. Pet. for Cert. at 21-22 n.14. Because the "government speech" argument is directly pertinent to proper resolution of this case, but will not be adequately presented by the parties, amici respectfully move for leave to file the attached brief addressed solely to that argument.

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7 C.F.R. § 916.45	6
7 C.F.R. § 916.62	12
7 C.F.R. § 917.20	11
7 C.F.R. § 917.25	12
7 C.F.R. § 917.30	12
7 C.F.R. § 917.35	12
7 C.F.R. § 917.39	6

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-1184

DANIEL R. GLICKMAN, Secretary,
United States Department of Agriculture,
v. *Petitioner,*

WILEMAN BROTHERS & ELLIOTT, INC., *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF AMICI CURIAE FOR THE
NATIONAL ASSOCIATION OF
STATE DEPARTMENTS OF AGRICULTURE,
THE NATIONAL MILK PRODUCERS FEDERATION,
AND THE
NATIONAL CATTLEMEN'S BEEF ASSOCIATION, INC.
IN SUPPORT OF PETITIONER**

INTEREST OF AMICI CURIAE

Founded in 1915, the National Association of State Departments of Agriculture ("NASDA") is a nonprofit, nonpartisan association of public officials comprised of the executive heads of the fifty state Departments of Agriculture and those from the territories of Puerto Rico, Guam, American Samoa, and the Virgin Islands. NASDA's purpose is to better American agriculture through the development and promotion of sound public

policy at the state, territorial, and federal levels and to communicate the vital importance of agriculture to the economy and general welfare of the people of the United States. Many of NASDA's members—the Commissioners, Secretaries, and Directors of the Departments of Agriculture at the state and territorial level from throughout the country—are charged by their respective governments with the responsibility of administering generic commodity promotion programs funded by mandatory assessments similar to the federal programs at issue in this case.

The National Milk Producers Federation (“NMPF”), founded in 1916, is the principal national representative for dairy producers and for the milk marketing cooperatives they own and operate. Milk producers receive substantial benefits from advertising authorized and conducted by the Dairy Promotion and Research Board, an entity created under the Dairy Promotion and Research Act, 7 U.S.C. §§ 4501 *et seq.* The Dairy Promotion and Research Board spends millions of dollars annually promoting dairy products, and these expenditures play an important role in the continuing success of the domestic dairy industry.

The National Cattlemen's Beef Association, Inc. (“NCBA”), which traces its lineage back to 1898, is a Colorado nonprofit corporation that acts as the primary national representative of the domestic cattle industry. Its primary corporate purposes are to protect the cattle industry in the United States, promote the importance of the cattle industry, and provide an official and united voice on issues of importance to cattle producers and feeders. The membership of the NCBA includes participants from all sectors of the cattle and domestic beef industry. NCBA members benefit directly from the promotion programs undertaken by the Cattlemen's Beef Promotion and Research Board, an entity created under the Beef Promotion and Research Act, 7 U.S.C. §§ 2901 *et seq.*

The structure and operation of the Dairy Promotion and Research Board and the Cattlemen's Beef Promotion and Research Board are similar to that of the Nectarine Administrative Committee and Peach Commodity Committee at issue in this case. Indeed, NCBA is a party in *Goetz v. Glickman*, No. 96-3120 (10th Cir.), currently pending on appeal, which involves, *inter alia*, a First Amendment challenge to the Beef Promotion and Research Act, 7 U.S.C. §§ 2901 *et seq.*, similar to the challenge at issue in this case. A similar First Amendment challenge to the Dairy Promotion and Research Act is pending before the Department of Agriculture and the courts. See *In re Gallo Cattle Co.*, NDPRB Docket No. 96-1 (U.S.D.A., filed April 16, 1996), *review pending*, *Gallo Cattle Co. v. USDA*, No. CIV-S-96-1146 DFL JFM (E.D. Cal., filed June 18, 1996). In addition, many of the state generic commodity promotion programs administered by NASDA members throughout the country are similar in operation and effect to the programs challenged in this case.

Government-established generic commodity promotion programs funded by mandatory assessments of the sort at issue in this case are a characteristic feature of the American agricultural economy, at both the federal and state levels. See *Pet. for Cert.* at 25-30. The constitutional analysis endorsed by the Ninth Circuit in this case poses a direct threat to the continuing viability of those programs. As explained in the foregoing Motion for Leave to File Brief Amici Curiae, amici seek to file this brief to ensure that the Court has the benefit of the argument that commercial advertising pursuant to such government-established and government-controlled generic commodity promotion programs—designed to achieve specified governmental objectives—is government speech.

STATEMENT

The underlying facts and course of proceedings below are set forth fully in the brief filed by the Solicitor General on behalf of the petitioner and will not be repeated

here. As the Solicitor General explained in the petition for certiorari, the government did not advance in the courts below the argument that the speech at issue here was "government speech," and accordingly does not rely on that argument as an "independent ground of decision" before this Court. Pet. for Cert. at 21-22 n.14.¹

That fact in no way precludes this Court from deciding the case on that basis. As the Court has explained, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446 (1993) (quoting *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991)). Here respondents have presented the claim that generic commodity promotion programs funded by mandatory assessments under the Agricultural Marketing Agreement Act violate the First Amendment rights of those compelled to pay assessments. Such programs are a common feature of the American agricultural economy, and similar programs have been undertaken by state governments. A decision by this Court on respondents' claim will therefore have ramifications beyond the immediate parties, and the Court is not limited in reaching the correct result to the theories those parties have advanced. See also *United States National Bank of Oregon*, 508 U.S. at 447 ("a court may consider an issue 'antecedent to * * * and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief") (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)); *United States v. Burke*, 504 U.S. 229, 246 (1992) (adopting ground

¹ The government has raised that argument in other cases presenting the same issue. See, e.g., *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990); *Goetz v. Glickman*, 920 F. Supp. 1173, 1182 (D. Kan. 1996), app. pending, No. 96-3120 (10th Cir.).

for decision which "has not been argued by the United States, here or below") (Scalia, J., concurring in the judgment).

SUMMARY OF ARGUMENT

The marketing orders issued by the Secretary—requiring fruit handlers to pay what amounts to a modest user fee for a government program designed to increase sales of their product—do not violate the First Amendment rights of the handlers. The court below reached the wrong result because it asked the wrong question. It erred in analyzing the orders under the test for government restrictions on private commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), because the speech sponsored by the marketing orders is government speech, not private speech, and the orders do not restrict private speech in any way. The handlers are free to speak however they choose on issues involving peaches, nectarines, and plums; the orders in no way interfere with their freedom to speak or associate. Rather than regulate private speech, the orders facilitate government speech. The government frequently engages in speech activities to promote particular policies—whether to discourage smoking, promote Armed Forces recruiting, or encourage energy conservation—and so long as the objective is a permissible one and the means reasonably adapted to promoting it, such activities do not violate the First Amendment rights of those required to share the cost, even if they are tobacco farmers, pacifists, or energy producers opposed to the government's message.

The pertinent questions are whether the entity doing the speaking may properly be considered the government or under the government's control, whether the message is determined by the government, and whether any private individual or entity has been so linked with the speech that it must be viewed as the speech of that individual or entity rather than the government. Here the marketing orders were issued pursuant to statutory authority to

achieve defined government objectives. They are administered under the supervision of the Secretary of Agriculture by committees appointed by him and subject to removal by him at any time. The speaker is therefore plainly the government. The message—commodity promotion—was set in general terms by Congress in the AMAA, *see* 7 U.S.C. § 608c(6)(I), recently reaffirmed in the Federal Agricultural Improvement and Reform Act of 1996 (the “FAIR Act”), Pub. L. No. 104-127, § 501(b), and implemented by the Secretary in the orders themselves, *see* 7 C.F.R. §§ 916.45, 917.39. Finally, the fact that the fruit handlers derive a special benefit from the government speech sponsored under these particular programs fully justifies funding the programs through assessments on those handlers rather than the public at large, and does not alter the First Amendment analysis. Such assessments do not give rise to the sort of close identification that might transform otherwise permissible government speech into impermissible forced private speech.

ARGUMENT

I. GOVERNMENT SPEECH SHOULD NOT BE ANALYZED AS IF IT WERE A RESTRICTION ON PRIVATE SPEECH

The court below analyzed the constitutionality of the generic advertising programs for California peaches, nectarines, and plums under the three-part test for reviewing government restrictions on commercial speech first articulated by this Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980). *See* Pet. App. 15a-21a. Although there is no question that the speech at issue is commercial speech, and therefore entitled to less protection than most other forms of speech, *see Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2381 (1995) (“pure commercial advertising” enjoys “a lesser degree of protection under the First Amendment”),

the *Central Hudson* test is inappropriate in this context for two reasons:

First, the *Central Hudson* test was developed to analyze restrictions on commercial speech, and has been applied by this Court only in that context. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (employing test in considering whether “to sustain a restriction on commercial speech”) (emphasis added); *Board of Trustees v. Fox*, 492 U.S. 469, 471 (1989) (employing test in considering “whether governmental restrictions upon commercial speech are invalid”) (emphasis added). No such restriction is at issue here. *See* AMAA, 7 U.S.C. § 608c(10) (“No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product.”); FAIR Act, § 501(b)(4), 110 Stat. 1030 (“The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.”).² The marketing orders simply require handlers to fund a program of advertising designed to expand the market for their product; it should not be analyzed as if it prohibited speech.

Second, the *Central Hudson* test analyzes the constitutionality of government restrictions on private speech.

² There is no question that the pertinent provisions of the FAIR Act are fully applicable to this case. The long-standing rule is that a court—including an appellate court—“should apply the law in effect at the time it renders its decision, even though that law was enacted after the events that gave rise to the suit.” *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1501 (1994). The FAIR Act also is highly probative of Congress’ intent in enacting the AMAA. *See Loving v. United States*, 116 S. Ct. 1737, 1749 (1996) (“[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction”) (quotation omitted).

For the reasons set forth below, however, the speech at issue in this case is not private speech but government speech. The fact that those reasonably compelled to fund speech—because they stand to benefit most directly from it—may object to what the government has to say does not give rise to a First Amendment violation.

Like private citizens and corporations, government at various levels regularly contributes its voice to the marketplace of ideas. As the Third Circuit has noted:

Citizens' tax dollars purchase a considerable amount of "government speech." Not only does the government speak on behalf of its citizens when it airs advertisements warning of the dangers of cigarette smoking or drug use, praising a career in the armed services, or offering methods for AIDS prevention, each time the President of the United States meets with a foreign dignitary, or state department officials enter into arms control negotiations, the government is engaging in expressive activities on behalf of everyone. [*United States v. Frame*, 885 F.2d 1119, 1131 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).]

See also *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir.) (rejecting view that marketplace of ideas is "one in which the government's wares cannot be advertised") (Scalia, J.), *cert. denied*, 478 U.S. 1021 (1986); *Student Government Ass'n v. Board of Trustees of the University of Massachusetts*, 868 F.2d 473, 482 (1st Cir. 1989) ("In addition to its role as a regulator, the state plays an important role as a participant in the marketplace of ideas."); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 134 (7th Cir. 1987) ("Speech by the government is common.") (Easterbrook, J., dissenting).

This speech necessarily is paid for by citizens who may or may not agree with the government's message. That fact, however, provides no basis for preventing the government from taking and communicating a position on

issues of public concern, or for any individual to demand the return of his money if he happens to disagree with the government's message.

As this Court explained in *Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990):

Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

See also *Lee v. Weisman*, 505 U.S. 577, 591 (1992) ("the very object of some of our most important speech is to persuade the government to adopt an idea as its own").

Furthermore, as a practical matter, effective government would come to a grinding halt if every person had a right to insist that his money not be used to support programs or positions with which he disagrees. See *Block v. Meese*, 793 F.2d at 1313 (discussing the "practical problems of excluding the government from ideological debate"); see also *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1015-16 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 950 (1992). Cf. *United States v. Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

Accordingly, the First Amendment simply does not provide a legal basis for objecting to government speech.

The First Amendment limits government interference with *private* speech; it does not limit government speech itself. Thus, while the First Amendment ordinarily prohibits the government from regulating speech on the basis of its content, this Court noted just last year that “we have permitted the government to regulate the content of what is or is not expressed *when it is the speaker or when it enlists private entities to convey its own message.*” *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 115 S. Ct. 2510, 2518 (1995) (emphasis added). As then-Judge Scalia put it in *Block v. Meese*: “The short of the matter is that control of government expression * * * is no more practicable, and no more appealing, than control of political expression by anyone else. * * * [T]he guarantee of freedom of speech does not * * * prevent government from adding its own voice to the many that it must tolerate.” 793 F.2d at 1314 (internal quotation omitted). See also *Brown v. Palmer*, 915 F.2d 1435, 1445 (10th Cir. 1990) (First Amendment must not be construed to “unduly chill[]” government speech), *aff’d*, 944 F.2d 732 (10th Cir. 1991) (en banc).

II. THE SPEECH FUNDED PURSUANT TO THE MARKETING ORDERS IS GOVERNMENT SPEECH BECAUSE IT IS UNDERTAKEN PURSUANT TO STATUTORY AUTHORITY TO ACHIEVE GOVERNMENTAL OBJECTIVES BY GOVERNMENT APPOINTEES UNDER THE DIRECTION AND CONTROL OF A GOVERNMENT OFFICER

The first factor to consider in determining whether speech is government speech is the obvious one: who is doing the speaking? This Court provided clear guidance on how to answer that question just last year in *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961 (1995). That case makes clear that entities such as the Nectarine Administrative Committee and Peach Commodity Committee are government instrumentalities for First Amendment purposes.

In *Lebron*, the National Railroad Passenger Corporation (better known as Amtrak) refused to allow the petitioner to display an advertisement of a political nature on a large illuminated billboard controlled by Amtrak. *Id.* at 963. The question for the Court was whether Amtrak should be considered part of the Government for First Amendment purposes. The Court’s answer was yes. The Court succinctly stated its holding in the final paragraph of its opinion: “We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.” *Id.* at 974-975.

The three factors that led this Court to conclude that Amtrak “is part of the Government for purposes of the First Amendment”—(1) creation of the entity by special law; (2) furtherance of governmental objectives; and (3) retention of appointment authority—are all present here and compel the same conclusion with respect to the Nectarine Administrative Committee and Peach Commodity Committee. As to the first factor, the Committees were created by the Government pursuant to special law, the AMAA. See 7 U.S.C. §§ 608c(7)(C), 610; 7 C.F.R. §§ 916.20, 917.20 (providing for the establishment of the Committees). Second, the Committees were created “explicitly for the furtherance of federal governmental goals.” *Lebron*, 115 S. Ct. at 973. The “federal governmental goal[]” served by the AMAA is to “establish and maintain * * * orderly marketing conditions for agricultural commodities in interstate commerce,” by, among other means, “paid advertising.” 7 U.S.C. §§ 602(1), 608c(6)(I).

These “governmental objectives” (*Lebron*, 115 S. Ct. at 974) were reaffirmed with the passage of the FAIR Act. Congress found that “[i]t is in the national public interest

and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs." § 501(b)(1), 110 Stat. 1030, to be codified at 7 U.S.C. § 7401. The promotion programs were found "to further the governmental policy and objective of maintaining and expanding markets for the covered commodities." *Id.* § 501(b)(8)(B), 110 Stat. 1031. The Committees were authorized for the specific purpose of furthering these objectives by recommending to the Secretary an annual budget for administering the marketing order, including a budget for advertising and other promotional activities. See 7 C.F.R. §§ 916.31, 917.35; Pet. App. 10a-11a.

As to the third *Lebron* factor, it is clear that the members of the Committees serve "under the direction and control of federal governmental appointees." *Lebron*, 115 S. Ct. at 974. The Secretary of Agriculture appoints all of the members of each Committee, and has the power to remove them at any time, see 7 C.F.R. §§ 916.23, 916.62, 917.25, 917.30. Again, this point was reaffirmed with the passage of the FAIR Act. See § 501(b)(2) (commodity promotion programs are "supervised by the Secretary of Agriculture"); *id.* § 501(b)(8) (commodity promotion programs are "under the required supervision and oversight of the Secretary of Agriculture"). The Ninth Circuit below acknowledged that "[c]ommittee members are appointed by the Secretary and supervised by the Agricultural Marketing Service, an agency within the [USDA]." Pet. App. 4a.³

³ Like the federal program at issue here, many state commodity promotion laws provide that the members of the advisory bodies involved in program administration be appointed by government officials. See, e.g., Cal. Food & Agric. Code § 58841 (Secretary of Food and Agriculture appoints advisory board members, who serve "at the pleasure of" the Secretary); Nev. Rev. Stat. § 556.060

The *Lebron* factors are important in classifying the speech at issue as government speech because they determine who the speaker is and who controls the content of the message. As the Third Circuit explained in *Frame* with respect to the Beef Promotion and Research Act:

The Board and Committee members serve at the pleasure of the Secretary of Agriculture * * *. [T]he Secretary makes the final decisions on all projects funded under the Act. All budgets, plans or projects approved by the Board become effective only upon final approval by the Secretary, and no contracts for the implementation of any plans may be entered into without the Secretary's approval. Thus, when the Board or Committee "speaks," they do so on behalf of the Secretary of Agriculture and the government of the United States. [885 F.2d at 1132 (citations omitted).]

(1) (a) (Board of Agriculture appoints garlic and onion advisory board members and "fix[es] their terms of office"). The state statutes often specify that appointees be drawn from nominations submitted by the affected industry. See, e.g., Fla. Stat. Ann. § 573.112 (Department of Agriculture and Consumer Services appoints advisory council from nominees chosen by producers of the agricultural commodity); Idaho Code § 22-1202 (governor appoints potato commission from nominees chosen by potato growers, shippers, and processors).

Some state advisory groups, however, are not government appointed but selected by industry representatives themselves. That fact alone does not mean that the promotion activity of such groups is not properly characterized as government speech. For example, while 10 of the 11 members of the California Kiwifruit Commission are elected by kiwi producers and handlers, the Secretary of Food and Agriculture retains the authority to order the Commission "to correct or cease any existing or proposed activity or function" in violation of the authorizing statute or contrary to the public interest, and California law expressly states that the Commission is "a state agency operating" "in the state government." Cal. Food & Agric. Code §§ 68051, 68052. The Commission thus can fairly be said to be "under the direction and control" (*Lebron*, 115 S. Ct. at 974) of the State.

So too here, when the Nectarine Administrative Committee and the Peach Commodity Committee speak, they do so on behalf of the government, and what they say is government speech.

III. THE FACT THAT THE GOVERNMENT SPEECH IS FUNDED BY ASSESSMENTS ON THOSE WHO BENEFIT MOST DIRECTLY FROM IT DOES NOT CHANGE THE NATURE OF THE SPEECH

The Third Circuit in *Frame* ultimately declined to conclude that the speech at issue was government speech because, in its view, "where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group" there is a "coerced nexus" between the message and the individuals who comprise the group. 885 F.2d at 1132. By contrast, that "nexus between the message and individual is attenuated," the court said, "[w]hen the government allocates money from the general tax fund to controversial projects or expressive activities." *Id.* That analysis is fundamentally flawed.

The focus of the government speech inquiry is—and should be—on the entity that conveys the message at issue and on the process through which that message has been formulated. The focus is not—and should not be—on whether or to what extent the message might be ascribed to an individual (other than the speaker) as a result of the "nexus between the individual and the specific expressive activity." *Id.* The latter inquiry lacks any firm grounding in established First Amendment doctrine and provides a wholly unworkable rule of decision for distinguishing between government and non-government speech.

The Third Circuit derived its "nexus" analysis solely from footnote 13 of Justice Powell's concurrence in *Abod v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977), which provides:

Compelled support of a private association is fundamentally different from compelled support of government. * * * [T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests.

See 885 F.2d at 1132-33. The pertinent distinction drawn by Justice Powell was not, as the Third Circuit apparently thought, the "nexus" between the individual and the message to which he objects. Instead, the distinction drawn was between being forced to associate with *private* speech—which is derived from "one segment of the population, with certain common interests"—and with *government* speech—which is derived from the government as "representative of the people." *Abod*, 431 U.S. at 259 n.13.

Thus, in determining whether the speech activities at issue in *Keller v. State Bar of California*, 496 U.S. 1 (1990), constituted government speech, this Court focused on the entity that conveyed the message—the State Bar Association—and *not*, as would have followed under the Third Circuit analysis, the "nexus" between the association's members and the message to which they objected. Because the Court concluded that the association was not like a typical government agency or official, who "[is] expected as a part of the democratic process to represent and to espouse the views of the majority of [its] constituents," *id.* at 12, the Court concluded that the messages it conveyed were not government speech. *Id.* at 13.

By contrast, here it follows under this Court's recent decision in *Lebron* that the entities conveying the message to which handlers object—the Committees—are government instrumentalities for First Amendment purposes. Moreover, this case is distinguishable in a second, perhaps

even more fundamental, respect. Here, unlike in *Keller*, the message being conveyed—commodity promotion—was formed in the first instance by Congress “as part of the democratic process.” 496 U.S. at 12. The Committees were created under authority of the AMAA with the express purpose of conveying that *particular* message to the public. They do so pursuant to precise governmental regulations and subject to the ongoing guidance and control of the Secretary of Agriculture.

No such governmental definition and control characterized the activities of the State Bar in *Keller*. The Court made clear that the messages at issue in that case represented the views of a particular group—the Bar—on a wide and changing array of issues.⁴ Here the message at issue was fixed by the representative of all the people—Congress—and is implemented by the Secretary. Although that message may be beneficial to a particular group—which justifies having them fund its dissemination—there is no doubt that it is the government’s message.

The government may—and frequently does—use “private entities to convey a governmental message,” or “to transmit specific information pertaining to its own program.” *Rosenberger v. University of Virginia*, 115 S. Ct. at 2519. When it does so, the government speech analysis still applies in analyzing objections to the message or specific information being conveyed by the private entities. *E.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991). But this case does not even involve the enlistment of private entities to convey the government’s message. Here, the government’s message is being conveyed by *government* bodies created by Congress specifically for that purpose

⁴ The Bar was alleged to have been engaged in such far ranging—and openly political—activities as “endors[ing] a gun control initiative, disapprov[ing] statements of a United States senatorial candidate regarding court review of a victim’s bill of rights, endors[ing] a nuclear weapons freeze initiative, and oppos[ing] federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing.” 496 U.S. at 15.

and placed under the direct supervision of *government* officials like the Secretary. In these circumstances, it simply defies common sense to conclude, as the respondents would have this Court do, that this case does not involve government speech.

Had Congress elected to fund the activities under the program with taxpayer dollars, there would be no question that the program’s speech was government speech. Simply because Congress made the decision to defray the program’s cost by imposing what amounts to a modest user fee on those “who most directly reap the benefits of the program,” FAIR Act, § 501(b)(2)—and who as a group have voted to fund the program—does not change the essential character of the speech. It remains the government’s message, with the content specified by Congress and articulated under the guidance and control of the Secretary.

This is a far cry from a case in which the government attempts to compel adherence to its own message, as was the case in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), where students were faced with expulsion and prosecution for failing to participate in the Pledge of Allegiance, or *Wooley v. Maynard*, 430 U.S. 705 (1977), where motorists were required to bear on their own vehicle license plates an ideological state motto they found morally objectionable. The handlers in this case face no such ideological dragooning. The marketing order simply requires a handler to pay a user fee; it neither “compel[s] him to utter what is not in his mind,” *Barnette*, 319 U.S. at 634, nor makes him “the courier for [the government’s] message.” *Wooley*, 430 U.S. at 717. That is, no one has asked any handler verbally to express *his* support of fruit promotion, as in *Barnette*, or to bear such a message upon *his* property, as in *Wooley*. For the government to compel political or ideological speech from the lips of a reluctant individual is worlds apart from compelling that person to contribute

financially to support government-supervised commercial speech, when that speech directly benefits his own commercial interests. See *NAACP v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) ("Government communication is legitimate as long as the government does not abridge an individual's 'First Amendment right to avoid becoming the courier for such message.'") (quoting *Wooley*, 430 U.S. at 717).

Justice Harlan made the same point in *Lathrop v. Donohue*, 367 U.S. 820, 858 (1961) (concurring in the judgment):

What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to [an organization] fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor.

Society frequently calls upon its members to pay taxes, dues, or other assessments to support various organizations and entities, both governmental and non-governmental. But no one thinks that everyone who makes such a payment thereby endorses to the last jot and tittle the agenda of the recipient, because "the connection between the payment of an individual's dues and the views to which he objects is factually so remote." *Id.* at 859.

* * * *

The speech at issue in this case is speech by committees established pursuant to federal law to achieve defined governmental objectives. The members of the committees are appointed by a government officer and are subject to removal by him. Their budgets, plans, projects, contracts, and activities are subject to his approval, supervision, and control. The message that is conveyed by these commit-

tees is the government's message. The fact that it is funded by assessments on those who benefit most directly from the government program—and who have by a vote elected to fund such a program—does not make the speech the forced speech of someone else. It remains government speech, and the fact that some of those compelled to support it—who are free to speak their own mind on the subject—may object to the government's message does not give rise to a First Amendment violation.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED

JUL 29 1996

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No. 95-1184

In The
Supreme Court of the United States
October Term, 1995

DANIEL R. GLICKMAN,
SECRETARY OF AGRICULTURE,

Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF ARIZONA, CALIFORNIA, FLORIDA, MICHIGAN, NEBRASKA, NEW JERSEY, NEW YORK, OREGON, VERMONT, AND VIRGINIA IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

The States of Arizona, California, Florida, Michigan, Nebraska, New Jersey, New York, Oregon, Vermont, and Virginia, through their Attorneys General, submit this *amicus curiae* brief in support of petitioner. The court below invalidated a federal marketing order provision that authorizes the use of mandatory assessments on the sale of peaches, plums, and nectarines for the purpose of conducting generic advertising and promotion of those crops.

Amici have vital interests in this matter because they have adopted marketing acts generally modelled after the Agricultural Marketing Agreement Act of 1937 ("AMAA", 7 U.S.C. 601 *et seq.*), under which the marketing orders under review were adopted. Like the AMAA, the state laws generally provide for mandatory assessments for generic promotion of the covered agricultural commodity. Unless the decision below is reversed, such assessments – which are vitally important to the economic health of *amici* states – may be jeopardized.

Whether the marketing order at issue is analyzed under the *Abood*¹ line of cases – as *amici* contend it should be – or under the *Central Hudson*² test applied by the Ninth Circuit, a close analysis of the governmental interests furthered by the order is required. Through their comprehensive oversight of agricultural commodities, the *amici* states are particularly well situated to address those

¹ *Abood v. Detroit Board of Education*, 431 U.S. 209 (1976)

² *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1989).

interests. This brief is therefore devoted primarily to describing how destabilizing features inherent to the agricultural market necessitate governmental intervention, and how the marketing order at issue is a vital tool for stabilizing the market. In this matter, *amici* states endeavor to assist the court in the resolution of this case.

SUMMARY OF ARGUMENT

1. *Amici* concur in the petitioner Secretary of Agriculture's position that the Ninth Circuit erred in using the *Central Hudson* test, which applies only to governmental prohibitions of commercial speech. The economic free association cases,³ which address compulsory fees used to pay for speech in agency shops and integrated state bars, plainly provide the applicable guidelines here. Respondents complain of forced association, not government-imposed limits on what they can say. *Amici* will not restate the petitioner's argument, which amplifies that point. We do, however, illustrate one particular reason why the lower court's analysis was fatally flawed. The objective of the three-part *Central Hudson* test is to protect consumers' interest in obtaining information. *Central Hudson*, 447 U.S. at 563; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). The flow of truthful information to consumers is not impaired by the commodity promotion program; indeed, the opposite is true.

³ *Amici* will hereafter refer to the interests addressed in the *Abood* line of cases as that of "economic free association."

The extra hurdles imposed by the *Central Hudson* test are therefore inapplicable.

2. The commodity promotional programs meet the requirements for the test of economic free association formulated in the *Abood* line of cases.

(a) Importance of Governmental Interest:

The governmental interest in supporting a stable agricultural economy and preventing "free riders" is as "vital" as the interest in labor peace that justifies agency shop regulation. Support for the agricultural sector of the economy is vital to assure the adequate and steady production of food and fiber. This interest has provided justification for the extraordinary measure of government price supports. The need for concerted action for advertising is greater for agricultural products than for manufactured products because of their homogenous, perishable, seasonal nature; because of the inelasticity of demand and the slow response in production to change in demand; and, because of the atomistic distribution of producers. The programs help stabilize the market by enhancing demand for the products through improved consumer information about the attributes and use of the agricultural products. This is now generally accepted as preferable to historical government programs aimed at stabilizing the market through techniques of creating artificial scarcity and of using taxpayer dollars to support farm prices.

(b) Degree of Intrusion on Free Associational Rights:

Intrusion on First Amendment associational rights poses less of a concern with a commodity promotion

program than with the agency shop or integrated bar. This is for two reasons. First, the collective representation that is justified by the government interest has less potential for infringement on core First Amendment concerns; the communicative purpose is limited to conveying a commercial message. Second, a government marketing program has a very circumscribed range of activities in which it is authorized by law to engage. Thus, it is unlike the union shop where, although the union is the sole authorized bargaining agent, it retains, as a private organization, the right to engage in a great range of expressive activity outside its collective bargaining role. Because of a union's dual role, there are frequent challenges regarding which of those otherwise lawful union activities a dissenting represented employee can be required to pay for. The commodity marketing program, lacking a dual private-public role, does not present these problems.

(c) Degree of Intrusion on Free Speech Rights.

A commodity promotion program imposes no limitation at all on free speech rights, making it less intrusive on First Amendment interests than the union shop, where a represented employee is denied the right to represent himself in negotiations with the employer concerning employment conditions. Indeed, the AMAA expressly forbids a marketing order's placing any restrictions on a producer's own advertising efforts.

ARGUMENT

I. THE SECOND AND THIRD PRONGS OF THE TEST FOR GOVERNMENT LIMITATIONS ON COMMERCIAL FREE SPEECH DO NOT APPLY TO THE INTEREST AT BAR BECAUSE THAT INTEREST, THE MERE REQUIREMENT TO PAY A FAIR SHARE FOR COMMERCIAL SPEECH, IS OF A LOWER ORDER OF CONSTITUTIONAL CONCERN.

The *amici* states concur with petitioner Secretary of Agriculture that the *Abood* line of cases, not the *Central Hudson* test, applies to respondent's First Amendment challenge to the marketing order at issue. The *Central Hudson* test applies to government limitations on commercial speech; the *Abood* line of cases addresses the use of compulsory fees to pay for speech which the contributor does not support. This case manifestly involves the latter issue and not the former. Rather than restating petitioner's argument here, *amici* seek only to highlight one particular reason why the *Central Hudson* test is inapposite to this case.

The *Central Hudson* test has three prongs. A restriction on commercial speech is constitutional if (1) the government interest supporting the restrictions is "substantial"; (2) the restrictions "directly advance" the asserted interest; and (3) the restrictions are "[no] more extensive than is necessary to serve that interest." 447 U.S. at 566. Although the first prong's requirement for the degree of the government interest necessary to justify the regulation is no higher than for the economic free association cases,⁴ the second and third

⁴ This Court has described the government interest required to justify infringement of economic free association as

Central Hudson prongs pose additional hurdles that are unnecessary here. These substantial hurdles are designed to benefit the interests of consumers by assuring the free flow of information; they are not designed to protect the interests of speakers. The court below erred in applying them in this case, where consumers' information is *increased* by the generic advertising program supported by the marketing orders.

This Court has made clear that the reason the First Amendment has come to extend its protection to commercial speech is so that the buyer has the necessary information to make informed decisions in the marketplace. As explained in *Central Hudson*, "the First Amendment's concern for commercial speech is based on the informational function of advertising." 447 U.S. 557, 563. "By protecting those who wish to enter the marketplace of ideas from governmental attack, the First Amendment protects the public's interest in receiving information." *Pacific Gas & Electric v. PUC of California*, 475 U.S. 1, 8 (1985) (emphasis added.) Extending First Amendment protection to commercial speech has been deemed "justified principally by the value to consumers of the information such speech provides." *Zauderer v. Office*

"vital," which clearly is as high as the *Central Hudson* requirement of "substantial." See the following passage from *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990):

[L]egislative recognition that the agency-shop arrangements serve *vital national interests* in preserving industrial peace, see *Ellis*, 466 U.S., at 455-456, indicates that such arrangements serve *substantial public interests*. . . .

Emphasis supplied.

of *Disciplinary Counsel*, 471 U.S. 626, 651. (Emphasis added.) This is because a ban on truthful advertising hurts the consumer by "hinder[ing] consumer choice." 44 *Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1208, ___ U.S. ___ (1996). From the consumer's point of view, "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, ___ U.S. ___ (1995).

Thus, out of concern for the consumer's interest in availability of information relevant to making economic decisions, *Central Hudson* set the barrier for the second and third prongs relatively high. "[T]he free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful." *Zauderer, supra*, 471 U.S. 626, 646.

The interests of the seller in *not* being required to provide commercial information are less weighty. A free association corollary to the principle of protecting commercial free speech in order to protect the public's access to information is that the government may compel disclosures, warnings or disclaimers as part of commercial speech to "dissipate the possibility of consumer confusion or deception." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651.⁵

⁵ By contrast, the government may not compel disclosures as part of soliciting for charity because, although it may be a commercial activity for the solicitor, the activity is inextricably intertwined with core First Amendment speech. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 798 (1988).

Zauderer emphasized important differences in the distinctions made as to two separate parameters of First Amendment analysis that bear on this case.

One parameter considers whether the government regulation *compels* speech (or financial contribution to speech) or *prohibits* speech – the “free association” v. “free speech” dichotomy. The other parameter gauges the sensitivity of the interest – be it in the more sensitive “core” area or in the less sensitive economic or commercial area.

As to the distinction between compulsion and prohibition, the Court in *Zauderer* underscored that there are “material differences between disclosure requirements and outright prohibitions on speech.” *Id.* at 650. Thus, the two interests require different analyses.

As to the sensitivity of interest parameter, the Court outlined the different treatment justified by the different value accorded, respectively, to free association interests in core areas and to free association interests in commercial areas.

As *Zauderer* explained:

We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech. [Citing *Wooley v. Maynard*, 430 U.S. 705 (1970); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624].

But the interests at stake in this case are *not* of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*. Ohio has not attempted to prescribe “what shall be orthodox in politics,

nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” 319 U.S. at 642. The State has attempted only to prescribe what shall be orthodox in commercial advertising. . . . Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, see *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is *minimal*.

Id. at 450-451. (Emphasis added.)

In the case of the commodity promotional program, the interest implicated is solely that of being compelled to pay for speech, not in being prohibited or limited in any way from speaking. Clearly, if, as *Zauderer* found, the interest in not disclosing information as a part of commercial speech is minimal, the interest in avoiding payment of one’s fair share of the cost of advertising from which one receives benefit is even *more minimal*.

In sum, because the flow of truthful information to consumers is in no way impeded by a program using assessments for an agricultural commodity promotion and advertising program, and because there is only a minimal free associational interest in being protected from the requirement to pay a grower’s fair share for advertising from which it benefits, the commodity promotional program should not be subjected to the more strenuous requirements posed by the second and third prongs of the *Central Hudson* test. Rather, the economic

free association test, whose factual application to commodity marketing programs this brief will address next, is the appropriate test by which to judge such a program's constitutionality.

II. THE GENERIC MARKETING PROGRAMS SATISFY THE REQUIREMENTS OF THIS COURT'S "ECONOMIC FREE ASSOCIATION" JURISPRUDENCE.

The economic free association cases – among which *Abood v. Detroit Board of Education*, *supra*, 431 U.S. 209 (agency shop), *Keller v. State Bar of California*, 496 U.S. 1 (1990) (integrated bar), and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1990) (agency shop) are prominent – look to three factors to determine the constitutionality of statutory schemes requiring collectivized representation for the purpose of furthering economic interests. They are:

1. Strength of Government Interest. Whether the collective representation is a reasonable means to support a "vital" governmental interest in economic regulation. (*Lehnert*, *supra*, 500 U.S. at 519; *Keller*, *supra*, 496 U.S. at 13.)

2. Limits on Abridgement of Free Association. Whether the use of the compelled payment is limited to costs that are germane to the function for which collectivized representation is imposed. *Lehnert*, *Id.*

3. Limits on Abridgement of Free Speech. Whether the program avoids "significantly add[ing] to the burdening of free speech that is inherent" in the function for

which the collectivized representation is imposed. *Lehnert*, *Id.*⁶

The marketing orders at issue meet these three tests: Collectivized representation for promoting the sale of agricultural commodities is a reasonable means to support the vital government interest in stabilizing the agricultural market; the AMAA and state programs fashioned after it are less intrusive upon free associational interests than an agency shop or integrated bar; and these programs pose no threat whatsoever of abridging free speech.

A. A STABLE AND ECONOMICALLY VIABLE AGRICULTURAL SECTOR IS A VITAL GOVERNMENTAL INTEREST THAT COMMODITY PROMOTION SIGNIFICANTLY BOLSTERS.

Maintaining a stable market for its agricultural products is a vital governmental interest. At the very basis of a country's welfare is its ability to provide food and fiber in an adequate quantity and diversity, at reasonable prices and at the time and place required, to meet the needs of

⁶ The interests at stake in these cases are unlike the interests in the constitutionally more intrusive invasion into core free association concerns, as where the individual is forced "as a part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." (*Wooley v. Maynard*, 430 U.S. 705, 715 (1977)). With the agency shop and integrated bar cases, and with the agricultural commodity promotion program, the only participation that can be required is financial and the message is of an economic nature.

its citizens. Thus, a stable agricultural market is also pivotal to a country's sovereignty interest in being economically self-sufficient. This has been keenly understood by the nation states of the world, and for this reason, agricultural policy has been a stubborn, if not intractable, issue in the efforts of the countries of the world to achieve economic integration.⁷ Even as nation-states increasingly have come to understand politically, as well as intellectually, that integrating the world market can ultimately hold out the best hope for the economic well-being of all of the world's citizens, nation-states have rational concerns to preserve their independence in their ability to meet, within their own borders, their citizens' needs for a plentiful supply of food and fiber. There is also widespread recognition that the health and vitality of rural communities is dependent on the level and stability of agricultural income.

The agricultural market is, however, subject to a number of destabilizing factors. This is because of the characteristics inherent in the business of agricultural production and marketing, which include (a) variable supply and inelastic demand; (b) seasonality and perishability of product; (c) lagged production and limited

⁷ See, e.g., Schoenbaum, Thomas J. "Agricultural Trade Wars: A Threat to the GATT and Global Free Trade", 24 *St. Mary's Law J.* 1165 (1993); Montana-Mora, Miguel "International Law and International Relations Cheek to Cheek; An International Law/International Relations Perspective on the U.S./E.C. Agricultural Export Subsidies Dispute." 19 *N.C.J. Int'l L. & Comm. Reg.* 1 (1993); Purnell, David R. "1993 International Trade Update: The GATT and NAFTA" 73 *Neb. L. Rev.* 211, 214-215 (1994).

mobility of resources; and, (d) an industry consisting of many small growers producing homogeneous products. Commodity promotion and advertising programs help stabilize and increase the demand for the product to support the income of the growers through the vicissitudes of agricultural business ups and downs.

1. The Agricultural Market is Subject to Numerous Destabilizing Factors Which Necessitate Governmental Intervention.

The Department of Agriculture issued the challenged marketing orders to combat longstanding but persistent difficulties faced by agricultural suppliers. The following is a brief description of the destabilizing factors which compel governmental intervention.

(a) Variable Supply and Inelastic Demand.

The supply of a particular agricultural commodity varies significantly from year to year. The variability results both from weather variations and from crop characteristics. Many tree crops characteristically alternate from year to year between large crops and small crops.⁸ The "boom or bust" nature of crop supply conduces to considerable instability in the agricultural market.

⁸ Heifner, R., W. Armbruster, E. Jesse, G. Nelson, and C. Shafer. *A Review of Federal Marketing Orders for Fruits, Vegetables, and Specialty Crops*. Washington, D.C.; U.S. Dept. of Agriculture, Agricultural Marketing Service, Agricultural Economic Report No. 477, (1981) pp. 6-12.

On top of this, the demand for agricultural commodities is inelastic, *i.e.*, prices are very responsive to changes in availability of the product, so that a one percent increase in quantity can result in more than a one percent decrease in price. The result is that the total income from a *large* crop is very frequently *smaller* than from a *small* crop. Inelasticity is especially strong for specialty crops, tree fruits and nuts, for which the United States dominates the world market. For example, when the size of the California avocado crop dropped from 570 million pounds in 1992/1993 to 271 million pounds in 1993/1994, the value rose from \$118 million to \$251 million.⁹ Because of the variable supply and inelastic demand, there is significant year-to-year price variability. As an example, for the decade of 1970 through 1980, the average variability of nectarine, plum and peach prices in California exceeded, respectively, 20 percent, 31 percent, and 22 percent.¹⁰ Had it not been for the commodity promotion program in effect under the marketing order here under review, the variability would have been even greater.

⁹ California Avocado Commission Annual Report, 1994-1995. The price inelasticity for peaches, nectarines and plums, the subjects of the marketing order under review, has been estimated to result, with a 1 percent increase in crop size, in a 2.3% (peaches), 2.7% (nectarines) and 3.9% (plums) reduction in price. Freed, Ron, "The Impact of Various Economic Factors on Grower Price and Maximizing Crop Value by Optimizing the Marketing Mix for California Tree Fruit Agreement," June, 1993. The California Tree Fruit Agreement is the agency that administers the marketing order here under review.

¹⁰ Heifner, *et al.*, n. 8, *supra*, p. 9.

(b) Seasonality and Perishability.

Because produce is ripe and ready for market during a limited time span during the year, and because much produce is highly perishable, producers are in a weak bargaining position. If the market is unfavorable when the crop is ready for market, the producer cannot withhold the produce until the market improves. As this Court noted in *National Broiler Marketing Assn. v. United States*, 436 U.S. 816, 825 (1977), "[a] large portion of an entire year's labor devoted to the production of a crop could be lost if the farmer were forced to bring his harvest to market at an unfavorable time." "Historically, perishability of produce forced the farmer to take whatever price he could obtain at the time of the harvest. . . . Even in a reasonably competitive market, physical inability to withhold produce will place a producer at a disadvantage." *Id.* at 840 (White, J. dissenting). Within a season, prices can vary *substantially* from week to week, depending on supply. For the 1992 season, for example, the price of peaches varied from \$7.00 to \$26.00 per carton, nectarines varied from \$7.00 to \$32.00 per carton, and plums varied from \$6.00 to \$28.00 per carton.¹¹

Advertising and promotion programs that increase overall demand by providing information on the availability, fruit characteristics, maturity standards, etc., help reduce price variability and improve producer returns by increasing the minimum prices.

¹¹ Federal State Market News Service, *Marketing California Nectarines, Peaches, Plums*, 1992.

(c) Lagged Production and Limited Mobility of Resources.

Producers of perennial crops, including tree crops such as peaches, plums and nectarines, face problems of 30 to 40 year planning horizons, long lags (a minimum of 3 years but more for many crops)¹² between initial planting and production, essentially fixed assets, and large capital requirements. These factors are conducive to maintaining excess capacity, which, of course, results in a lowering of prices. There is a tendency to overinvest when prices are favorable. Then, when prices drop, adjustments are both difficult and slow because of the specialized nature of production resources. For example, an orchard may stay in production for a long period even when returns and incomes are very depressed, because the cost of replacing the orchard with a more valuable crop is high.¹³ The problem of sustained low incomes due to limited mobility of resources out of commitment to a particular crop is referred to as "the farm problem".¹⁴

¹² For example, it takes 5 years to bring a peach tree into commercial production; periods for some other tree crops are lemons - 5 to 6 years; prunes - 6 years; walnuts - 6 to 8 years; and pecans - 8 years. California Agricultural Statistics Service, *California Fruit & Nut Acreage* (1992). Livestock producers also have to deal with biological lags.

¹³ Johnson, G.L., and L. Quance, *The Overproduction Trap in U.S. Agriculture. Resources for the Future*, Washington D.C. (1972).

¹⁴ Gardner, B.L. "Changing Economic Perspectives on the Farm Problem." 30 *Journal of Economic Literature* 62-101 (1990).

(d) Many Small Producers and Homogeneous Products.

"[A]griculture is made up of a large number of widely dispersed, atomistic producers with no one producer of sufficient size to significantly affect markets."¹⁵ In 1992, in California, for example, there were more than 10,000 grape growers, more than 6000 almond growers, and almost 6000 peach growers.¹⁶ Because market power is diluted among so many individual producers, producers have always considered themselves to be price takers rather than price makers.¹⁷ A factor further undercutting an individual producer's ability to create a market is that, unlike for most manufactured products, the product of one agricultural producer is not readily distinguishable from that of another producer. The peach or nectarine produced on Farm A appears very much like the peach or nectarine produced on Farm B. Thus, a

¹⁵ Looney, J.W., "The Changing Focus of Government Regulation of Agriculture in the United States" 44 *Mercer L. Rev.* 763, 767 (1993). See, also, Davidson, Kenneth M., "Symposium: 1982 Merger Guidelines: The Competitive Significance of Segmented Markets," 71 *Calif. L. Rev.* 445, 451, n. 32 (1983) ("Agriculture is an atomistic homogeneous product market. It is periodically subject to both natural disasters and economic distress from overproduction.").

¹⁶ U.S. Dept. of Commerce, Bureau of the Census, 1992 *Census of Agriculture, California State and County Data*.

¹⁷ Forker, Olan, & Ronald Ward, *Commodity Advertising*, Lexington Books (1993) at 7. ("Since the producers are small in size and large in number relative to the purchasers of their production they have considered themselves 'price takers' with little influence over the price or form of their products when marketed.")

producer cannot readily establish a market for his own produce as distinct from all the others.

In the vast sea of farms, all producing fungible commodities, no farmer can demand a price higher than the prevailing market rate. Nor can any one farmer, acting alone, affect price merely by manipulating output.¹⁸

"Due to this atomistic nature of agricultural production," government regulation of agriculture has been designed to protect the individual farm from market instability, "boom-bust pricing cycles."¹⁹

2. The Marketing Orders At Issue Are An Important and Reasonable Tool Used by the Government to Address Instability in the Agricultural Market.

(a) Other Government Programs Which have Historically Been Used to Stabilize the Agricultural Market Are Not Currently Viewed as Satisfactory.

Early Congressional responses to the fragile and unstable conditions of agricultural markets were exemptions to antitrust provisions. They were conceived to permit agricultural cooperatives to form in order to give producers some control over market conditions.²⁰ Then,

¹⁸ Chen, Jim, "The American Ideology", 48 *Van. L. Rev.* 809, 853 (1995)

¹⁹ Looney, n. 15, *supra*, at 767

²⁰ Exemptions in the Clayton Act of 1914, ch. 323, § 1, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-17) and the

in response to the very low farm prices of the depression, Congress passed legislation that sought to maintain prices by limiting production, *i.e.*, to raise prices by artificially creating scarcity. Congress first did this through the Agricultural Adjustment Act of 1933, which offered monetary payments to farmers in exchange for limiting production.²¹ 1937 saw the arrival of the Agricultural Marketing Agreement Act, which in its current form is the basis of the case before this Court. This act also authorized control of quantity in order to maintain prices.²² The following year, Congress enacted the Agricultural Adjustment Act of 1938, which included provisions both for production control and for payment to growers.²³

Various federal agricultural programs in the last fifty years have involved government payments to farmers on a large scale.²⁴ In 1992, for example, 75 percent or more of the nation's wheat, cotton, rice, and feed grain acreage

Capper-Volstead Act of 1922, ch. 57, § 1, 42 Stat. 388 (1922) (current version at 7 U.S.C. §§ 291-292 (1988)). See Looney, n. 15, *supra*, at 767.

²¹ Ch. 25, 48 Stat. 31 (1933) (current version at 7 U.S.C. §§ 601-626.) See Looney, n. 15, *supra*, at 765.

²² Ch. 296, 50 Stat. 246 (1937)

²³ Pub.L. No. 75-430, ch. 30, 52 Stat. 31 (1938)

²⁴ For a discussion of the history of price supports, see Rasor, Paul B. and James B. Wadley, "The Secured Farm Creditors Interest In Federal Price Supports: Policies and Priorities," 73 *Ken. L.J.* 597 (1985); and Rasmussen, Wayne D., "New Deal Agricultural Policies after Fifty Years," 68 *Minn. L. Rev.* 353 (1983).

was enrolled in a price support program.²⁵ Over time, the public has become disenchanted with both quantity controls and price supports.²⁶

(b) The Commodity Marketing Programs Have Come to Be Accepted as Effective and Appropriate Means for Supporting the Agricultural Market.

As both creation of artificial scarcity and heavy taxpayer support for farmers have fallen into disfavor, generic promotion and advertising for agricultural commodities have come to be viewed as an important program to improve farm prices and incomes with very small costs to government.²⁷ By the mid-1980s, there was general acceptance of support for generic promotion through mandatory assessments under both marketing orders and "checkoff" programs.²⁸

²⁵ Malasky, Alan R., Christopher R. Kelley & Susan A. Schneider, "Resolving Federal Farm Program Disputes: Recent Developments" 19 *Wm. Mitchell L. Rev.* 283, 285 (1993).

²⁶ Forker and Ward, n. 17, *supra*, at 89; Malasky, *et al.*, n. 25, *supra*, at 298. A common criticism of the price and income support programs has been that most of the benefits are received by the large producers. Looney, n. 15, *supra*, at 790-91.

²⁷ See, e.g. Rausser, Gordon C. and David Nielson, "Looking Ahead: Agricultural Policy in the 1990s." 23 *U.C. Davis L. Rev.* 415, 422-427 (1990).

²⁸ Forker and Ward, n. 17, *supra*, at 89. "Checkoff" refers to the manner of funding, in that the funds are normally deducted from the payment made to the producer by the handler.

Generic advertising is described as follows:

"Generic advertising is the cooperative effort among producers of a nearly homogeneous product to disseminate information about the underlying attributes of the product to existing and potential consumers for the purpose of strengthening demand for the commodity."²⁹

Through commodity marketing programs, producers have been able to put together enough money to "operate rather large information programs to inform consumers of the attributes of their commodity" (*Id.* at 10.)

An individual producer would not find it economic to engage in generic advertising, as is illustrated by the following example. Suppose that returns from a generic advertising program are \$10 for each \$1 spent and there are 500 equally small producers of a commodity. If an individual producer spends \$10, the benefits to the industry will be \$100, but since the benefits are distributed equally based on the amount sold, the individual producer gets a return of only \$.20 for the \$10 expenditure. Thus, the use of assessments from all producers of a commodity is necessary to ensure that for the benefit, which is equally shared, the cost is also equitably distributed. The sharing of costs through mandatory assessments avoids the "free rider" problem, which this Court has found to be a vital government interest in the agency shop context. See, e.g., *Lehnert, supra*, 500 U.S. at 519. As two noted commentators have stated:

Commodity checkoff programs are a direct outgrowth of the potential free-rider problem.

²⁹ Forker & Ward, n. 17, *supra*, at 2.

Commodity industries recognize the need to advertise their products but also recognize the need for everyone who benefits to pay their share of the program costs.

Forker and Ward, n. 17, *supra*, at 19.

The programs can be very effective in terms of return to the growers for each promotional dollar spent. For example, a just-completed study conservatively estimates net industry returns for the California Table Grape Commission's promotion program as five dollars for every dollar spent.³⁰

(c) The Importance of the Commodity Marketing Programs as a Means of Stabilizing the Agricultural Market Will Continue to Grow.

The role of generic advertising in stabilizing the agricultural market will continue to increase as the market becomes larger and more complex. Just as earlier in this century the agricultural economy went from local to interstate in scale,³¹ it has now become

³⁰ Alston, J.M., J.A. Chalfant, J.E. Christian, E. Meng, and N.E. Piggott, *The California Table Grape Commission's Promotion Program: An Evaluation*. Report to the Commission, July 10, 1996. Other examples are provided in the *amicus curiae* brief by the Washington Apple Commission, *et al.*

³¹ Portions of the first Agricultural Adjustment Act of 1933 were declared unconstitutional by this Court in *United States v. Butler*, 297 U.S. 1, 74 (1936), in part because they dealt with what was deemed a "local" matter, i.e., agriculture. When the broader Agricultural Adjustment Act of 1938 was reviewed by this court

internationalized.³² As noted in *amici* states' brief to this Court in support of the Secretary of Agriculture's petition for *certiorari* in this matter, collective promotional efforts by producers become more important as markets become more distant and complex and as possible trade barriers pose potential hurdles to access relevant markets.³³ The United States is the world's largest agricultural exporting nation, accounting for approximately one-sixth of the world's agricultural trade.³⁴

Moreover, with the Uruguay Round of GATT negotiations and with NAFTA, some of the traditional agricultural supports will no longer be available. For example, section 22 of the Agricultural Adjustment Act of 1933, as amended, authorized (until recently) the Secretary of Agriculture to limit agricultural imports where they would interfere with any of the price support programs. 7 U.S.C. § 624 (1988). Under the Uruguay-Round-

in *Wickard v. Filburn*, 317 U.S. 111 (1942), agriculture had expanded and was deemed an interstate enterprise. See, Looney, n. 15, *supra*, at 765.

³² The internationalization of agriculture is a constant theme in recent law review articles. See, e.g., Centner, Terence J., "The Internationalization of Agriculture: Preparing for the Twenty-First Century" 73 *Neb. L. Rev.* 5 (1994).

³³ *Brief of Amici Curiae of the Attorneys General of the States of Arizona, California, Florida, Georgia, Michigan, Nebraska, New Jersey, Oregon, Vermont, Virginia, and Washington in support of the U.S. Solicitor General's Petition for Writ of Certiorari*, filed March 21, 1996, at 11-13.

³⁴ Purnell, David R., "A Critical Examination of the Target Export Assistance Program, Its Transformation into the Market Promotion Program and Its Future," 18 *N.C. J. Int'l L. & Comm. Reg.* 551, at n. 71 (1993).

generated World Trade Organization Agreement on Agriculture, however, no quantity limits or fees may be imposed on any product of a World Trade Organization member, and various agricultural subsidies are prohibited or highly restricted.³⁵ NAFTA also limits import restrictions³⁶ and will essentially remove all restrictions by the year 2008.³⁷

Even as this Court has recognized the importance of collective representation for the "atomized" labor market in the union and agency shop cases, along with the need to avoid free riders, so should it also recognize the importance for the atomized producers of an agricultural commodity to engage in collectivized representation in order to market their produce, along with the equal importance in avoiding free riders. In sum, the use of assessments for a generic promotional program meets the threshold test of being a reasonable means to accomplish a vital governmental interest.

³⁵ Agreement on Agriculture, Articles 4(2), 6, 7, Annex 1A, Agreement Establishing the World Trade Organization, April 15, 1994 (reprinted in H.R. Doc. No. 316, 103 Cong., 2d Sess. 1355 (1994)); see 43 U.S.C. § 624(f). See, Gantz, David A. "A Post-Uruguay Round Introduction to International Trade Law in the United States," 12 *Ariz. J. Int'l & Comp. Law* 7 (1995); Figueroa, Miguel A., "The GATT and Agriculture," 5 *Kan. J. of Law and Pub. Pol.* 93 (1995).

³⁶ North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, 605 (1993) article 703(3), Annex 703.3.; see NAFTA Implementation Act, 19 U.S.C. §§ 3301-3473 (1993).

³⁷ *Id.* at ch. 7(A).

B. BECAUSE THE NATURE OF THE MESSAGE FOR WHICH ASSESSMENTS ARE MADE IS PURELY COMMERCIAL, AND BECAUSE THE MARKETING PROGRAMS ARE AUTHORIZED TO ENGAGE IN ONLY A LIMITED SCOPE OF ACTIVITY, THERE IS LESS INTRUSION INTO FREE ASSOCIATIONAL INTERESTS THAN THERE IS WITH AN AGENCY SHOP ARRANGEMENT.

The second prong of the economic free association test is directed to minimizing the extent of intrusion upon free associational interests. The marketing programs here under review are *less* intrusive than the agency shops which this Court has long countenanced. This is for two reasons. Unlike the agency shop, the authorized collective representation under a marketing program is purely commercial. Moreover, the scope of activities which a marketing program can conduct is strictly limited by the scope of government authorization.

In a union shop arrangement, the union as the collective bargaining agent perforce engages in representation on issues that have political and social values. As this Court recognized in *Abood*:

An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits

on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. . . . The examples could be multiplied.

431 U.S. at 222.

By contrast, the marketing programs are less likely to conflict with a grower's views on sensitive political and social issues. This was recognized by the first published opinion to grapple with the First Amendment implications of a federal commodity marketing program. In *U.S. v. Frame*, 885 F.2d 1119, 1136 (3d Cir. 1989), the court drew the following comparison:

"In comparison with the broad constitutional incursions arising from agency and union shop agreements and countenanced in *Hanson, Street*, and *Abood*, the Beef Promotion Act's interference with first amendment rights appears slight. The Cattlemen's Board is authorized only to develop a campaign to promote the product that the defendant himself has chosen to market. Thus, the Cattlemen's Board is authorized only to engage in commercial speech on behalf of beef producers. Unlike the union, the Board will not engage in activities that necessarily implicate a broad range of ideological, moral, religious, economic, and political interests, such as negotiation of wage increases, medical benefits, and limitations on the right to strike."

Moreover, unlike a union, which is not a government agency and which therefore has wide latitude to engage in a variety of expressive actions to which a dissenter

might object,³⁸ a marketing program, as a government agency, has only such power as it is given by statute.³⁹ In the union shop situation one can expect there to be constant challenges to whether a particular union activity is "chargeable" to dissenters as well as to the faithful, and procedures must be in place for prompt adjudication. *Teachers v. Hudson*, 475 U.S. 292 (1986).

A marketing program, by contrast, is not rife with possibility for disputes over what can or cannot be charged to an objecting producer. Because of the limited charter of a government-created marketing program, there is not likely to be any margin at all between what is chargeable to the objecting producer and what is *ultra vires*. For example, when the California commission formed to promote table grapes sought to file an unfair labor practice with California's Agricultural Labor Relations Board, the court denied it the right to do so based upon its limited authorization. *United Farm Workers of America v. Agricultural Labor Relations Bd.*, 41 Cal.App.4th 303, 319 (1995). The court, relying on the rule that as a state agency the Table Grape Commission has only such powers as the law has affirmatively conferred on it, read the Commission's authorizing statute strictly. Using a strict reading, it ruled that the Commission's express

³⁸ "We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Abood*, *supra*, at 335 (footnote omitted).

³⁹ See, e.g., *Railway Labor Executives' Assn. v. National Mediation Bd.*, 29 F.3d 655, 666, n. 6 (D.C. Cir. 1994).

authorization to litigate must be interpreted to be limited solely to the purpose of collecting assessments. With such narrow limitations on the activities of a marketing program, there appears to be no room for the program to engage in activities which it is authorized to conduct, but which are not chargeable to an objecting producer.

C. THE COMMODITY MARKETING PROGRAMS POSE NO THREAT WHATSOEVER TO FREE SPEECH INTERESTS.

The third and final prong of the economic free association test requires that the scheme "not significantly add to the burdening of free speech inherent" in the function for which the collectivized representation is put in place. *Lehnert, supra*, 496 U.S. 507, 519. In regard to this third prong as well as to the second, the commodity marketing programs are more benign than the agency shop arrangements long countenanced by this Court. In fact, in this regard they are totally benign, because they impose no limitation whatsoever on free speech.

In the agency shop arrangement, the represented employee clearly suffers an abridgement of his ability to engage in free expression in that he is not allowed to represent himself in bargaining with his employer over the conditions of his employment.

By contrast, no restriction on speech attends the generic marketing program. Any producer covered by such a program is in no way constrained in conducting any advertising, promotion, or any other communication with any audience of its choosing. Indeed, the AMAA

expressly precludes any restrictions on the producer's right to advertise:

No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

7 U.S.C. § 608c(10)

It should be noted here that the mere assessment of monies does not, as some have claimed and the court below suggested, constitute a constitutionally cognizable infringement on free speech. A passage in *Lathrop v. Donahoe*, 367 U.S. 820 (1961) explains why compelled contribution cannot be used to state a "free speech" claim:

This argument . . . is that the mere exaction of dues money works a Constitutionally cognizable inhibition of speech by reducing the resources otherwise available to a dissident member for the espousal of causes in which he believes. The untenability of such a proposition becomes immediately apparent when it is recognized that this rationale would make every governmental exaction the material of a 'free speech' issue.

367 U.S. at 852 (concurring opinion by Justice Harlan).

Thus, there is no need to weigh whether the commodity marketing programs impinge on free speech interests substantially more than inherent to the function of generic commodity promotion, because they do not impinge on free speech at all.



CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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Dated: July 29, 1996

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
AND BRIEF OF THE AMERICAN FEDERATION OF
LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.3(b) of this Court's Rules, the American Federation of Labor and Congress of Industrial Organization ("AFL-CIO") hereby moves for leave to file a brief *amicus curiae* in the above styled case in support of petitioner. Counsel for petitioner has consented to the filing of said brief, counsel for respondents has not replied to either telephonic or FAXed requests for consent.

INTEREST OF THE *AMICUS CURIAE*

The AFL-CIO is a federation of 75 national and international labor organizations having a total membership

of approximately 13,000,000 working men and women. This case raises a "negative" First Amendment challenge by fruit handlers covered by a government program of market regulation that, *inter alia*, provides for the mandatory payment by the handlers of fees that pay the cost of generic advertisements of the fruits they handle. This case is thus a variation on the line of cases challenging on the same negative First Amendment theory the agency shop fee required under collective bargaining agreements entered into pursuant to the Railway Labor Act and the National Labor Relations Act. Indeed, both the *certiorari* petition and the brief in opposition in this case contain extensive discussions of these authorities.

The AFL-CIO has actively participated in the agency shop cases and seeks to participate in this case to state its views on their meaning and on the proper application of their jurisprudence.

CONCLUSION

For the above stated reasons this motion for leave to file an *amicus curiae* brief in support of petitioner should be granted.

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WILEMAN BROS. & ELLIOTT, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF THE AMERICAN FEDERATION OF
LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") files this brief *amicus curiae* contingent on the granting of the attached motion for leave to file said brief. The AFL-CIO's interest in this matter is set out in that motion.

STATEMENT OF THE CASE

The court of appeals in the decision below invalidated on constitutional grounds certain aspects of the California peach, nectarine and plum marketing orders issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act ("AMAA").

The purpose of the AMAA is to "establish and maintain . . . orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. § 602(1). In furtherance of this purpose, the Secretary is authorized to issue marketing orders regulating, among other things, the quality of the covered commodity and the quantity that may be shipped to market. 58 F.3d at 1372. A series of amendments to the Act expressly provide that marketing orders for nectarines, peaches and plums may authorize "paid advertising." 7 U.S.C. § 608(c)(6)(I). See 68 Stat. 906 (1954) (authorizing marketing and development projects); 76 Stat. 632 (1962) (authorizing paid advertising of cherries); 79 Stat. 1270 (1965) (extending paid advertising authorization to California plums and nectarines); 85 Stat. 340 (extending paid advertising authorization to California peaches). Marketing orders are subject to the notice and comment requirements of the Administrative Procedure Act. *Id.* And, before being adopted by the Secretary, the order must be approved by either two-thirds of the affected producers or by producers who market at least two-thirds of the volume of the covered commodity. *Id.*

Marketing orders are implemented by committees, whose members are selected by the Secretary from among the covered businesses. 58 F.3d at 1372. The committee recommends rules and regulations to the Secretary covering such matters as grading, product development and generic product promotion. *Id.* The proposed rules and regulations become effective when adopted by the Secretary through informal rulemaking, and are subject to modification at any time on the Secretary's initiative or the request of a covered handler for reconsideration. *Id.* at 1372-73.

The expense of administering a marketing order is covered by an assessment imposed on the covered commercial fruit packers and distributors ("handlers") based on the volume of their shipments. 58 F.3d at 1372. The

handlers' assessments cover administration, inspection services, research, advertising and promotion. *Id.* at 1373. The total amount of the assessments is based on an annual budget submitted by the committee and approved by the Secretary. *Id.*

The handler-plaintiffs in this case challenged the peach, nectarine and plum marketing orders on a variety of grounds, most of which were rejected by the courts below. The court of appeals did, however, sustain the handlers' First Amendment challenge to being required to provide financial support for generic advertising campaigns promoting the consumption of these fruits.

The court of appeals began its analysis of the handlers' First Amendment claim by recognizing that the government has a substantial interest in promoting the sales of these fruits. 58 F.3d at 1378. And, the court below also recognized that this interest is "undoubtedly" furthered by the generic advertising campaign since "advertising increases consumption of the product being advertised." *Id.*

The court of appeals held, however, that furthering a substantial government interest is not sufficient to sustain compulsory financial support of product advertising against a First Amendment challenge. To defend this aspect of the marketing order, the court below ruled, the Secretary must prove that "the generic advertising program sells the product more effectively than the 'specific, targeted marketing efforts of individual handlers.'" 58 F.3d at 1378. Having found that the Secretary failed to prove that the government's interest could not have as effectively been carried out by encouraging the handlers to engage in individual advertising, the court below struck down the compulsory financing of generic product advertising as violative of the First Amendment.

SUMMARY OF ARGUMENT

The respondent fruit handlers—who are covered by a general orderly marketing program—claim a negative First Amendment right to abstain from making their required proportionate contribution to the costs of generic advertisements promoting the consumption of the fruits they market. Because advertising is commercial speech, the court of appeals concluded that the fruit handlers' negative First Amendment claim is governed by *Central Hudson Gas & Electric Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980). The court of appeals erred in concluding that the strict standards enunciated in *Central Hudson* for determining the constitutionality of *prohibitions* against truthful commercial advertising apply to a regulatory scheme that *promotes* such advertising. The First Amendment protects commercial speech in the interest of furthering the free flow of information. This same value, which is infringed upon by a complete ban of truthful advertising, is advanced by requiring the fruit handlers to financially support truthful generic advertising.

Instead, the fruit handler's claims are like other claims this Court has considered by members of regulated groups urging that their compelled association with expressive activity contemplated by a legislative regulatory scheme violates their constitutional right of non-association. Most closely analogous are claims of this nature that have been brought by employees challenging union expenditures in agency shop cases, and attorneys challenging bar expenditures in unified bar cases.

In these cases the Court has repeatedly rejected these claims so long as the positive group speech activity is contemplated by the regulatory scheme and there is a rational basis for concluding that this positive speech activity serves the overall goals of the regulatory scheme. And, unless the challenged speech activity is political or ideological speech at the core of protected First Amendment

values, the Court has taken a generous view in considering whether the expenditures are rationally related to the overall legislative purpose.

These results are explained by the fact that an asserted right not to be compelled to speak contracts the range of communication which it is the primary purpose of the First Amendment to protect. That being so, the Court has been careful to limit the reach of the negative speech doctrine, particularly in the context of economic and social regulation, to assure that the doctrine serves its constitutional function—to protect claims of conscience and the autonomy of the individual—without trenching on the government's general authority to regulate commerce or on the positive First Amendment right of free speech.

Because none of the interests protected by the negative speech doctrine are implicated by the fruit handlers' claims here, and because a claim that a regulated party has a broad constitutional right to opt out of the affirmative portion of an overall system for regulating a facet of the economy threatens as well important economic and social programs, the decision below should be reversed.

ARGUMENT

1. In this case the Court is being asked by business entities covered by a government marketing regulation program to endorse a negative First Amendment right to opt out of the required funding of part of that program. The respondent fruit handlers object to the aspect of the program that requires them to pay for generic advertising of the fruit they handle. Because advertising is a form of speech, the handlers claim that their desire not to fund the ads rises to the level of a First Amendment right not to be compelled to speak. And, because advertising is a form of *commercial* speech, the handlers assert that their First Amendment claim should be resolved by application of this Court's *Central Hudson* test, and that the required funding of ads fails that test.

As we now show, this argument—adopted by the court of appeals—is wrong in each of its particulars as well as in its conclusion.

The “negative” First Amendment right the handlers invoke in this commercial context is not comparable in substance or in force to the “positive” First Amendment right to truthfully advertise evaluated in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980), and its progeny. The court of appeals' supposition that in the commercial context every positive First Amendment speech right generates an equal and opposite negative First Amendment speech right has no basis in reason or law.

Instead, the handlers' claims are similar to claims that have been made by members of other regulated groups who assert a First Amendment right to opt out of commonly funded group activities authorized by the regulatory statute in question. These attenuated First Amendment claims have been uniformly rejected by this Court on a showing that the challenged activity is (a) contemplated by and (b) rationally related to the governmental

purposes of the underlying regulatory program. Precisely because the claim here is of the same kind as those claims, it should be rejected for the same reasons on the same showing.

2. At the outset, we think it plain that in mechanically reaching the conclusion that the *Central Hudson* analysis applies to every form of regulation touching upon commercial speech, the court below committed the error—identified by this Court—of “concluding that *all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression.” 44 *Liquormart, Inc. v. Rhode Island*, — U.S. —, 116 S. Ct. 1495, 1507 (1996) (emphasis in original).

The 44 *Liquormart* Court pointed out that *Central Hudson* “identified the serious First Amendment concerns that attend blanket advertising prohibitions that do not protect consumers from commercial harms,” and that *Central Hudson* held that such complete bans on truthful advertising must be reviewed with “special care.” 116 S. Ct. at 1508, quoting *Central Hudson*, 447 U.S. at 566 n.9. And, 44 *Liquormart* adds that “speech prohibitions of this type rarely survive constitutional review” under the *Central Hudson* standards. 116 S. Ct. at 1508.

Central Hudson's heightened standard of review is not a mere happenstance but rather a legal standard deeply rooted in substantive First Amendment concerns. First of all, “complete speech bans . . . are particularly dangerous because they all but foreclose alternative means of disseminating certain information.” 44 *Liquormart*, 116 S. Ct. at 1507. And, “special concerns arise from ‘regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy,’” because “[i]n those circumstances, ‘a ban on speech could screen from public view the underlying governmental policy.’” *Id.* at 1506-07, quoting *Central Hudson*, 447 U.S. at 566

n.9. Thus, "commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy." 44 *Liquormart*, 116 S. Ct. at 1508, citing *Central Hudson*, 447 U.S. at 575 (Blackmun, J., concurring).

Equally to the point, the justifications normally advanced for applying a more relaxed standard of review to the regulation of commercial speech do not apply to a complete ban on truthful advertising. As a general matter, "the greater 'objectivity' of commercial speech justifies affording the State more freedom to distinguish false commercial advertisements from true ones, and . . . the greater 'hardiness' of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation." 44 *Liquormart*, 116 S. Ct. at 1506 (citations omitted). By contrast,

Regulations that suppress the truth are no less troubling because they target objectively verifiable information, nor are they less effective because they aim at durable messages. As a result, neither the "greater objectivity" nor the "greater hardiness" of truthful, nonmisleading commercial speech justifies reviewing its complete suppression with added deference. [44 *Liquormart*, 116 S. Ct. at 1508.]

None of the concerns animating and explaining the *Central Hudson* rule are even remotely implicated in the requirement that the fruit handlers covered by a marketing order financially support the generic product advertising aspect of that program. To the contrary, the generic advertising component of the marketing orders furthers "the disclosure of beneficial consumer information." 44 *Liquormart*, 116 S. Ct. at 1507. See *Central Hudson*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising.").

Where "the purpose of [the challenged] regulation is consistent with the reasons for according constitutional

protection to commercial speech" that purpose "justifies less than strict review." 44 *Liquormart*, 116 S. Ct. at 1507 (emphasis supplied). The court of appeals committed fatal error in proceeding from the opposite premise.

3. (a) Our showing that *Central Hudson* does not control here suffices to clear away an obstacle to the proper evaluation of the handlers' negative First Amendment claim, but does not suffice to show what that proper evaluation entails. It is helpful in starting on the latter task to outline the challenged regulation and the nature of respondents' challenge to that regulation.

The Agricultural Marketing Agreement Act regulates what would otherwise be an unrestricted market in the covered agricultural products to assure "orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. § 602(1). As part of that overall program for rationalizing the production and sale of these commodities, the covered producers are required to financially support regulatory programs that encourage the consumption of the covered commodity, including generic advertising. See, pp. 2-3, *supra*.

The court of appeals found that the required funding of the ads here violated the fruit handlers' First Amendment rights because the handlers "disagree[d]" with the messages of two of the ads, because the ads allegedly helped the handlers' competitors more than the ads helped them, and because the handlers believed that "they can better spend their marketing money on their own" ads. 58 F.3d at 1377.

(b) This is not the first occasion this Court has considered like claims. In a wide variety of settings, the legislature has regulated the terms of commercial and professional interactions and compelled the regulated parties to act in certain ways. Time and again the Court has thereupon been asked to consider claims by the regulated actors that the government compulsion violates a nega-

tive First Amendment right *not* to associate or *not* to speak.

Thus, property owners who hold their property open to the public have claimed that a law requiring them to allow speakers of all viewpoints to speak on their premises violates their right not to be compelled to speak. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Lawyers required to disclose certain information in their advertising have challenged the requirement on similar negative speech grounds. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). By the same token, cable television companies have challenged the law requiring them to carry the signals of local broadcast television stations as a violation of the cable companies' right not to speak. *Turner Broadcasting System, Inc. v. F.C.C.*, — U.S. —, 114 S. Ct. 2445 (1994). And, employees required to associate as a result of a governmentally-sanctioned bargaining system that mandates the selection of an exclusive bargaining representative have claimed that the compelled funding of the representative violates their right of non-association. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Finally, claims like these employee claims have been made by members of unified state bar associations challenging the compelled payment of bar dues. *Keller v. State Bar of California*, 496 U.S. 1 (1990).

In each of these settings, members of the regulated group have urged that their compelled association with some expressive activity offends them, and that they have a negative First Amendment right to opt out of participation in that speech activity. In each of these settings, too, the Court has rejected these claims, so long as the positive group speech activity is contemplated by the regulatory scheme and there is a rational basis for concluding that the positive speech activity serves the overall goals of that regulatory scheme.

(c) The long line of agency-shop/unified-bar fee cases present the closest analogy to this marketing order case.¹

In both the union/agency-shop and the state-unified-bar fee contexts, the government has "compelled financial support of group activities," *Lathrop*, 367 U.S. at 820, notwithstanding any objection a covered individual might have to such compelled association. In these settings, as here, the legislature has allowed the association to levy on members of the common class—employees in a collective bargaining unit, individuals licensed by the state to practice law—to fund the association's activities. And, in these settings, as here, the legislation is a response to perceived economic or social problems in the unregulated system for providing goods or services.

Hanson, *supra*, which arose out of the Railway Labor Act, is the fountainhead of this jurisprudence.² And, *Hanson's* central holding is that, so long as the required financial support is for group activity germane to the economic or social goals that the legislature sought to advance, the assertion of a negative First Amendment right not to financially associate with the group is without substance. 351 U.S. at 236-238. Indeed, *Hanson* recognizes that

¹ See *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Machinists v. Street*, 367 U.S. 740 (1961); *Lathrop v. Donohue*, 367 U.S. 820 (1961); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

² As indicated above, the Railway Labor Act, in relevant part, allows a union chosen to be the exclusive bargaining representative by the majority of employees in a bargaining unit to negotiate an "agency shop" contractual provision with the employer requiring all members of the bargaining unit to pay a uniform fee to the union to cover the union's costs in acting as an exclusive representative.

given the legislative judgment that such group activity is an integral part of an overall social or economic program and that required financial support is necessary to prevent "free riding" by those whose interests the group activity is designed to advance, such a First Amendment challenge is, in its essence, the kind of challenge to the government's broad power to regulate commerce that the Court has historically denied. *Id.* at 238 ("the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments").

The *Hanson* Court thus rejected the employees' negative First Amendment argument on the ground that "[i]ndustrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained." 351 U.S. at 233. The agency shop law therefore passed constitutional muster because the Congress had the authority to reach the conclusion that the agency shop would promote peaceful labor relations. *Id.* at 235. In the *Hanson* Court's view, the only First Amendment problems that could arise as a result of the operation of the agency shop would be if the money collected was spent on activities that both impinge on First Amendment values and are "for purposes *not* germane to collective bargaining." *Id.* at 235 (emphasis supplied). See also *Street*, 367 U.S. at 768; *Allen*, 373 U.S. at 121; *Ellis*, 466 U.S. at 448.

Abood, the seminal case on public sector collective bargaining, is to the same effect. The Court noted that the compelled funding of a group which takes positions with which one disagrees "might well be thought . . . to interfere in some way with an employee's freedom to associate . . . or to refrain from doing so as he sees fit." 431 U.S. at 222. The Court rejected the negative First Amendment challenge to such compelled association on

the ground that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations. . . ." *Id.*

In so ruling, the *Abood* Court emphasized that when the union is engaged in the collective bargaining function that is at the heart of the government's labor-management relations scheme, its actions are not subject to a valid negative First Amendment challenge regardless of how controversial those actions may be. The Court, for example, observed that the union's attempt to negotiate funding for abortion as part of the employees' medical plan might well offend a fee payor's conscience. But taking and forwarding that bargaining position does not generate any opt-out right. 431 U.S. at 222. "As long as [the union's leaders] act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Id.* at 223.

The Court reached the same conclusion on the same doctrinal basis in the state unified bar cases. *Lathrop* holds that the "compelled financial support of group activities," 367 U.S. at 820, withstands constitutional challenge so long as the legislature "might reasonably believe" that such support serves "a legitimate end of state policy," *id.* at 842 & 843. And *Keller* reaffirms this point as one so clear as to be almost beyond discussion: "It is entirely appropriate that all of the lawyers who derive a benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in [a self-regulation] effort." 496 U.S. at 12.

Looked at in a wider perspective, the union agency shop and state unified bar fee cases are consistent with, and an integral part of, a larger category of cases—those in which the Court "has recognized the strong governmental interest in certain forms of economic regulation, even though

such regulation may have an incidental effect on rights of speech and association." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982). For the Court in accepting in differing contexts the view that protected expression can take many different forms—and is not limited to political speech—has well understood that taken to an extreme, assertions of the negative rights of non-expression and non-association threaten even the most unexceptional rules of law.

That being so, once it has identified a legitimate *non-expressive* governmental purpose, the Court has refused to allow speech claims based solely on the regulation's "incidental effect" on the regulated party to trump that governmental purpose. As the *Claiborne Hardware* Court put it:

The right of business entities to "associate" to suppress competition may be curtailed. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees and consumers to remain free from coerced participation in industrial strife." [458 U.S. at 912 (citations omitted).]

See also *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990) (no First Amendment protection where "the undeniable objective of the[] boycott [i]s an economic advantage for those who agreed to participate").

(d) To say that the government has a broad power consistent with the First Amendment to compel association as part of the governance of the day-to-day social and economic affairs of the society is not to say there are no First Amendment limits to the government's regulatory powers. While the government is free to have and to express its point of view, nevertheless "[i]f a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the con-

stitutional rights of the students denied access to those books." *Board of Education v. Pico*, 457 U.S. 853, 870-871 (1982); see also *id.* at 907 (Rehnquist, J., dissenting) ("I can cheerfully concede . . . this . . . extreme example[]").

Analogous limits apply when the government compels financial support of group activities. The Court first identified those constitutional limits in *Abood*. Contrary to what one would suppose from a reading of respondents' papers, *Abood* does *not* hold that each expenditure made by an entity through the use of exacted fees is subject to a separate, strict scrutiny First Amendment analysis, any more than the Court has ever held that "a local school board . . . need[s] to demonstrate a compelling state interest every time it spends taxpayer's money in ways the taxpayer finds abhorrent." *Abood*, 431 U.S. at 259, n.13. Rather, *Abood* and its progeny demand proof that the challenged speech activity is contemplated by and rationally related to the overall regulatory regime that caused the government to compel the association in the first instance.

The Court has iterated these "germaneness" and "rational basis" requirements in this context in a variety of formulations. Thus, in *Hanson*, in the course of finding no constitutional violation in the collection of an agency fee, the Court also indicated that "[i]f 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." 351 U.S. at 235. And, in *Abood* the Court quoted the above language from *Hanson* and added further that "[a]s long as [union leaders] act to promote the cause which justified bringing the group together, the individual cannot withdraw his support because he disagrees with the group's strategy." 431 U.S. at 223. By the same token, in *Keller*, reviewing challenges to expenditures of a state unified bar, the Court held that "[t]he State Bar may

therefore constitutionally fund activities germane to [the State's interest in regulating the legal profession] . . . It may not, however, in such a manner fund activities of an ideological nature which fall outside those areas of activity." 496 U.S. 14. *See also id* ("the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession").

And, in each of these cases, the Court also made it plain, albeit once again through a variety of locutions, that for the objector to make out a negative First Amendment claim he must also demonstrate that the complained-of compulsion is something over and above—something qualitatively different than—the compulsion inherent in the government's decision to require group association in the first instance. Thus, for example, as *Lehnert* explains, the Court in the Railway Labor Act agency-shop cases "limited its inquiry to whether the expenses at issue 'involve[d] additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest.'" *Lehnert*, 500 U.S. at 518, quoting *Ellis*, 466 U.S. at 456.

Reviewing these varying formulations, the *Lehnert* Court concluded that objectors may be compelled to contribute to the funding of a group activity so long as the activity is determined to

- (1) be "germane" to [the entity's statutory mission];
- (2) be justified by the government's vital policy interest . . . and [by the interest in] avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of [the compelled funding scheme]. [*Lehnert*, 500 U.S. at 519; *see also Keller*, 496 U.S. at 13-15.]

(e) The Court, moreover, following the general approach to construing regulatory statutes, has taken a

generous view in considering whether the challenged group expenditures are within the legislature's contemplation, and in considering whether those expenditures are rationally related to the legislature's regulatory purposes.

In *Ellis*, the Court gave short shrift, for example, to challenges to union social activities on the ground that the Congress was not "inclined to scrutinize the minor incidental expenses incurred by the union in running its operations." 466 U.S. at 450. While acknowledging that the objectors made out a negative First Amendment claim in form, the Court found the claim to be without substance.

[W]e perceive little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself. . . . The very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds. "The furtherance of the common cause leaves some leeway for the leadership of the group." [*Id.* at 456-457 (citation omitted)].

And, in *Lehnert*, the Court rejected the objector's claim that there has to be some "direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit," finding that requiring "so close a connection" would be inconsistent with the constitutional test. 500 U.S. at 522-523.

On the other hand, where the challenged activity trenches on core First Amendment values, the Court has demanded a closer fit. In particular, in both the agency shop and the unified bar contexts, the Court has struck down compelled funding of expenditures for the group's political or ideological activity, where it was not clearly established that these activities form a necessary part of the group's governmentally-sanctioned purpose. As such, the test insures that the group is not using the free rider rationale

"as a cover for forcing ideological conformity." *Hanson*, 351 U.S. at 238.

See, e.g., *Abood*, 431 U.S. at 220 (striking down compelled funding "for political and ideological purposes unrelated to collective bargaining," because such funding compelled employees "to associate for the purpose of advancing [political] beliefs and ideas"); *id.* at 235-236 (if the group is to "spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties [under the statutory scheme], . . . such expenditures [must] be financed from charges, dues, or assessments paid by [those] who do not object to advancing those ideas and who are not coerced into doing so against their will"); *Keller*, 496 U.S. at 13-14 (because "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services[,] [t]he State Bar may . . . constitutionally fund activities germane to those goals out of the mandatory dues of all members[,] [but] [i]t may not . . . in such manner fund activities of an ideological nature which fall outside of those areas of activity."); *id.* at 15 ("those activities having political or ideological coloration which are not reasonably related to the advancement of such goals").

4. The agency shop and unified bar cases' negative First Amendment rights rulings follow logically from general free speech and free association principles.

(a) The two recognized purposes of the First Amendment are: (1) "'to secure the widest possible dissemination of information from diverse and antagonistic sources' [so as] 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'" (*New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)); and (2) to assure "[t]he individual's interest in self-expression" (*First National Bank v. Bellotti*, 435 U.S. 765, 777 n.12 (1978)).

A right to communicate free of government *limitations* advances both of these purposes. In contrast, a supposed "right" *not* to communicate at all in the context provided by government economic and social regulation, such as the marketing legislation here, is divorced from—and in tension with—the "marketplace of ideas" purpose of the First Amendment. An economic actor who refuses to associate with others for the purposes of funding communications germane to that program is quite obviously not enhancing—but rather contracting—the range of communication which it is a primary purpose of the First Amendment to promote. An expansive negative First Amendment rights approach, rather than buttressing positive First Amendment rights, cuts into those rights.

(b) It is, therefore, not surprising that the other set of First Amendment values, concerning the preservation of individual integrity, has been the focus of the negative First Amendment rights cases, and must provide the set of values that the fruit handlers rely upon here. In *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), the Court defined the area of protection as "the sphere of intellect and spirit which it is the purpose of First Amendment to preserve from all official control"; and in *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), the Court characterized the protected interest at stake as "the broader concept of 'individual freedom of mind'." See also *Abood*, 431 U.S. at 234-235; compare *Elrod v. Burns*, 427 U.S. 347, 356-357 (1976).

These are hardly self-defining phrases, but the evolving case law beginning with *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), gives them content. That case raised a compelled speech challenge to a law requiring attorney advertising to contain a notice stating that clients who retain lawyers on a contingent fee basis are required to pay costs. The Court began its analysis by rejecting out-of-hand *Zauderer's* attempt to bring his claim within *Wooley* and *Barnette*:

[T]he interests at stake in this case are not of the same order as those discussed in *Wooley*, [*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974),] and *Barnette*. . . . Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. . . . [D]isclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech. [471 U.S. at 651 (emphasis in original).]

In light of the minimal First Amendment interest involved, the Court "h[e]ld that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 626. In stating this conclusion, moreover, the Court

reject[ed *Zauderer's*] contention that we should subject disclosure requirements to a strict "least restrictive means" analysis. . . . See, e.g., *Central Hudson*[]. Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purpose can be hypothesized. [*Id.* at 652, n.14.]

The *Zauderer* approach is not limited to negative commercial speech claims, but applies more generally to the range of situations in which the claim of a right not to speak bows to a compelled association that is a necessary feature of a broader regulatory program. Thus, in *PruneYard*, the Court, in rejecting the shopping center's negative First Amendment attack on California's law permitting the use of open commercial property for a broad

array of speech activity, noted that "*Wooley* . . . was a case in which the government itself prescribed the message, required it to be displayed openly on appellee's personal property that was used 'as part of his daily life,' and refused to permit him to take any measures to cover up the motto even though the Court found that the display of the motto served no important state interest." 447 U.S. at 87. And, the *PruneYard* Court characterized *Barnette* as a case that "involved the compelled recitation of a message containing an affirmation of belief." 447 U.S. at 88. See also *Board of Education v. Pico*, 457 U.S. at 864 (plurality opinion); *id.*, at 876 (Blackmun, J., concurring); *id.* at 889 (Burger, C.J., dissenting); *id.* at 896-97 (Powell, J., dissenting); *id.* at 909, 915 (Rehnquist, J., dissenting).

In the *Hanson* line of cases, in *PruneYard*, and in *Zauderer*, of course, the claimant is *not* closely and personally involved in communicating the message, is *not* likely to be identified with the message, *can* expressly disavow the message, and *is* free to communicate his or her own message on the same subject. Where all this is true the Court has recognized that the government's regulatory program cannot be said to work a meaningful incursion on the objector's intimate, personal rights of conscience protected by *Barnette* and *Wooley*.

Indeed, to ascribe to the business entities here, to the lawyer in *Zauderer*, or to the shopping center in *PruneYard*, each acting in a wholly commercial context, an "intellect," a "spirit," or a "mind," is to confuse metaphor with reality. Business enterprises do, to be sure, enjoy the First Amendment's protection against government censorship. *Bellotti, supra*. But the *Bellotti* Court declined the invitation to hold that "corporations have the full measure of rights that individuals enjoy under the First Amendment." 435 U.S. at 779, n.14. Rather, the Court there recognized that

"Corporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as the privilege against self-incrimination . . . or . . . the enjoyment of the right to privacy." *Id.* And, as the various opinions in *Bellotti* discuss at some length, a business corporation's First Amendment rights derive from "the inherent worth of the [corporation's] speech in terms of its capacity for information," *id.* at 777, and *not* from "[t]he individual's interest in self-expression . . . a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge," *id.* at 777 n.12.

The sum of the foregoing is thus: in a setting involving government regulation of commercial or professional activity the Court has refused to extend the right not to associate to the point at which it prohibits the government from requiring regulated parties to fund activities—including expressive activities—that further the regulation's overall economic and social purposes.³

(c) That statement of the law, we believe, takes full cognizance of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), where the Court invalidated a right-of-reply statute that required any newspaper that assailed a political candidate's character to print the candidate's reply in equal space and prominence. As the Court explained in *Turner Broadcasting System, Inc. v. F.C.C.*, — U.S. —, 114 S. Ct. 2445 (1994)—even apart from whatever distinctions exist between media corporations and other types of businesses—*Tornillo* does *not* rest on the newspaper's asserted negative right of non-speech, but on the newspaper's *positive right to speak* and on the need to assure that government regulation does not penalize or otherwise chill that right:

³ Indeed, for the reasons stated above, the Court has never accepted the proposition that business entities have any purely negative speech rights at all.

Because the right of access at issue in *Tornillo* was triggered only when a newspaper elected to print matter critical of political candidates, it "exact[ed] a penalty on the basis of content," . . . [and] would deter newspapers from speaking in unfavorable terms about political candidates. . . . Moreover, . . . the law induced the newspaper to respond to the candidates' replies when it might have preferred to remain silent. [*Turner Broadcasting*, 114 S. Ct. at 2465 (quoting *Tornillo*, 418 U.S. at 275).]

And, the access regulations at issue in *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1 (1986), were struck down for similar reasons. Once again the Court refused to accept the proposition that business entities have any negative right of non-speech. Instead, the Court determined that a law requiring a state utility to distribute an editorial newsletter published by a consumer group critical of the utility's rate-making practices would require the utility "to respond to arguments and allegations made by the [group] in its messages to [the utility's] customers." *Id.* at 16. It was that governmentally-dictated "forced response" that the Court concluded was "antithetical to the free discussion the First Amendment seeks to foster." *Id.*

Indeed, *Turner Broadcasting*, *supra*, in addition to explaining the theory and the limits of *Tornillo*, underlines those limits in its holding that cable operators have no First Amendment right to decline to "transmit speech not of their own choosing." 114 S. Ct. at 2646.

The *Turner Broadcasting* Court explained that the "must-carry" provisions at issue in that case "are not activated by any particular message spoken by cable operators and thus exact no . . . penalty," are not designed in any way to "counterbalance the message of the cable operators," and do not "force cable operators to alter their own messages to respond to the broadcast program-

ming they are required to carry.” 114 S. Ct. at 2465. Moreover, like the lawful compelled access at issue in *PruneYard*, *supra*, the compelled message “would ‘not likely be identified with those of the owner.’” 114 S. Ct. at 2466, quoting *PruneYard*, 447 U.S. at 87. Finally, “no aspect of the must-carry provisions would cause a cable operator . . . to conclude that ‘the safe course is to avoid controversy.’” 114 S. Ct. at 2466, quoting *Tornillo*, 418 U.S. at 257.

Turner Broadcasting, then, is at one with the *Hanson* line of cases, and with *Zauderer* and *PruneYard*. As the *Turner Broadcasting* Court emphasized in the strongest terms, a regulated business’ claim of a constitutional right not to speak is, at its core, inconsistent with the paramount purposes of the First Amendment:

The First Amendment’s command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict . . . the free flow of information and ideas. [114 S. Ct. at 2466.]

5. The court of appeals here, applying *Central Hudson*, struck down the required funding of generic product advertising on the hypothesis that a “more narrowly tailored” opt-out regime is “an obvious alternative to the mandatory collectively-financed advertising program.” 58 F.3d at 1380. No plausible reading of the relevant First Amendment case law, and no plausible understanding of the principles that animate that case law, support that approach. What the Court said in dismissing a virtually identical argument in *Zauderer* is fully applicable here:

Because the First Amendment interests implicated by [the negative speech claim] are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purpose can be hypothesized. [471 U.S. at 652, n.14.]

Turning from the court of appeals’ doctrinal rationale to the fruit handlers’ specific complaints to funding generic product advertisements, it is not disputed that the generic ads are “germane” to the government’s regulation of this market, and it is not disputed that the generic ads are rationally related to the overall purposes of the program. That being so, claims that regulated parties “disagree” with the message of the ads, 58 F.3d at 1377, or that “they can better spend their marketing money on their own” ads, *id.*, simply do not rise to the level of a cognizable First Amendment claim.

It is very much to the point in that regard that the handlers’ claims raise do *not* any of the political or ideological concerns that led the Court in the union agency shop and state unified bar cases to closely scrutinize claims that compelled partisan political expenditures were part of the legislative design under review. To compare the objector’s claims of conscience in those cases—or the claims of conscience of the citizens in *Barnette* and *Wooley*—to a fruit handler’s claim here that he found one of the ads in question contained “subliminal sexual messages,” 58 F.3d at 1377, n.6, is to trivialize the “right of conscience” as defined by this Court and to do so in a way that threatens important economic and social programs as well as positive speech values.

Implicitly acknowledging the weakness of their negative speech claim, the fruit handlers assert that their “ability to engage in protected commercial speech is severely diminished” by the marketing orders, “due to the restrictions placed on respondents’ budgets by being forced to contribute to the ‘generic’ message.” *Opp. to Pet.* 12 & 13. But this objection proves far too much. The claim that a government-mandated financial obligation diminishes the regulated class’ resources, and hence its financial capacity to speak, applies to any and all government required expenditures, and has nothing whatsoever to do with the nature of the required expenditure.

Rejecting the same argument in the agency shop context, the Ninth Circuit itself observed that "we seriously doubt that this states a First Amendment injury at all. . . . Any other conclusion would turn every tax refund suit—indeed every monetary claim against an entity acting under color of law—into a First Amendment case." *Grunwald v. San Bernardino School Dist.*, 994 F.2d 1370, 1374-1375 (9th Cir.), *cert. denied*, 114 S. Ct. 439 (1973). Money that the growers pay to support the regulatory aspects of the marketing orders is also unavailable for the growers' own advertising, but they do not pretend that this "infringement" on their ability to engage in advertising makes out a First Amendment claim. The growers' promotion of their own sales, "inspired as it is by the profit motive," is undoubtedly hardy enough to survive whatever "chilling effect" results from being required to financially support the part of the overall orderly marketing program that promotes the sale of nectarines, peaches and plums generally. *44 Liquormart*, 116 S. Ct. at 1506. While *Buckley v. Valeo*, 424 U.S. 1 (1976), teaches that money can at times be speech, it remains the case that money can also be just money, and that its collection can be devoid of First Amendment difficulties.⁴

⁴ It is, of course, true that an individual may object to the fact that through association, ideas with which the individual disagrees ultimately might be magnified in volume and importance. But at least where, as here, the individual remains entirely free to add his own voice to the dialogue, and to associate with others to do so, that objection rings hollow. Indeed, in *Regan v. Taxpayers Without Representation*, 461 U.S. 540 (1983), this Court necessarily rejected the notion that when the government grants a limited, solely financial advantage to one type of speech activity, that grant constitutes such a fundamental distortion of the balance of the public dialogue as to violate the First Amendment. The Court did so by rejecting the proposition that a group not similarly favored has a right to end a government subsidy to another group for lobbying purposes. In that regard, *Regan* stand on the strongest doctrinal footing. Any other conclusion would make unconstitutional the entire spectrum of governmental speech activity and of

CONCLUSION

For the above-stated reasons, the decision below should be reversed.

Respectfully submitted,

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governmental support for communications by private individuals. As the Court observed in reaffirming *Regan* in *Rust v. Sullivan*, 500 U.S. 173, 194 (1991), "[w]ithin far broader limits than petitioners are willing to concede, when the government appropriates public funds to establish a program it is entitled to define the limits of that program." The marketplace distortion argument is particularly suspect where, as here, the purpose and effect of governmental action is "not to abridge, restrict or censor speech but rather . . . to facilitate an enlarged public discussion" and therefore to "further[], not abridge[], pertinent First Amendment values." *Buckley v. Valeo*, 424 U.S. at 92; *see also Storer v. Brown*, 415 U.S. 724 (1974). In short, as this Court has held, the Establishment Clause of the First Amendment pertains only to religion, and not to speech generally. *Buckley v. Valeo*, 421 U.S. at 92.

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No. 95-1184

Supreme Court, U.S.

FILED

AUG 14 1996

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In the
Supreme Court of the United States
October Term, 1995

DANIEL R. GLICKMAN,
SECRETARY OF AGRICULTURE,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF RESPONDENTS**

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QUESTIONS PRESENTED FOR REVIEW

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities.

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**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF RESPONDENTS**

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of respondents Wileman Brothers and Elliott, Inc., *et al.* Written permission from all parties to file this brief has been lodged with the Clerk of the Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating nationally in litigation matters

affecting the public interest. PLF has over 25,000 supporters nationwide. PLF policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such action only when PLF's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief amicus curiae in this matter. PLF has a long-standing interest in cases which involve issues of compelled speech and association. For example, PLF attorneys were the attorneys of record in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Smith v. Regents of University of California*, 4 Cal. 4th 843, cert. denied, 510 U.S. ___, 114 S. Ct. 181 (1993). PLF also participated as amicus curiae in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), and *Rosenberger v. Rector and Visitors of the University of Virginia*, ___ U.S. ___, 115 S. Ct. 2510 (1995).

PLF believes that its public policy perspective and litigation experience in support of First Amendment rights will provide a necessary additional viewpoint on the issues presented in this case.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals, finding that the Secretary's generic advertising program violated the First Amendment, is reported at *Wileman Brothers & Elliot, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995).

STATEMENT OF THE CASE

This case pits California peach and nectarine handlers against certain provisions of the Secretary of Agriculture's

marketing orders which govern the advertising of tree fruits. In 1937, Congress passed the Agriculture Marketing Agreement Act (AMAA or Act). The purpose of the AMAA is "to establish and maintain such orderly marketing conditions for agriculture commodities in interstate commerce." 7 U.S.C. § 602(1). Under the Act, the Secretary of Agriculture is authorized to establish marketing orders for fruits and vegetables.

Marketing orders are approved by either two-thirds of the producers of the commodity or the producers of two-thirds of the commodity. 7 U.S.C. § 608c(9)(B). The Secretary's orders are then implemented by committees composed of members of the regulated industry. *Id.* at § 608c(7)(C) and § 10. In 1958, the Secretary promulgated Marketing Order 916, regulating nectarines grown in California. The following year, the Secretary published Marketing Order 917, regulating peaches, pears, and plums grown in California.

Respondents (handlers) grow, pack, and market nectarines and peaches. *Wileman Brothers & Elliot, Inc. v. Espy*, 58 F.3d at 1373. The handlers' business is regulated by the marketing orders governing peaches and nectarines. In addition to establishing quality control standards, these orders charge fruit handlers an assessment which is used to finance a generic advertising program. The assessment imposed on individual fruit handlers is based on the volume of fruit they ship. *Wileman Brothers*, 58 F.3d at 1372. In 1987, handlers began withholding the charged assessments they were required to pay under the marketing orders (approximately 53% of which was used for advertising). *Id.* at 1373-74 n.3. The handlers then challenged the marketing orders by filing a petition with the United States Department of Agriculture (USDA), claiming that the assessments used to fund the advertising programs violated their First

Amendment right to be free from compelled speech.¹ The handlers objected to financing messages with which they disagreed and claimed that their ability to advertise on their own was curtailed by the forced assessments. *Id.* at 1377. The Administrative Law Judge (ALJ) rejected the handlers' First Amendment challenge to the marketing orders. In an unpublished decision, the United States District Court for the Eastern District of California agreed with the ALJ on the First Amendment issues, granted the Secretary's motion for summary judgment, and ordered the handlers to pay \$3.1 million in past assessments. On appeal, the Ninth Circuit held that the advertising programs violated the handlers' First Amendment rights. *Wileman Brothers*, 58 F.3d at 1380.

After determining that the challenged assessment imposed a restriction on commercial speech, the Ninth Circuit applied the three-pronged test articulated by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). *Wileman Brothers*, 58 F.3d at 1378. Although agreeing with the Secretary that the promotion of fruit was a substantial governmental interest, the court held that the marketing orders failed to satisfy the second and third prongs of the *Central Hudson* test. *Id.* at 1378-79. The court held that the generic advertising program did not "directly advance" the governmental interest, because there was no evidence to demonstrate that the government promoted the fruit more effectively than would have the individual handlers. *Id.* at 1379. The court also held that the advertising program failed the "narrowly tailored" prong of the *Central Hudson* test, because it did not permit the handlers to opt out of the

¹ In addition to the First Amendment challenge, the handlers claimed that the orders violated their due process rights, the AMAA, and the Administrative Procedure Act.

program to conduct their own advertising. *Id.* at 1379-80. Thus, the court held that "forced contributions to pay for generic advertising programs contravene the First Amendment rights of the handlers." *Id.* at 1380.

The Secretary of Agriculture petitioned this Court for a Writ of Certiorari. On June 3, 1996, this Court granted the writ. *Glickman v. Wileman Brothers & Elliot, Inc.*, ___ U.S. ___, 116 S. Ct. 1875 (1996).

SUMMARY OF ARGUMENT

The generic advertising program should be strictly scrutinized. Commercial speech has traditionally been accorded a lesser degree of constitutional protection than other forms of protected speech. The reason for this disparate treatment is the State's interest in protecting consumers from the "commercial harms" of misleading speech or incomplete information. In this case, however, the government is not regulating commercial speech in an attempt to protect the populous from lies and half-truths. Instead, the government is regulating commercial speech in order to extol the many virtues of California peaches and nectarines. Because the government is not attempting to prevent commercial harms, the traditional reasons for according commercial speech less protection are not present, hence, the Secretary's generic advertising program should be evaluated under a stricter standard of review.

The marketing orders challenged in this case infringe on the handlers' freedom not to associate. Unlike its commercial speech jurisprudence, this Court has declined to distinguish between commercial and noncommercial associational rights. Rather, regulations that encroach upon a commercial entity's rights of free association are subject to strict judicial scrutiny.

The advertising program is unconstitutional because it is not the least restrictive means of achieving a compelling state interest. The importance of maintaining a strong national agricultural economy is not debatable. However, the Secretary has failed to show that government advertising is better equipped to achieve this goal than advertising conducted by individual farmers. The obligation to subsidize the government's advertising efforts diminishes the individual handlers' financial ability to pursue their own promotional endeavors. Not only does the Secretary's advertising scheme infringe upon the handlers' rights to disseminate the message of their choice, it adversely affects the First Amendment rights of the consumers by limiting the commercial messages and information available to them.

Finally, the Secretary's goal of endorsing tree fruits could be accomplished through means less restrictive of First Amendment rights. First, the government could implement an advertising program which rewards handlers' individual advertising efforts by reducing the amount of the assessment imposed. Second, the Secretary could simply make the advertising program voluntary.

ARGUMENT

I

THE PEACH AND NECTARINE MARKETING ORDERS ARE UNCONSTITUTIONAL BECAUSE THEY ARE NOT THE LEAST RESTRICTIVE MEANS TO ACHIEVE A COMPELLING STATE INTEREST

The marketing orders at issue in this case implicate two fundamental rights protected by the First Amendment to the

United States Constitution:² the rights to be free from compelled speech and association. The importance of these principles has long been recognized. Thomas Jefferson explained that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." I. Brant, *James Madison: The Nationalist*, at 354 (1948), *quoted in Keller v. State Bar*, 496 U.S. at 10, and *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 n.31 (1977). An early observer of our democratic system also noted that the "most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them." A. de Tocqueville, *Democracy in America*, 196 (P. Bradely, ed. 1945). de Tocqueville's careful scrutiny of our constitutional system led him to conclude that the right of association was "almost as inalienable in its nature as the right of personal liberty." *Id.*

Implicit in the First Amendment's guarantees of freedom of speech and association is the freedom to refrain

² The First Amendment provides that "Congress shall make no law respecting an establishment of religion, of prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

from engaging in these activities. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (state cannot compel students to salute the flag); *Wooley v. Maynard*, 430 U.S. 705 (1977) (state cannot compel citizens to display "Live Free or Die" slogan on their license-plates). Moreover, it has been recognized that the government cannot compel a commercial entity to disseminate messages with which it disagrees. *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 17 (1986) (plurality opinion) (striking down utility commission rule requiring a private corporation to distribute a consumer organization's message in its billing envelopes and reaffirming that "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say"). This Court has also acknowledged that the freedom of association protects the right not to associate. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

In light of the historical importance of these rights, and for the reasons that follow, this Court should strictly scrutinize the Secretary's generic advertising program.

A. In Evaluating the Secretary's Marketing Orders This Court Should Apply Strict Judicial Scrutiny

The challenged peach and nectarine marketing orders regulate commercial speech in two ways. First, they force fruit handlers to lend financial support to a message with

which they disagree.³ Second, by forcing the handlers to subsidize the generic advertising program, the marketing orders infringe upon the handlers' financial ability to conduct their own advertising.⁴ Upon characterizing the speech involved in this case as "commercial," there arises a temptation to simply funnel the marketing orders through the familiar three prongs of the *Central Hudson* test to evaluate their constitutionality. However, merely labeling the marketing orders as "commercial speech" does not end the quest for the proper standard of constitutional review; rather it is only the first step. Just last term, three members of this Court explained:

As our review of the case law reveals, Rhode Island errs in concluding that *all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional

³ Specifically, the handlers objected to the advertised messages proclaiming that "red is better" and that "all California fruit is the same." Also, the handlers objected to an assessment financed chart which listed the "Red Jim" nectarine. The rights to this particular variety of nectarine are owned by a member of the Nectarine Administrative Committee. *Wileman Bros.*, 58 F.3d at 1377 n.6.

⁴ Some of the handlers were required to contribute in excess of \$50,000 a year to underwrite the generic advertising program. The Ninth Circuit reached the unremarkable conclusion that "[t]his is a significant sum of money that could have been used in [the handlers'] own marketing efforts." *Wileman*, 58 F.3d at 1379.

analysis that should apply to decisions to suppress them.

44 Liquormart, Inc. v. Rhode Island, ___ U.S. ___, 116 S. Ct. 1495, 1507 (1996) (plurality opinion) (emphasis added) (citing *Rubin v. Coors Brewing Co.*, 514 U.S. ___, 115 S. Ct. 1585, 1587-88 (1995) (Stevens, J., concurring in judgment)). Instead of automatically applying the *Central Hudson* framework to all regulations of speech which propose a commercial transaction, a reviewing court must first determine whether the regulation is designed to prevent misleading speech or protect consumers from the dangers of incomplete information. "It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.'" *44 Liquormart*, 116 U.S. at 1508 (quoting, in part, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993); see also *Rubin v. Coors Brewing Co.*, 115 S. Ct. at 1594 (Stevens, J., concurring) (commercial speech doctrine not applicable because government regulation "neither prevents misleading speech nor protects consumers from the dangers of incomplete information"); *Discovery Network, Inc.*, 113 S. Ct. at 1518 (Blackmun, J., concurring) ("[T]here is no reason to treat truthful commercial speech as a class that is less 'valuable' than noncommercial speech.")).

In this case, the Secretary is not attempting to prevent misleading speech or protect consumers from the dangers associated with incomplete commercial information. The Secretary makes no claim--nor is there any evidence to support such a claim--that left to their own devices the handlers would resort to lies, half-truths, or trickery in order to hawk their produce to unsuspecting consumers. Rather, the Secretary attempts to justify its regulation of commercial speech by claiming "that the government has a substantial

interest in enhancing returns to peach and nectarine growers." *Wileman*, 58 F.3d at 1378. Because the regulations at issue in this case were not implemented in order to protect consumers from "commercial harms," the traditional reasons for applying the *Central Hudson* standard of review are not present. Absent the usual justifications for treating commercial speech differently, this Court should evaluate the Secretary's generic advertising program under a more rigorous standard of review than that generally applied to "commercial speech." *44 Liquormart*, 116 S. Ct. at 1508 (holding that a speech ban designed to serve an end unrelated to consumer protection must be reviewed with "special care").

Concluding that the *Central Hudson*, mid-level scrutiny standard of review is inappropriate in a case such as this begs the obvious question; what is the proper standard of review? The answer to this question is found in this Court's freedom of association jurisprudence.

In addition to commercial speech, this case also implicates the freedom of association. The handlers' free speech rights should not be analyzed in isolation, rather they should be evaluated in conjunction with their rights to free association. As with the freedom of speech, the freedom of association "plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. at 623. This Court has held that compelled financial contributions can violate the First Amendment's freedom of association. *Abood v. Detroit Board of Education*, 431 U.S. at 234 (holding that union could not use dissenting members' fees for political or ideological causes with which the member disagrees); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 n.9 (1986) (holding that individuals cannot be forced to subsidize union's political speech and emphasizing "that freedom of association, as well as freedom of

expression supported [this] conclusion." (Citing *Abood*, 431 U.S. at 233.)

In *Roberts*, this Court addressed a commercial organization's freedom of association rights. "[T]he Jaycees ... is first and foremost, an organization that, at both the national and local levels, promotes and practices the art of solicitation and management." *Roberts*, 468 U.S. at 639 (O'Connor, J., concurring). In holding that governmental interference with the Jaycees' associational rights could only be justified by a compelling state interest which could not be achieved through less restrictive means, this Court did not delineate between commercial and noncommercial associational rights.⁵ Rather, the Court adopted a single standard--strict scrutiny--to evaluate regulations which infringe upon the right to associate, regardless of the "commercial" nature of the association. Based on this Court's holding in *Roberts*, lower courts have held that generic advertising programs that infringe upon associational rights must be measured against strict scrutiny. *United States v. Frame*, 885 F.2d 1119, 1134 (3d Cir. 1989) (Beef Promotion Act subject to strict scrutiny); see also *California Kiwifruit Commission v. Moss*, 96 Daily Journal D.A.R. 5783, 5787 (May 22, 1996) (Opinion of Nicholson, J.)

⁵ *Roberts* did, however, distinguish between "intimate association" and "expressive association." This Court defined intimate association as those relationships "that attend the creation and sustenance of a family" and other "highly personal" relationships. Expressive association, on the other hand, refers to the right of individuals to associate in order to engage "in those activities protected by the First Amendment--speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618. This case involves the latter category.

(kiwifruit assessment subject to strict scrutiny).⁶ Based on *Roberts*, this Court should assess the handlers' freedom of association challenges under the most exacting level of scrutiny.

B. The Marketing Orders Are Not The Least Restrictive Means of Achieving a Compelling Governmental Interest

In the court below, the Secretary claimed that the government has an interest "in enhancing returns to peach and nectarine growers." *Wileman Bros.*, 58 F.3d at 1378. While no one would seriously dispute the importance of achieving and maintaining a strong agricultural economy, the Secretary's generic advertising program is necessarily premised on the somewhat arrogant assumption that the government is better able to advertise than are the individual fruit handlers. Not only is this rationale paternalistic, it is also antithetical to our notion of a free-market economy. This Court has repeatedly recognized that "the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system." *Rubin*, 115 S. Ct. at 1589 (quoting, in part,

⁶ The Ninth Circuit found it unnecessary to decide on the proper standard of review to be applied in cases challenging the constitutional propriety of agricultural marketing orders. "The *Frame* majority applied this test [strict scrutiny] to the Beef Promotion Act. However, because we hold the almond marketing program unconstitutional even under the less stringent *Central Hudson* standard, we do not decide which of these two should apply." *Cal-Almond, Inc. v. United States Department of Agriculture*, 14 F.3d 429, 436 (9th Cir. 1993) (citations omitted).

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976)). *Virginia Board of Pharmacy*, the case that first acknowledged that commercial speech is entitled to the protection of the First Amendment, explained that economic realities can make commercial speech more important than political speech. "[A] particular consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia Board of Pharmacy*, 425 U.S. at 763.

"Generic" advertising of peaches and nectarines is also a misnomer. Although a member of the rose family, a peach by any other name sometimes does not smell as sweet. There are more than 230 varieties of peaches and nectarines marketed in California differing in taste, smell, and color. Many are proprietary varieties grown by a single grower. (Indeed, one of the varieties of nectarines advertised by the "generic" advertising program at issue here was proprietary to one grower who also happened to sit on the marketing board.) There are even cross varieties that combine peaches and nectarines in a single fruit. To advertise, as does the Secretary with the handlers' money, that all California peaches are the same is both untrue and destructive of the efforts of individual efforts of growers and handlers to develop specific varieties of peaches and nectarines to fulfill the demands of the market place.

The Secretary's advertising program actually has the effect of stifling the free flow of commercial information. As the Ninth Circuit recognized, if the individual handlers were not required to subsidize the Secretary's advertising program, they would have more capital to spend on their own individual marketing efforts. *Wileman Brothers*, 58 F.3d at 1379. At least one of the respondents, Gerawan

Farming Inc., claimed that it would advertise its own label. It is reasonable to assume that other handlers would provide consumers with information regarding the merits of their individual product. Another respondent, Kash, Inc., explained that it found in-store promotions to be an effective means of advertising, and that it would devote more resources to that method if it did not have to support the Secretary's advertising program. *Id.* The Ninth Circuit also came to the indisputable conclusion that "[e]ven if individual handlers were to utilize the same media as used by the generic advertising program, their efforts would undoubtedly differ in the details." *Id.* Simply put, absent the obligation to support the Secretary's advertising campaign financially, the handlers would diversify both the medium and the message of their promotions.

Giving the handlers the financial freedom to increase their own advertising efforts would also serve the First Amendment rights of the consumers.⁷ Instead of receiving the simplistic, and by definition "generic," message that "California nectarines are the juiciest," consumers would be provided with information about the many varieties of California peaches and nectarines. Increased information about the products advertised would allow the consumer to make a more informed decision about which product to purchase.

The commercial market-place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight

⁷ It has long been recognized that the First Amendment protects not only the right of the advertiser, but also the right of the consumer to receive information. *Virginia State Board of Pharmacy*, 425 U.S. at 757.

worth. But the general rule is that the speaker and the audience, not the government assess the value of the information presented.

44 *Liquormart*, 116 S. Ct. at 1508 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). In this case, the government moved beyond merely assessing the information and cast itself in the role of the commercial speaker. By requiring individual fruit handlers to contribute their limited advertising dollars to the funding of this program, the government has necessarily limited the ideas and information that would otherwise be found in the commercial marketplace. Not only does this infringe on the speakers' rights to disseminate their own messages, it also diminishes the amount and variety of information that would otherwise be available to the audience.

Finally, the court below concluded there was no evidence demonstrating that the government's collective advertising was more effective than advertising undertaken by the individual handlers. The First Amendment rights implicated by this case are by no means absolute, however, at the very least, the guarantee of free speech should protect the right of individual business persons to choose the method of advertising best suited to the promotion of their product.

Evidence of less restrictive alternatives to the current peach and nectarine orders is found in similar agricultural marketing orders. For example, the almond marketing order challenged in *Cal-Almond, Inc.*, provided the almond handlers with the option of seeking a credit for advertising efforts they conducted on their own. 7 C.F.R. § 981.41(c)

(1993). 14 F.3d at 433.⁸ The peach and nectarine marketing orders, however, have no option which rewards--or even recognizes--the spirit of individualized entrepreneurialism.

There also exists another obvious alternative to the mandatory marketing orders. Instead of extorting assessments from unwilling handlers--in amounts that may exceed \$50,000 for a single handler--the Secretary could implement a voluntary advertising program. According to the Secretary, a voluntary, more narrowly tailored program would allow nonpaying handlers to reap the benefits sown by their paying counterparts. *Wileman Brothers*, 58 F.3d at 1380. This assertion lacks a grounding in reality. Although 33 states commercially produce peaches and 28 states handle nectarines, California handlers alone are subject to the compelled assessments. As the Ninth Circuit explained: "If the Secretary is concerned about free-riders, there are already plenty of them in other states." *Wileman*, 58 F.3d at 1380. Without some evidence to show that California fruit handlers are unique in their refusal to pay their own way, the Secretary's "free-rider" justification for compelling assessments simply makes no sense. Because the Secretary's generic advertising program fails to survive strict scrutiny, it should be declared unconstitutional by this Court.

CONCLUSION

Twenty years ago this Court recognized the preeminent role that commercial speech plays in a free market economy:

⁸ Despite this option, the Ninth Circuit concluded that the almond marketing order was not "narrowly tailored" because it failed to recognize certain types of advertising, such as the promotion of a product which also included "competing nuts." *Cal-Almond*, 14 F.3d at 440.

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Virginia Board of Pharmacy, 425 U.S. at 765. By diminishing the handlers' financial ability to advertise, the Secretary's generic program is impeding the free flow of commercial information. In the absence of some evidence to demonstrate that the federal government is better equipped to promote agricultural products than are the growers, distributors, and handlers of those products there is no reason--much less a compelling one--to sustain the Secretary's generic advertising program.

DATED: August, 1996.

Respectfully submitted,

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Supreme Court, U. S.

FILED

SEP 27 1996

No. 95-1184

CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995**

**DANIEL R. GLICKMAN,
Secretary of Agriculture,**

Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., et al.,

Respondents.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AND ALLIED EDUCATIONAL FOUNDATION AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities, where the handlers object to the expressive content of those programs.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-1184

DANIEL R. GLICKMAN, Secretary of Agriculture,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION
AND ALLIED EDUCATIONAL FOUNDATION AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting free speech rights, both of individuals and of the business community. To that end, WLF has appeared before this Court as well as other federal and state courts in cases raising important First

Amendment issues. See, e.g., *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994); *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, ___ F.3d ___, No. 95-50160 (5th Cir., Sept. 12, 1996).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici strongly object to government efforts to compel individuals or corporations to speak against their will. *Amici* are concerned that the First Amendment standards proposed by Petitioner in this case are so lax as to permit compelled financial support of private speech based on a mere showing that the compelled support would rationally serve government policy. *Amici* believe it important for the Court to make clear that First Amendment protections against compelled speech are not so easily trammelled.

Amici submit this brief in support of Respondents with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statements set forth in the briefs of Respondents.

In brief, Respondents -- a group of handlers who grow and ship California tree fruits -- are challenging federal programs that requires them to contribute financially to advertising campaigns whose content they find objectionable.

The challenged programs involve California peaches, California plums, and California nectarines. Pursuant to "marketing orders" issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (the "AMAA"), 7 U.S.C. § 601 *et seq.*, handlers (*i.e.*, shippers) of those three fruits have been required to provide funding for generic advertising campaigns for the fruits. The campaigns are designed and carried out by committees, whose members are appointed by the Secretary from among California fruit growers and handlers, all of whom compete with Respondents.¹

Respondents object that the challenged programs are misleading and undermine their own marketing efforts. In particular, Respondents object to advertisements indicating that fruits are fungible; they contend that their produce is superior to other fruit on the market, and the advertisements thus undermine their efforts to market their produce based on its superior quality. Other objections include evidence that advertisements favor varieties of fruits handled by members of the committees, at the expense of other varieties.

Respondents contend that their First Amendment rights are violated when they are forced to fund advertisements

¹ The marketing order for California nectarines has provided for industry-funded advertising since 1966. A second marketing order, covering both peaches and plums, provided for industry-funded advertising for plums from 1971 to 1991 and has provided for industry-funded advertising for peaches since 1976.

which they find objectionable and which force them to spend money in order to counter what they view as misleading information disseminated by the generic advertising programs. While the Secretary contends that all fruit growers and handlers benefit from the compulsory advertising campaigns, Respondents assert that they could more successfully market their products if permitted to promote them as they see fit.

In 1987 and 1988, Respondent Wileman Bros. & Elliott, Inc. ("Wileman Bros.") filed administrative petitions pursuant to 7 U.S.C. § 608c(15)(A), challenging various aspects of the marketing orders for California peaches, plums, and nectarines. Wileman Bros. subsequently began withholding the assessments it was required to pay under the marketing orders. An administrative law judge (ALJ) issued lengthy decisions siding with Wileman Bros. (and the other Respondents, who had subsequently joined the petitions); but the Department of Agriculture Judicial Officer (JO) in September 1991 reversed those decisions and upheld the marketing orders in all respects. Petition Appendix ("Pet. App.") 6a-7a.

Respondents filed this action in federal district court in California, seeking review of the JO's decision pursuant to 7 U.S.C. § 608c(15)(B). The action was consolidated with the Secretary's suits against Respondents to enforce compliance with the challenged marketing orders. Pet. App. 7a.

In January 1993, the district court granted summary judgment to the Secretary and ordered Respondents to pay past-due assessments. Pet. App. 40a-100a. With respect to the First Amendment issues before this Court, the district court purported to adopt the Third Circuit's strict standard of

review in compelled speech cases.² The district court held that the Secretary had met those standards, finding that the challenged advertising programs were justified by a "compelling government interest" in avoiding instability in agricultural markets and that alternatives to mandatory programs would not be "significantly less restrictive" of First Amendment rights -- because the current program entails only a "slight" interference with such rights. *Id.*

In a June 1995 decision, the U.S. Court of Appeals for the Ninth Circuit reversed with respect to First Amendment issues. Pet. App. 1a-35a. Applying this Court's test for analyzing restrictions on commercial speech (set forth in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980)), the Ninth Circuit held that the peaches/plums/nectarines advertising programs flunked the final two prongs of the *Central Hudson* test: the program was found neither to "directly advance" the government's asserted interests, nor to be "narrowly tailored" to achieving those interests. Pet. App. 17a-21a.

In June 1996, the Court agreed to review the First Amendment aspects of the case. Although the Secretary asserted in the court of appeals that the mandatory advertising

² The Third Circuit has held that compelled financial support of an agricultural commodity advertising program can pass First Amendment scrutiny "only if the government can demonstrate that [the program] was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms." See *United States v. Frame*, 885 F.2d 1119, 1134 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). The Third Circuit derived its standards by examining its own and this Court's compelled speech precedents, including *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Wooley v. Maynard*, 430 U.S. 705 (1977).

programs should be reviewed under the standards established in *Central Hudson* for commercial speech restrictions, the Secretary now contends that the *Abood* line of compelled speech cases is controlling.

SUMMARY OF ARGUMENT

The First Amendment protects not only freedom of speech, but also the freedom not to speak. Those restrictions on the government's power to compel speech extend fully to government efforts to compel financial support of private organizations' speech. Yet, in his zeal to defend government efforts to compel Respondents to fund the advertising campaigns at issue here, the Secretary asks the Court to adopt a compelled-financial-support test that amounts to little more than rational-basis review.

Particularly troublesome is the Secretary's suggestion that a more relaxed standard of review should apply because the speech for which he seeks compelled support happens to be commercial speech (i.e., speech that "proposes a commercial transaction"). It makes no sense for the level of review given to compelled speech to turn on whether the speech can be termed "commercial." After all, it is the very government entity that is applying the compulsion that determines whether funds are to be used for commercial or noncommercial speech. Moreover, the rationale for permitting a somewhat relaxed standard of review in cases involving *regulation* of commercial speech is wholly inapplicable in the context of *compelled* speech.

The advertising programs at issue in this case, when subjected to an appropriately strict standard of First Amendment review, cannot withstand constitutional scrutiny.

The Secretary has failed to articulate any vital policy interest served by the programs, nor has he even attempted to demonstrate that the programs are narrowly tailored in order to minimize interference with First Amendment rights.

ARGUMENT

I. THIS CASE IS GOVERNED BY THE *BARNETTE* AND *ABOOD* LINE OF DECISIONS, WHICH REQUIRE VERY CLOSE SCRUTINY OF ANY GOVERNMENT EFFORT TO COMPEL SPEECH

Having argued in the Ninth Circuit that his compelled advertising programs should be judged under the *Central Hudson* test, the Secretary now asserts that the correct rule of decision derives from *Abood* and other cases in which the Court has considered government efforts to coerce support for expressive activities from unwilling speakers.

Amici agree with the Secretary that the Court ought to look for guidance from the *Abood* line of decisions. However, *amici* believe that the Secretary has mischaracterized that line of decisions. Far from providing a rubber stamp for compelled speech that is "germane" to any government "regulatory objective" deemed "important" (Petitioner's Brief at 15), *Abood* and its progeny impose an exacting measure of First Amendment scrutiny on any government effort to compel speech by individuals or business entities.

Starting with its decision in *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943), which struck down a law requiring school children to recite the Pledge of Allegiance regardless of their objections to doing so, the Court has made clear that the First Amendment protects

not only freedom of speech, but also the freedom not to speak. See also *Wooley v. Maynard*, 430 U.S. 705, 713-715 (1977)(New Hampshire may not require objecting motorists to display the state motto, "Live Free or Die," on automobile license plates).

The Court has repeatedly held that constitutional restrictions on compelled speech extend to compelled financial support of private organizations' speech. Thus, First Amendment rights are implicated by compelled support of, e.g., a state bar association (*Keller v. State Bar of California*, 496 U.S. 1 (1990)), or a labor union by a public-sector employee (*Abood*, 431 U.S. at 222). The Court has never suggested that a different constitutional analysis is required depending on whether the compulsion takes the form of government efforts to force individuals to utter specific words (as in *Barnette*) or the form of monetary exactions in order to finance speech by non-government entities (as in *Keller* and *Abood*).

Under *Abood* and its progeny, government efforts to compel financial support of the speech of private organizations is subject to exacting First Amendment scrutiny. First, the government must demonstrate that the compelled financial support serves some extremely important government interest. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 506, 519 (1991)(plurality).³ Second, the funded activity must be

³ The Court has used a variety of phrases to describe the showing required of the government in demonstrating the importance of its challenged policy interest. In *Lehnert*, the Court stated that the government must show that its policy interest is "vital." *Id.* Other cases have required that the government demonstrate that its interest is "compelling." See, e.g., *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 n. 11 (1986). *Abood* itself (continued...)

"germane" to the government interest relied upon. *Id.* Third, the compulsory funding scheme must be narrowly tailored. *Chicago Teachers Union*, 475 U.S. at 303 & n.11; *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 19 (1986)(plurality). That is, it must not "significantly add to the burdening of free speech that is inherent in the allowance" of any amount of compulsory funding of expressive activity. *Lehnert*, 500 U.S. at 519 (plurality).

The Secretary's portrayal of *Abood* as an endorsement of compelled speech is simply inaccurate. *Abood* involved an "agency shop" arrangement between a public school board and the union representing teachers, whereby teachers who declined to join the union were required to pay the union an "agency fee" — a fee precisely equal to the dues paid by union members. The Court held that such compelled support of a union "ha[d] an impact upon [nonunion members'] First Amendment interests" (*Abood*, 431 U.S. at 222) and was impermissible except to the extent that the compelled support directly served some very important government interest. *Id.* at 234-236. The Court ruled that one such interest was the maintenance of labor peace — which Congress had determined was directly advanced by creation of a system under which

³(...continued)

was silent on the issue, instead relying without discussion on previous case law which established that "the important contribution of the union shop to the system of labor relations established by Congress" was sufficient to justify requiring employees to finance the collective bargaining activities of a union serving as the employees' exclusive bargaining representative. In any event, the precise verbal formulation of the government's burden is not of crucial significance; the important point is that the Court has imposed an extremely heavy burden on governments seeking to justify their efforts to compel speech.

employee interests would be served by an exclusive bargaining agent. *Id.* at 220-224. Since under that system, a union designated as an exclusive bargaining agent was required to represent all employees within the bargaining unit (even nonmember employees), the Court determined that the exclusive bargaining agent system would be undermined by the "free rider" problem -- the financial incentive that employees have "to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees" -- unless nonmembers could be required to pay for such benefits. *Id.* at 221-222.

The Court nonetheless made clear that the First Amendment prohibits a union from charging nonmembers for expressive activities *not* directly related to the union's collective bargaining functions. *Id.* at 232-237. The Court determined that nonmembers may not be required to share in the costs of the union's political contributions or of expressing the union's views on issues unrelated to its duty as exclusive bargaining representative (*id.* at 234), but it left for future cases the drawing of a precise line between union activities that constitute collective bargaining activities and those that do not. *Id.* at 236-237.⁴

Keller applied *Abood's* compelled speech analysis in the context of mandatory dues paid to a state bar association,

⁴ That line-drawing process has been the subject of numerous subsequent federal court suits. See, e.g., *Lehnert v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984). Although the courts on occasion have had difficulty in drawing the line with precision, reported decisions have repeatedly emphasized that the *only* government interest that justifies impingement on the First Amendment rights of nonunion employees is the interest in maintaining a system of exclusive bargaining agents. See, e.g., *Lehnert*, 500 U.S. at 520-521.

finding that such dues impinge on lawyers' First Amendment rights. *Keller*, 496 U.S. at 13. The Court noted that it had previously held, in *Lathrop v. Donohue*, 367 U.S. 820 (1960), that states have a very strong interest in regulating the legal profession and improving the quality of legal services, and that in order to avoid the "free rider" problem, "[i]t is entirely appropriate" that lawyers share in the cost of such regulation -- which directly benefits lawyers by, among other things, excluding nonlawyers from the practice of law. *Id.* at 12. The Court made clear, however, that the First Amendment prohibits a state from requiring lawyers to fund expressive bar association activities not related to the bar association's function as a regulator of the legal profession. *Id.* at 15-16. As in *Abood*, the Court declined to draw a bright line between "related" activities and "unrelated" activities. *Id.* As examples of unrelated expressive activity that lawyers could not be compelled to fund, the Court listed "endorse[ment] or advance[ment] [of] a gun control or nuclear weapons freeze initiative," two of the activities in which the State Bar of California had engaged. *Id.* at 16.

It is important to note that the principles articulated in *Abood* and *Keller* extend to compelled funding of *any* speech or expressive activity, not simply to "political" speech.⁵ For example, *Abood* provided a lengthy list of traditional union expressive activities which could have "an impact upon the[] First Amendment rights" of dissenting employees, only a few of which activities could be deemed "political" as that term is commonly used:

⁵ The Secretary appears to concede that point. See Petitioner's Brief at 22-23 ("unions may utilize the dues of dissenting employees for expressive activities, so long as those activities are germane to the unions' statutory role under the labor laws").

[An employee's] moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating a limit on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines to limit inflation, or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied.

Abood, 431 U.S. at 222. See also *id.* at 231 ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters -- to take a nonexhaustive list of labels -- is not entitled to full First Amendment protections."); *Lehnert*, 500 U.S. at 521-522 (plurality) ("First Amendment protection is in no way limited to controversial topics or emotionally charged issues."). As the Court made clear in *Wooley*, the First Amendment protects "the right to refrain from speaking *at all*," not simply the right to refrain from speaking on political or controversial subjects. *Wooley*, 430 U.S. at 714 (emphasis added).⁶ Thus, it is no

⁶ Of course, compelled funding of activities with no expressive content does not raise First Amendment concerns. Thus, the Court held in *Ellis* and again in *Lehnert* that "union social activities" were properly chargeable to dissenters (who were free to participate in the activities) because the "communicative content" of the activities was minimal, if any. *Ellis*, 466 U.S. at 456; *Lehnert*, 500 U.S. at 529 (plurality); *id.* at 559-560 (Scalia, J., concurring in the judgment in part and dissenting in part). Accordingly, compelled funding for those considerable portions of the Secretary's marketing order activities that lack expressive content is not vulnerable to First Amendment challenge.

defense to Respondents' First Amendment objections to the advertising programs that those objections are based on aesthetic disagreements regarding the quality of fruit, rather than on hotly debated political differences.

The Secretary's portrayal of the *Barnette/Abood/Keller* line of cases is faulty not simply because of its attempts to minimize a government's burden in demonstrating that the compelled speech serves some extremely important interest. The Secretary also attempts to eliminate all consideration of the "narrow tailoring" requirement.⁷ The Secretary contends that compelled financial support of the expressive activities of private parties should be upheld so long as it is "germane" to some "important regulatory objective." Petitioner's Brief at 15. Thus formulated, the Secretary's test amounts to little more than rational basis review of compelled speech. The Court's compelled speech decisions make clear that government interference with the First Amendment right not to speak is not to be treated so cavalierly.

Under the Secretary's view of compelled speech doctrine, the government would be free to compel school children to recite the Pledge of Allegiance in classrooms. Inculcating a spirit of national unity would appear to qualify as an "important regulatory objective," and compelled recitation of the Pledge of Allegiance is undoubtedly "germane" to that objective. Yet even in the middle of World War II, the Court in *Barnette* rejected a school board's argument that the spirit

⁷ As noted *supra* at 9, *Chicago Teachers Union, Pacific Gas & Electric*, and *Lehnert* all made crystal clear that compelled financial support of the speech of private organizations violates the First Amendment unless it is "narrowly tailored," meaning that the infringement of First Amendment rights is the minimum amount necessary to achieve the government's purpose.

of national unity fostered by recitation of the Pledge of Allegiance should override First Amendment concerns. *Barnette*, 319 U.S. at 640-641. Indeed, the Court has made clear that in the context of protected speech, any difference between compelled speech and compelled silence "is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 796-797 (1988). Just as the Court has been extremely reluctant to permit government regulation of protected speech, so too should it be extremely reluctant to permit the government to compel speech except in the rarest of circumstances. Moreover, *Pacific Gas & Electric* makes clear that corporations enjoy the same First Amendment protections against compelled speech as do individuals. *Pacific Gas & Electric*, 475 U.S. at 16.

We note in passing that the lower courts have uniformly rejected the Secretary's suggestion that the *Barnette/Abood/Keller* line of cases establishes a somewhat more relaxed standard of review than that provided under *Central Hudson* in commercial speech regulation cases. The Third Circuit in *Frame* stated that the *Abood* line of compelled speech decisions provided the rule of decision in a First Amendment challenge to a federal compulsory advertising program for beef. *Frame*, 885 F.2d at 1134. The court said that *Abood* and its progeny employ "a higher standard of scrutiny than employed in cases involving only regulation of commercial speech," such as *Central Hudson*. *Id.* The Ninth Circuit applied the *Central Hudson* test in this case and in *Cal-Almond, Inc. v. U.S. Department of Agriculture*, 14 F.3d 429 (1993) (a First Amendment challenge to a generic almond promotion program), because: (1) it recognized that *Central*

Hudson was a less stringent test; (2) the challenged promotional programs could not survive under either the *Central Hudson* test or the *Barnette/Abood/Keller* test; and thus (3) use of the *Central Hudson* test would obviate any need to decide which of the two tests was applicable. *Cal-Almond*, 14 F.3d at 436 ("[B]ecause we hold the almond marketing program unconstitutional even under the less stringent *Central Hudson* standard, we do not decide which of these two should apply.").

In sum, *amici* agree with the Secretary that the *Abood* line of cases provides the rule of decision in this case. But contrary to the Secretary's suggestions, *Abood* imposes an exacting standard of review on government efforts to compel financial support of private organizations' speech, a standard which (as demonstrated in Part III. *infra*) the Secretary has not come close to meeting.

II. COMPELLED SPEECH IS NOT SUBJECT TO MORE RELAXED REVIEW SIMPLY BECAUSE THE SPEECH TO BE COMPELLED IS COMMERCIAL IN NATURE

Although he concedes that *Abood* provides the rule of decision in this case, the Secretary nonetheless seeks to lessen his evidentiary burden by noting that the speech he is attempting to compel in this case is commercial in nature. The Secretary argues:

In this case, the challenged marketing orders authorize only commercial speech designed to promote greater consumption of the products that respondents themselves offer for sale. See Pet. App. 90a; *United States v. Frame*, 885 F.2d [at 1136]. Because of commercial speech's

"subordinate position in the scale of First Amendment values," the government has broader latitude in this setting.

Petitioner's Brief at 33-34.

The Secretary's reliance on case law concerning government attempts to *suppress* commercial speech is wholly misplaced and would lead to a dangerous erosion in First Amendment protections against compelled speech. The Court's rationale for permitting a somewhat relaxed standard of review in cases involving regulation of commercial speech⁸ is wholly inapplicable in the context of compelled speech.

In its recent decision striking down Rhode Island's ban on liquor price advertising, the Court reiterated the two justifications for affording the government more leeway in its regulation of commercial speech: (1) "the greater 'objectivity' of commercial speech justifies affording the State more freedom to distinguish false advertisements from true ones"; and (2) "the greater 'hardiness' of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation." *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1506 (1996). Neither of those two

⁸ The Court has defined "commercial speech" as speech that "propose[s] a commercial transaction." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 473 (1989). Fully protected speech is not transformed into commercial speech simply because it is uttered by a corporation (*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)) or that the speaker is motivated by a desire for a profit. As the Court explained in *Fox*, "Some of our most valued forms of fully protected speech are uttered for a profit." *Fox*, 492 U.S. at 482. The Court has, for example, afforded full First Amendment protection to the contents of a paid advertisement soliciting money. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

justifications has any relevance to government efforts to *compel* speech.

First, government compulsion of speech cannot logically further the government's interest in preventing the dissemination of false advertising. The only speech being propounded is the speech that the government is attempting to compel. In the absence of that compulsion, there would be no speech and thus no cause to worry about false advertising.

Second, there is no basis for concluding that compelled commercial speech is any harder than other forms of compelled speech. All forms of compelled speech are extremely "hardy" since they are backed by the force of law. Nor is there any reason to suppose that compelled noncommercial speech will have any more chilling effect on voluntary speech than would compelled commercial speech; a chilling effect on voluntary speech is simply not one of the dangers of compelled speech, whether commercial or noncommercial.

Moreover, it makes no sense for the level of review given to compelled speech to turn on whether the speech can be termed "commercial." After all, it is the very government entity that is applying the compulsion that determines whether funds are to be used for commercial speech or noncommercial speech. Why should government entities who compel payments into a fund used to finance private speech be entitled to a lower level of First Amendment scrutiny simply because the funds ultimately are used to promote a product rather than, say, to encourage regular medical checkups?

Under the Secretary's theory, a lower level of First Amendment review would be applied to a government program requiring Amish citizens to contribute to a fund for

advertising General Motors cars than to a program requiring those same citizens to contribute to a nonprofit health-awareness program. The Amish citizens might object to being forced to promote a means of transportation which they shun, but (under the government's theory) the compelled speech on behalf of General Motors would be subjected to minimal First Amendment review because an advertisement promoting the sale of General Motors cars clearly qualifies as commercial speech. It is no answer to respond that the Amish citizens' objections are entitled to greater weight because they are deeply felt or in some sense "ideological," because such a response would enmesh the Court in the impossible task of assigning comparative weights to objections to compelled commercial speech. For example, would a Ford Motor Co. executive (who believes that Ford cars are superior to General Motors cars) have less basis than Amish citizens for objecting to being compelled to fund General Motors advertisements?

Amici submit that the Court lacks any objective method of weighing the strength of objections of those compelled to fund commercial speech. Respondents object to being compelled to fund the generic peaches/plums/nectarines advertising programs because they sincerely believe that the programs convey an erroneous message (that all brands of peaches, plums, or nectarines are the same). There can be no principled basis for distinguishing that objection from any other sincerely held "ideological" objection. Indeed, *Abood* cautioned against *any* attempt by courts to discern the basis for objections to compelled speech:

[T]he employees here indicated in their pleadings that they opposed ideological expenditures of *any* sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with

the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure.

Abood, 431 U.S. at 241. Unless the Court is prepared to rule that *all* compelled commercial speech is entitled to a lesser degree of First Amendment protection no matter how strongly felt the objections may be, there can be no basis for the Secretary's claim that the commercial nature of the speech he is attempting to compel in this case lessens Respondents' First Amendment protections.

Nor may the Secretary rely on commercial speech case law that upholds disclaimer requirements designed to eliminate potential deception in existing advertisements. In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court upheld an Ohio rule requiring lawyers whose advertisements are potentially misleading to include warnings or disclaimers in the advertisements in order to "dissipate the possibility of consumer confusion or deception." *Zauderer*, 471 U.S. at 651. But the Court has endorsed compelled disclaimer requirements *only* for the purpose of counteracting potentially misleading messages included in the advertisement; the Court has *never* imposed such requirements on individuals or businesses who have not initiated the advertisements on their own. As the Court explained in *Pacific Gas & Electric*:

The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Nothing in *Zauderer* suggests, however, that the State is equally free to require corporations to carry the messages

of third parties, where the messages themselves are biased against or expressly contrary to the corporation's views.

Pacific Gas & Electric, 475 U.S. at 15 n.12. See also *Riley*, 487 U.S. at 803 (Scalia, J., concurring in part and concurring in judgment)("[T]he state can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made.").

In sum, nothing in the Court's past treatment of government efforts to *regulate* commercial speech lends support to the Secretary's argument that the government should be afforded greater latitude when compelling funding of commercial speech than when compelling funding of noncommercial speech.

III. THE COMPELLED ADVERTISING PROGRAMS CANNOT BE SUSTAINED UNDER THE TEST ESTABLISHED BY *ABOOD* FOR COMPELLED FINANCIAL SUPPORT

A. The Government Has No Vital Policy Interest in Running Generic Advertising Campaigns

The Secretary's arguments in support of the mandatory California peaches/plum/nectarines advertising programs fall far short of satisfying the burden imposed by *Abood* and its progeny on governments seeking to compel financial support of private organizations' speech.

In particular, the Secretary has failed to articulate anything approaching a "vital" policy interest in maintaining the disputed advertising programs. We note that thousands of

commodities are successfully marketed in this country without the benefit of federal government-imposed advertising programs (e.g., bananas and Georgia peaches). It is difficult to understand how the advertising campaigns can be deemed "vital" when the evidence plainly indicates that such campaigns are not necessary to permit American farmers to survive. Even accepting for the sake of argument the Secretary's claims that compelled generic advertising campaigns lead to increased product sales, effectuating marginal increases in sales within a healthy industry is hardly on a par with the policy interests cited in *Abood* (preservation of labor peace by strengthening the collective bargaining process) as the bases for assessment of agency fees on dissenting employees.

The Court noted in *Abood* that prohibiting the collection of agency fees from dissenting employees -- thereby allowing them to become "free riders" -- could completely undermine the exclusive representation system upon which American labor law is based. *Abood*, 431 U.S. at 223-224. The Court held that Michigan was justified in fearing that if the exclusive representation system were undermined, "confusion and conflict . . . could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." *Id.* at 224. No similar calamity is plausible if the peaches and nectarines advertising programs were ended.

Moreover, *Abood* has been explained in later decisions as based primarily on the recognition of the inequity of permitting "free riders" to refuse to bear their fair share of collective bargaining. As the Court stated in *Ellis*, "Congress' essential justification for authorizing the union shop was the desire to eliminate free riders -- employees in the bargaining

unit on whose behalf the union was obliged to perform its statutory function, but who refused to contribute to the cost thereof." *Ellis*, 466 U.S. at 447. Despite the Secretary's claims to the contrary, no similar "free rider" problem exists in this case.

Respondents are "free riders" only in the sense that they have arguably benefitted from the federal advertising programs to which they object. But any such benefit is only incidental to the programs' professed desire to benefit the industry as a whole; the advertising committees are under no obligation to create advertising that will be of special benefit to Respondents.⁹ In contrast, a union is *required* to provide particularized benefits for *each* employee within its bargaining unit, regardless whether the employee is one who objects to paying money to the union. For example, the union is required to provide fair representation to dissenting employees in any grievance proceeding they may initiate with the employer. Thus, Respondents are simply not the type of "free riders" that *Abood* had in mind. As Justice Scalia explained in *Lehnert*:

[W]here the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of "free-riding" nonmembers; private speech often furthers the interests of nonspeakers, and that alone does not empower the state to compel the speech to be paid for. What is distinctive, however, about the "free

⁹ Indeed, Respondents allege that members of the committees have promoted the interests of their varieties of fruit at the expense of other varieties.

riders" who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry -- indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests. In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others.

Lehnert, 500 U.S. at 556 (Scalia, J., concurring in the judgment in part and dissenting in part). *See also Abood*, 431 U.S. at 222 ("benefits of union representation . . . necessarily accrue to all employees").

Respondents are no more "free riders" than are rival long-distance telephone companies when AT&T encourages consumers to "reach out and touch someone" by placing a long-distance phone call. Those companies undoubtedly benefit from such advertisements, but that benefit is hardly sufficient justification for overriding their First Amendment objections to being compelled to contribute to the costs of the advertisements.

Nor may the Secretary obviate the need for demonstrating a vital policy interest in this case by pointing out that Respondents have "voluntarily chosen" to enter the peach, plum, and nectarine markets. Petitioner's Brief at 34. The Court has routinely rejected arguments that the government may condition citizens' right to participate in routine commercial activities on their willingness to relinquish First Amendment rights. For example, *Wooley* held that New Hampshire could not condition motorists' access to its highways on their relinquishment of First Amendment

objections to displaying the state motto, "Live Free or Die," on their cars. *Wooley*, 430 U.S. at 713-715. Nor does the First Amendment permit a state to condition employment in a government job on public support of a political party; the First Amendment is violated in such cases even though the prospective employee may easily avoid the "compelled" speech by simply refusing to accept the proffered job. *Elrod v. Burns*, 427 U.S. 347 (1976).

In sum, the Secretary has failed to demonstrate a policy interest sufficiently "vital" to justify its infringement of Respondents' First Amendment rights. The interests asserted by the Secretary in support of the peaches/plums/nectarines advertising programs do not begin to approach the level required by *Abood*, *Keller*, *et al.* to permit infringement of First Amendment protections against compelled speech.

B. The Compelled Advertising Programs Are Not Narrowly Tailored to Achieving Any Government Policy Interest

The peaches/plums/nectarines advertising programs are constitutionally defective for the additional reason that they are not narrowly tailored to achieving any of the Secretary's identified policy interests. Indeed, the Secretary's brief fails even to acknowledge the existence of a "narrow tailoring" requirement in compelled speech cases.

While *Abood* is silent on the issue of narrow tailoring,¹⁰ more recent cases have made clear that compelled speech cannot pass constitutional muster unless it is narrowly tailored to serving the government's vital policy interests. *Lehnert*, 500 U.S. at 519 (plurality); *Chicago Teachers Union*, 475 U.S. at 303 & n.11; *Pacific Gas & Electric*, 475 U.S. at 19 (plurality). Even assuming that the Secretary has a "vital" interest in promoting increased California fruit sales, there are numerous methods by which he could do so while infringing on Respondents' First Amendment rights to a far lesser extent.

One such method was noted by the Ninth Circuit. The Secretary's interest in sales promotion could be satisfied by simply requiring each handler to spend not less than a fixed amount on promotional campaigns; the handler would then be free to decide whether to contribute his promotional funds to the current peaches/plums/nectarines advertising campaigns or to develop his own campaign. Pet. App. 20a-21a. By granting each handler a greater say in how his promotional funds would be used, such a system would impose far less of a burden on First Amendment rights while at the same time ensuring that adequate amounts are expended each year on promotional campaigns. Indeed, numerous federal agricultural promotional campaigns -- including the almond promotion program at issue in *Cal-Almond* -- provide handlers with credits for funds they spend on their own promotional

¹⁰ That silence can hardly be viewed as an indication that the *Abood* Court believed that there were no limits on how far a government could go in infringing First Amendment rights so long as all measures enacted were germane to its vital policy interests. Rather, the Court had no occasion to address that issue; it simply determined that some core union functions were properly chargeable to dissenting employees and that other functions not germane to those core functions were not chargeable, and it left more precise line drawing for later cases.

activities; there is no evidence in the record that such programs have proven any less effective in promoting sales than programs without a credit option.

Alternatively, the Secretary's policy interests could be achieved in a more narrowly tailored manner if the advertising programs were funded through general tax revenues. As the Supreme Court explained in *Keller*, 496 U.S. at 10-13, use of general tax revenues to disseminate a particular viewpoint does not raise First Amendment concerns. Thus by definition, an advertising program funded through general tax revenues would be far less restrictive of First Amendment rights than are the current programs -- and therefore the current programs cannot be said to be narrowly tailored to achieving the Secretary's policy interests.¹¹

Speech funded through expenditure of tax revenues -- known as "government speech" -- does not infringe on the First Amendment rights of taxpayers who disagree with the message conveyed, because "[g]overnment officials are expected as part of the democratic process to represent and to espouse the views of a majority of their constituents." *Id.* at 12. Thus, Respondents would have no cause for complaint if a generic advertising program for peaches, plums, and nectarines were funded out of tax revenues. That might even be true if the government imposed a tax on growers and handlers in order to raise sufficient revenue to pay for such a program. However, the Court need not address whether the current programs qualify as "government speech," because the

¹¹ Moreover, given the absence of a "free rider" problem of the type present in *Abood*, there is no basis for contending that taxpayer funding fails to address the Secretary's interests in correcting the inequities arising from the presence of "free riders."

Secretary has explicitly waived reliance on that argument. Petitioner's Brief at 25 n.16.

Nor would there be any merit to a "government speech" argument in this case. The peaches/plums/nectarines advertising programs at issue here are controlled by competitors in the industry, who are responsible for planning and executing the advertising campaigns and determining assessments for handlers. In other forums, the Department of Agriculture -- in an apparent effort to avoid making its commodity promotion programs subject to the Administrative Procedure Act -- has repeatedly disclaimed a desire to exercise any direct control over the programs. See, e.g., K. Clayton, "Issues Facing Domestic Commodity Research and Promotion Programs," at 4-5, in W. Armbruster and J. Lenz (eds.), *Commodity Promotion Policy in a Global Economy* (Farm Foundation 1993). Under similar facts in *Keller*, the Court rejected an argument that speech by the State Bar of California constituted "government speech"; the Court held that an organization such as a state bar -- whose membership and leadership is limited to a small segment of the total population and whose income derives from "dues" rather than from legislative appropriations -- cannot be said to engage in "government speech" exempt from First Amendment protections against compelled speech. *Keller*, 496 U.S. at 11-13.

A third method of achieving the Secretary's policy interests in a more narrowly tailored manner would be to encourage growers and handlers to enter into voluntary cooperative promotional ventures. Voluntary cooperatives have been successfully established for numerous agricultural products. Indeed, since the Secretary's current advertising programs are premised on the theory that such programs are

in the overall best interest of growers and handlers (albeit they do not always recognize their best interests), it stands to reason that increased encouragement of voluntary cooperatives would eventually succeed in increasing the number of such cooperatives.

In sum, the Secretary's peaches/plums/nectarines advertising programs are not narrowly tailored to achieving the Secretary's policy interests. Numerous alternatives to those programs would achieve the Secretary's policy interests while infringing far less on First Amendment rights.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: September 27, 1996

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Supreme Court, U.S.
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No. 95-1184

In The
Supreme Court of the United States
October Term, 1995

DANIEL R. GLICKMAN,
SECRETARY OF AGRICULTURE,

Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE FOR
SUN-MAID GROWERS OF CALIFORNIA
IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities.

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BRIEF AMICUS CURIAE FOR SUN-MAID GROWERS OF CALIFORNIA IN SUPPORT OF RESPONDENTS

Sun-Maid Growers of California hereby submits this brief *amicus curiae* in support of respondents. Pursuant to Rule 37.3(a) of this Court, petitioner and respondents have both consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Sun-Maid Growers of California ("Sun-Maid") is an agricultural marketing cooperative,¹ and the largest single marketer of raisins in the world. Sun-Maid is owned by approximately 1,200 raisin farmers who are members, or equity owners, of the cooperative. Sun-Maid was originally founded in 1912 as the California Associated Raisin Company. The trademark "Sun-Maid," a young woman wearing a red bonnet and holding a tray of freshly-picked grapes, was first created in 1915, and the cooperative changed its name in 1922 to identify more closely with its highly successful brand. The "Sun-Maid" trademark remains one of the world's most identifiable food brands to this day.

¹ Sun-Maid is incorporated under the laws of California, in particular the provisions of CAL. FOOD & AG. CODE §§ 54000 *et seq.*, dealing with agricultural marketing cooperatives. Pursuant to section 7.09 of Sun-Maid's Bylaws and Raisin Marketing Agreement, the cooperative is authorized to act "on behalf of each grower member under any governmental marketing agreement, order, program or plan relating to the marketing of raisins, including the exercise of any right to vote on behalf of each member."

On behalf of its 1,200 farmer members, Sun-Maid presently processes and markets about 30% of the California raisin crop; since California is responsible for 40-45% of world raisin production, Sun-Maid's share of the world crop is approximately 12-15%.²

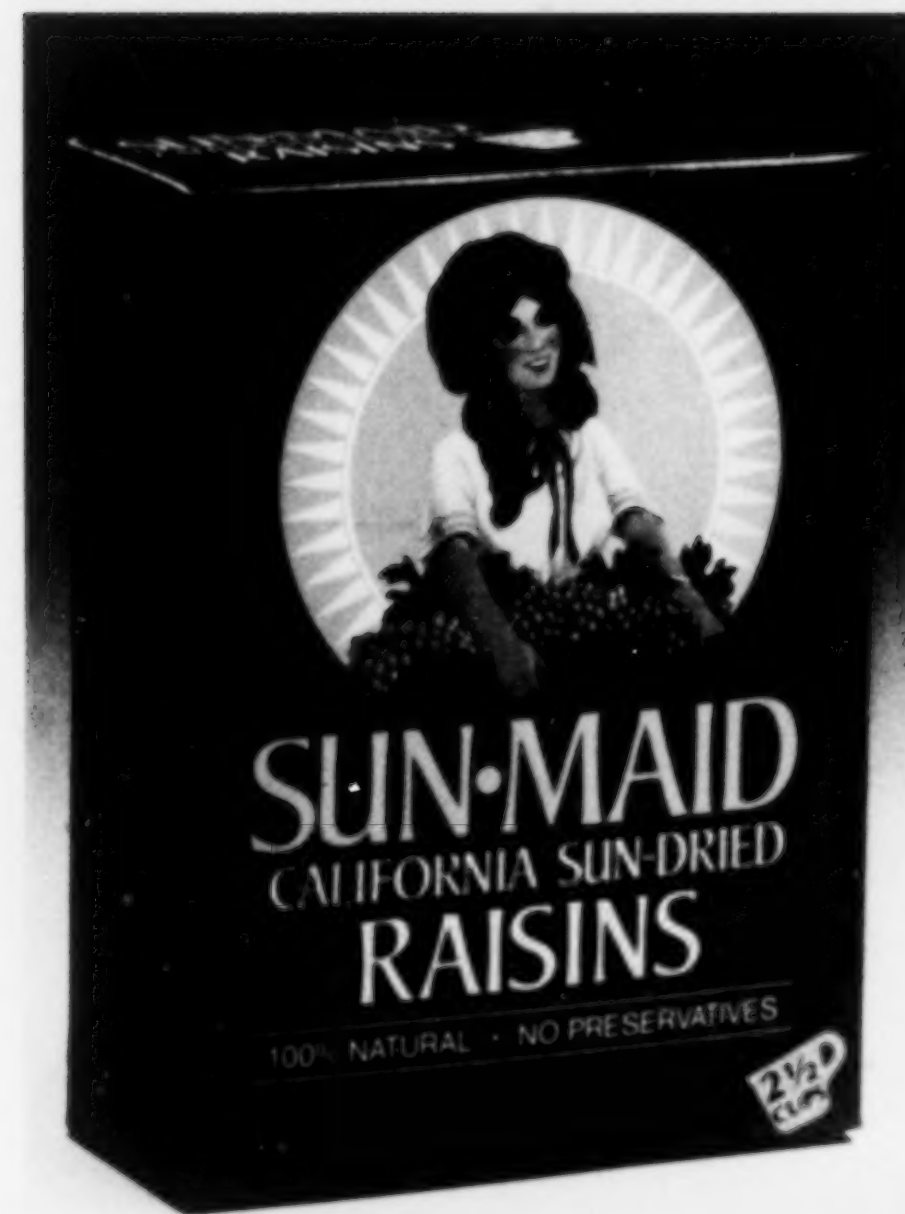
The marketing of California raisins (like the peaches and nectarines at issue in the present case) is regulated under the federal Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601 *et seq.* Under federal law, the Raisin Administrative Committee is financed by assessments against the handlers in the industry, and with the money it receives the committee is authorized, among other things, to provide for marketing and promotion, including paid advertising, designed to promote the marketing of raisins in domestic and foreign markets. 7 C.F.R. § 989.53 (1996). The raisin regulations (unlike the peach and nectarine program) authorize the Raisin Administrative Committee to grant credit to a handler against its assessment for some or all of the handler's own direct expenditures for promotion and advertising. 7 C.F.R. §§ 989.53(b), 989.80 (1996). However, at present the Raisin Administrative Committee is not allowing such credits.

From 1949 to 1994 the California raisin industry was also subject to a state marketing order created pursuant to the California Marketing Act of 1937, CAL. FOOD & AG. CODE §§ 58601 *et seq.* The California Raisin Advisory Board ("CALRAB") was formed to administer the state

² Sun-Maid's share of the world's sun-dried raisin crop is larger - approximately 24%. In 1995 Sun-Maid increased sales to \$194.3 million, up from the previous year's \$186.2 million.



The California Dancing Raisins



The Sun-Maid

marketing order.³ CALRAB was responsible for the "California Dancing Raisins" ads of the 1980s and 1990s.

The "Dancing Raisins" (and CALRAB's other activities) were funded by assessments similar to those under the federal program. In its last crop year (August 1, 1993 through July 31, 1994), CALRAB received an assessment of \$32.50 per ton, from *both* the grower and the processor/marketer, for each ton of raisins received for sale by a handler. Since Sun-Maid's grower-members also bear the cooperative's costs of processing and marketing, this meant that Sun-Maid's members were effectively assessed \$65 per ton. Sun-Maid received a "brand credit" of \$1 for each \$2 it spent in media advertising, but this was capped at about 75% of the processor assessments, so that Sun-Maid received credit for about \$2.1 million against \$5.2 million in total assessments.

Although this state program has now terminated, the federal program continues and there have been repeated discussions of a new state marketing order. Sun-Maid and its farmer members are opposed to mandatory generic advertising programs, and have an interest in insuring that any future federal or state marketing regimes comply with the constitutional rights of Sun-Maid's 1,200 grower-members.

³ To Sun-Maid's knowledge, CALRAB and the state raisin marketing order were created without adherence to the California Administrative Procedure Act and their governing regulations were not codified in the California Administrative Code.

SUMMARY OF ARGUMENT

The large number of briefs filed on both sides of this case speak to its importance, and to the disagreement about the appropriate legal test to be applied here. The parties and other *amici* discuss the applicable legal standards thoroughly. Our *amicus* brief will not belabor that debate. Rather, our purpose here is to provide the Court with a different perspective on two important issues, both of which suggest that the program at issue in this case cannot withstand constitutional scrutiny under *any* of the potentially applicable legal standards.

1. There are serious reasons why a grower or marketer might object to the messages conveyed in so-called "generic advertising." In effect, government-compelled "generic" advertising programs force all members of an entire industry to speak with a single voice, and to be identified with a single message; such programs thus subvert the ability of independent growers and marketers, acting alone or through cooperatives, to associate and deliver their own messages. Such "generic" government-mandated advertising dilutes and obscures a grower's or cooperative's ability to develop its own brand identity and consistent advertising messages. In Sun-Maid's own case, the "generic" advertising has actually functioned to promote the products of Sun-Maid's competitors, even though Sun-Maid was the single largest funder of such advertising. Misuses and anti-competitive effects of so-called "generic advertising" can be seen throughout the agricultural industry.

2. Even if the government does have a permissible interest in requiring growers and sellers to buy more

advertising than they would pay for of their own volition, to avoid "free riders," the burdens of any program on First Amendment rights must be no more significant than necessary. Less burdensome alternatives clearly exist here.

(a) First, cooperatives like Sun-Maid provide a *voluntary* alternative through which growers may gain the advantages of scale without being forced to support messages they oppose. Congress has recognized this in the recently-adopted FAIR Act, which expressly acknowledges the contributions of cooperative advertising to industry promotion efforts. Thus, government-mandated advertising programs should be permissible, if at all, only in industries where voluntary cooperatives are not a possible option.

(b) Second, some mandatory assessment programs already allow credits against the assessment for voluntary branded advertising. As several of the other courts to consider this issue have ruled, the Constitution requires at a bare minimum that such credits be afforded in all cases, allowing any "free rider" concerns to be answered without unnecessary coercion. Since the peach and nectarine programs at issue in the present case allowed no credits at all, they cannot survive constitutional scrutiny under any standard.

ARGUMENT

1. Mandatory so-called "generic advertising" programs improperly force growers and marketers to finance and be associated with messages they do not support, and substantially interfere with their ability to deliver their own messages.

Some of the other courts which have considered this issue, and some of the briefs in this case, have expressed skepticism of the reasons for growers to oppose generic advertising. When the California Court of Appeals recently struck down the state's mandatory assessments to support generic kiwifruit promotion, the dissenting justice remarked, "It is difficult to conceive how *any* kiwifruit grower could claim disagreement with the promotional messages of the Commission." *California Kiwifruit Commission v. Moss*, 45 Cal. App. 4th 769, 794, 53 Cal. Rptr. 2d 138, 154 (3d Dist. 1996) (Raye, J., dissenting), *modified*, 46 Cal. App. 4th 1089c (3d Dist. 1996), *review granted*, 96 Daily Journal D.A.R. 10167 (August 14, 1996). Likewise, the majority in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), found that a cattleman's challenge to the Cattleman's Board had not been presented "in a manner that would allow a reviewing court to reasonably infer a dispute over anything more than mere strategy." *Id.* at 1137. In the present case, petitioner argues that the challenged programs "not only further substantial public purposes, but also further the interests of respondents. . . ." Brief for Petitioner at 17. Why, petitioner implies, can't the growers see that the generic programs are for their own good?

One might counter that the respondents' motives are irrelevant – no one should be forced to pay for speech that one opposes, and to be forced to justify one's opposition may further infringe one's rights. Nevertheless, the answer to this inquiry may be significant for some purposes. Sun-Maid, a major cooperative which is opposed to being compelled to contribute to such mandatory government-administered programs, is in a position to provide this Court with a different perspective on why a substantial grower/marketer might object, in good faith and for compelling reasons, to being forced to subsidize "generic" advertising that is supposedly directed at increasing overall demand but is, in fact, inherently anti-competitive.

Stated simply, the purpose of "generic advertising" is to create a single voice for an entire industry, whether or not the individual members of that industry actually agree. The advertising explicitly represents itself to be created and endorsed by the entire industry, carrying messages of unity among the growers and carrying a "union" identification such as "California Summer Fruits," "Cattlemen's Board," "California Raisin Advisory Board," or the like.⁴ To the public, such advertising cannot help but appear to carry the imprimatur of the entire industry, and thus to convey the appearance of unanimity.

For a grower/marketer which has developed (or is trying to develop) its own brand identity, such apparently

⁴ "Each of the materials bears the logo of, or is otherwise attributed to, 'California Summer Fruits,' the 'California Tree Fruit Agreement,' or both." Brief for Petitioner at 8 n.8.

unified "generic" advertising can be very troublesome. Such advertising may effectively function as advertising *for* the competitors of the branded advertiser and *against* the branded advertiser's own efforts; or, if the branded advertiser is powerful enough on the relevant industry committee, it may be able to take control of the "generic" program and manipulate it to receive the benefits of the industry-funded advertising as well as its own proprietary marketing efforts.⁵ Advertising is a matter of details: unavoidably, the details will serve the interests of one group or another within a supposedly unified group. Given the structure of marketing committees, this can often result in a majority taking advantage at the expense of a minority.

In the raisin industry, for example, Sun-Maid's famous trademark has earned international goodwill for Sun-Maid since 1915. Sun-Maid has also consistently promoted the health and nutrition aspects of raisins. The emergence of a "generic" advertising program, based on dancing raisins and other "entertainment" values, had the effect of diluting the power of Sun-Maid's mark and message, which Sun-Maid had spent decades and millions of dollars to develop.

The details of the generic raisin campaign have repeatedly favored those of Sun-Maid's competitors who did not have their own brand identity to protect. For example, at one time it was decided that the raisin box shown in the ads should not be red, because Sun-Maid's

⁵ See the discussion of the almond industry at note 8, *infra*, and the text accompanying that footnote.

package is red. So a purple box was used. But then other growers started using the purple box, effectively tying their products to the ads – something Sun-Maid could not do without destroying its own longtime trade dress. In one foreign campaign a Sun-Maid competitor was allowed to purchase a "tag-line" at the end of generic ads, effectively transforming them into specific branded ads for the competitor. In the United Kingdom, CALRAB introduced raisin canisters carrying the image of the "Dancing Raisins" into direct competition with Sun-Maid's own canisters. Likewise, "California Raisins" packages were introduced in Taiwan and Russia.⁶ In effect, the generic program turned "California raisins" into a competitive brand: a brand that Sun-Maid had paid to create, but could not use without harming its own long-established identity.⁷

⁶ The Russian package, for example, was described as "a special generic brand 'California Raisins' package . . . developed exclusively for the CIS. It features photographs of the American flag and California raisins on the front panel and photographs of four different ingredient uses for raisins on the back panel. . . . The raisins are packed under the authority of the Raisin Administrative Committee and being distributed by Commerce International of Moscow, Russia." CALRAB press release reported by BUSINESS WIRE, December 21, 1993 (available through the LEXIS Marketing Library).

⁷ The inherent tendency of a supposedly generic promotion campaign to favor one producer over another can also be seen in the way the very name "California Raisins" has been seized by Sun-Maid's competitors as a competitive brand. For example, on the World Wide Web at the home page called [HTTP://WWW.CAL-RAISIN.COM](http://www.CAL-RAISIN.COM) will be found, not the California Raisin Advisory Board or the Raisin Administrative Board, but rather one of Sun-Maid's competitors. (Sun-Maid's own Web address is, of course, [HTTP://WWW.SUN-MAID.COM](http://www.SUN-MAID.COM).) Another example of such programs' inherent unfairness can be seen in the complete

Similar problems and conflicts have turned up in the other programs to have been considered by the courts:

- In the present case, respondents contend that the generic program favors the growers of red-flesh nectarines (apparently a majority of the committee board) over those who grow yellow-flesh fruit, and that "generic" funds have been used to promote a proprietary nectarine, the "Red Jim," owned by one member of the board. *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367, 1377 n.6 (9th Cir. 1995).

- The Ninth Circuit identified drastic inequities in the almond program. In *Cal-Almond, Inc. v. U.S. Dep't of Agriculture*, 14 F.3d 429 (9th Cir. 1993), *petition for cert. filed* (May 20, 1996), the court expressly found that "the regulations hinder the handlers' efforts to increase sales and returns to growers," *id.* at 438, and that ultimately "there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers. . . .", *id.* at 440.⁸

absence from the generic "Dancing Raisins" campaign of any role for golden raisins, which are produced by a different method from dark sun-dried raisins. Golden raisins, a distinct category of raisin product, were subject to the same state assessments as other raisins, but never appeared in the generic campaign.

⁸ The almond industry provides an interesting contrast with the raisin market. In each, an important cooperative has a substantial share of the market and a history of independent advertising. In the case of almonds, the leading cooperative had an absolute majority of the market and thus, the Ninth Circuit

- The Third Circuit upheld the beef promotion program in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), but in dissent Judge Sloviter pointed out that the program seemed to have no real regulatory function at all, *id.* at 1144, and that its advertisements made claims questionable to some, *id.* at 1147.

- In the recent state appeals court decision striking down California's kiwifruit program, the lead opinion noted that the state commission "has failed to show that its program has had any effect whatsoever on grower returns", *California Kiwifruit Commission v. Moss*, 45 Cal. App. 4th 769, 775, 53 Cal. Rptr. 2d 138, 142 (3d Dist. 1996), *review granted*, 96 Daily Journal D.A.R. 10167 (August 14, 1996), and that the number of kiwifruit producers had declined during the program, *id.* at 781 n.16, 53 Cal. Rptr. 2d at 146 n.16, *as modified*, 46 Cal. App. 4th 1089c. The concurring justice summarized the problem: the program "permits large growers, who produce the majority of kiwifruit and stand to gain the most from an expanding market, to pass a referendum obligating all growers, including small growers . . . who have little hope of marketing their crops on an international or even

found, it was in a position to control the advertising program to the detriment of smaller growers. By contrast, although Sun-Maid is the largest raisin grower/packer, it does not have a majority of production and thus Sun-Maid's competition is in a position to control the program. The point is that one way or another, the program will be skewed unfairly, favoring one side or the other. In either set of circumstances, coerced funding of advertising by those whom it hurts is simply inappropriate under the First Amendment.

national level, to pay an assessment which in effect subsidizes the larger growers' marketing efforts", *id.* at 790, 53 Cal. Rptr. 2d at 152 (Scotland, A.P.J., concurring).⁹

- Most recently, the press has reported that the U.S. District Court in Sacramento has ruled against the California Milk Advisory Board's mandatory assessment, after the owner of Gallo Cattle Company (reportedly the largest dairy farm in the United States), complained that the program was forcing him to subsidize "advertising that his competitors' cheeses are as good as his are [and] . . . to promote milk, which he doesn't even sell." Darlin, *Gallo's Whine*, FORBES, June 17, 1996, at 78; BUSINESS WIRE, July 27, 1996 (available through the LEXIS Marketing Library), reporting on *Gallo Cattle Co. v. U.S. Dep't of Agriculture*, No. CIV-S-96-1146 DFL JFM (E.D. Cal.).

In some of these cases the larger growers' interests have taken precedence over those of the smaller; in other cases the large growers' independent advertising efforts are being subverted for the benefit of those who don't advertise separately. The universal conclusion, however, is that the programs are almost always unfair to somebody, because there isn't often such a thing as truly "generic" advertising that helps the whole industry at the

⁹ The California Supreme Court has granted review in the kiwi case, in which each of the three Court of Appeals justices wrote a separate opinion. 96 Daily Journal D.A.R. 10167 (August 14, 1996). The California Supreme Court has also deferred all additional briefing in the case, perhaps because the present case is pending before this Court.

same time. And it would be no answer to tell the complainants in each industry to take their specific grievances to court if they think the program is unfair. Surely it would not be desirable to have the courts reviewing each small detail of each of these programs to decide if they are unfair, and if so whether the unfairness is unconstitutional. Better to acknowledge that generic advertising is inherently biased, and to allow independent growers and handlers in each industry to judge this for themselves and to have the right to withdraw.

In any case, these stories explain what is wrong with petitioner's argument that forced funding is permissible because it implicates "purely commercial speech that promotes consumption of products that respondents have voluntarily chosen to sell," Brief for Petitioner at 15. A grower or handler may have voluntarily entered a particular commodity market, but it never agreed to pay for the marketing of its competitors' products and the negation of its own marketing efforts. True, "purely commercial speech" is at issue here, but this does not make the infringement less significant: this Court has held that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

Nor can the problems with generic programs be marginalized as nothing more than "disagreement over advertising strategies." Generic advertising effectively forces everyone in the industry to join hands and sing a single tune of praise to what the majority decides. Inherently, by promoting all nectarines (or cheeses, or raisins)

at the same time and with the same slogan, generic ads encourage the status quo, discourage the innovation and product differentiation that would otherwise occur in a competitive market, with various industry players looking for more efficient, more attractive, more convenient uses for the product in an effort to better please the consumer. Even the Secretary of Agriculture has acknowledged the vital importance of such innovation. "Time and time again," Secretary Glickman said in a recent press release, "we hear that agriculture must do more to encourage the production and marketing of value-added commodities – that's where the jobs are, that's where the growth is." *USDA Announces Market Access Program Allocations for Fiscal 1996*, USDA PRESS RELEASE NO. 0233.96 (May 3, 1996)¹⁰

Innovative product differentiation can and does occur. For example, Sun-Maid has recently received a patent for a new method of sun-drying raisins while still on the vine. U.S. PATENT NO. 5,411,561 (May 2, 1995). The raisins produced by this method will have a lighter color and fruitier taste, which may be expected to please some consumers more than others. Another recent Sun-Maid patent sets forth a method for producing high-moisture raisins suitable for baking and other food processing purposes without prior preparation. U.S. PATENT NO. 5,397,583 (March 14, 1995). Both of these new products will require special promotion, and any generic raisin advertising programs would be of no help – indeed,

¹⁰ This USDA press release can be found on the Internet at [HTTP://WWW.USDA.GOV/NEWS/RELEASES/1996/05/0233](http://www.usda.gov/news/releases/1996/05/0233).

would more likely support the existing mainstream product. In each case, Sun-Maid has taken up Secretary Glickman's challenge and produced a new, value-added commodity – but the generic advertising program discourages such innovation, and even penalizes it, forcing the innovator to pay for advertising that supports its uninnovative competition.

Petitioner argues that generic advertising is necessary – and must be compelled by government action – because otherwise "individual handlers would have little interest in participating in collective efforts to promote increased overall consumption of a commodity. Instead, there would be a strong incentive for each individual handler to tailor its own advertising to inure to its own benefit." Brief for Petitioner at 46. But such individuated speech on behalf of self-interest is exactly the diversity of expression that the First Amendment protects. As one judge observed in the recent decision invalidating California's mandatory assessments for kiwifruit promotion, "the state's interest underlying the kiwifruit marketing program does not include the advancement or preservation of harmony among kiwifruit growers." *California Kiwifruit Commission v. Moss*, 45 Cal. App. 4th 769, 790, 53 Cal. Rptr. 2d 138, 152 (3d Dist. 1996) (Scotland, A.P.J., concurring), *review granted*, 96 Daily Journal D.A.R. 10167 (August 14, 1996). Mandatory generic advertising forces all members of the industry to finance, and to be identified with, the projection to the public of a false consensus. It conveys that its messages are supported with a unanimity that does not exist, that the entire industry endorses with solidarity the proclamations of the "Tree

Fruit Agreement" or the "Raisin Administrative Committee."

The government's avowed intent for this forced associative speech is to manipulate public understanding and public demand, supposedly for a greater "public interest." This Court has repeatedly made clear that such a purpose is illegitimate: like the advertising ban invalidated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976), it is a "highly paternalistic approach" aimed at "keeping the public in ignorance." By forcing all members of the industry to pay for the creation of this fictitious unified consensus, it "screen[s] from public view the underlying governmental policy" of suppressing competitive conduct, a purpose identified as suspect by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 n.9 (1980). It "not only hinder[s] commercial choice, but also impede[s] debate over central issues of public policy," like the ban struck down last term in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1508 (1996).¹¹

Perhaps recognizing the inherent impropriety of forcing a grower to pay for advertising against its will, several of the *amici* deny that mandatory advertising

¹¹ Stated another way, "the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," an interest that Justice Thomas found to be "*per se* illegitimate" in his concurrence in *44 Liquormart*, 116 S. Ct. at 1516.

implicates private speech rights at all, but rather constitutes "government speech" not subject to control by private citizens. This Court disposed of the argument succinctly in *Keller v. State Bar of California*, 496 U.S. 1 (1990). This Court held that for First Amendment purposes the State Bar of California could not be treated as a government agency: its funding came "not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors"; only lawyers could be members and all lawyers were required to be members; and the ultimate governance of the legal profession was committed to the State Supreme Court, not the Bar. *Id.* at 11. The Bar "was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers." *Id.* at 13. The parallels between the bar and the commodity boards at issue here are extremely close.¹² The "government

¹² The attempts of *Amici* National Association of State Departments of Agriculture *et al.* ("NASDA"), to distinguish *Keller* are unavailing. NASDA argues that the boards were "formed in the first instance by Congress 'as part of the democratic process'" and that they operate pursuant to government regulation and the supervision of the Secretary of Agriculture (Brief of *Amici* NASDA at 16) – but of course the California State Bar was likewise formed by the state legislature and placed under the supervision of the State Supreme Court. With respect to this issue, there is simply no meaningful difference between the organizations at issue here and the State Bar which the court found subject to the First Amendment in *Keller*.

speech" argument has ultimately been rejected by all of the appellate courts which have considered generic advertising,¹³ and the government rightly disclaims any reliance on the argument here. Generic advertising programs are emphatically *not* created with the input of the elected representatives of all the people. Rather, they are controlled and financed by a board chosen by and from the industry on whose behalf the ads are made; they explicitly claim to represent the voice of the *industry*, not the government.¹⁴ Thus, they falsely claim the apparent approval of the whole industry, and are mandatorily funded by everyone; they are no less coercive to an individual grower or marketer, who would otherwise choose not to support the program or its message, than was the state's demand that a pacifist display the slogan "Live Free or Die" on his license plate in *Wooley v. Maynard*, 430 U.S. 705 (1977).

In effect, mandatory group advertising forces every member of an industry to subscribe financially to a kind

¹³ Even in *United States v. Frame*, which upheld the beef promotion program, the court found that "the compelled expressive activities . . . are not properly characterized as 'government speech' " inasmuch as it presented a situation in which "the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group. . . ." 885 F.2d at 1132.

¹⁴ Petitioner points out, "Each of the materials bears the logo of, or is otherwise attributed to, 'California Summer Fruits,' the 'California Tree Fruit Agreement,' or both" - not USDA. Brief for Petitioner at 8 n.8. Likewise the "Dancing Raisins" were sponsored by the California Raisin Advisory Board, not the state department of agriculture.

of "loyalty oath" on behalf of the interests defined by a majority of the industry. This compulsion results in advertising that deceptively, designedly purports to represent the collective voice of all, and suppresses the ability of a dissenter to convey that dissent. Such a compulsory program does not honor the First Amendment.

2. **Given the available alternatives, the programs at issue here constitute a substantial additional burden on First Amendment rights and are therefore unconstitutional.**

The proponents of mandatory advertising assessments point to the "free rider" problem as their primary justification for the compulsory nature of the programs. The problems and abuses in such programs, as outlined in the previous section of this brief, suggest that no argument is enough to sustain mandatory advertising. But even if the free rider problem is deemed compelling enough to justify *some* kind of industry-wide program, careful consideration of the issue demonstrates that the programs at issue in *this* case cannot withstand scrutiny.

As Justice Scalia wrote in partial concurrence in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991),

"Once it is understood that the source of the state's power, despite the First Amendment, to compel nonmembers to support the union financially, is elimination of the inequity that would otherwise arise from mandated free-ridership, the constitutional limits on that power naturally follow."

Id. at 556 (Scalia, J., concurring in part and dissenting in part). Under the test for restrictions on commercial speech, the inquiry is whether the infringement of First Amendment rights is "more extensive than necessary than is necessary," *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). Under the line of compelled-funding cases beginning with *Abod v. Detroit Board of Education*, 431 U.S. 209 (1977), the inquiry is whether the compulsion is "germane" to and justified by the purpose – i.e., the avoidance of free riders – and whether it "does not significantly add to the burdening of free speech" inherent in the compulsory arrangement. *Lehnert*, 500 U.S. at 520. Sun-Maid will leave to the parties and other *amici* the discussion of which test applies here; under any of these tests, however, the programs at issue here fail, because the free rider problem can be handled with little or no infringement on First Amendment freedoms.

Cooperatives like Sun-Maid constitute a *voluntary* alternative to compulsory group advertising. Petitioner argues that small growers need the industry-wide program "to obtain the benefits of advertising that they could not afford on their own." Brief for Petitioner at 27. But if cooperative membership is available, the small grower can gain these advantages if they are wanted, without being compelled to pay for them if they are not. (And, at least in some markets, the grower may also have a *choice* between co-ops, rather than being compelled to join a single government-mandated commodity association.) Congress recently acknowledged the ability of cooperatives to provide this alternative; in section 516(a)

of the Federal Agriculture Improvement and Reform Act of 1996 (the "FAIR Act"), 110 Stat. 888, 1041, the Secretary of Agriculture is empowered to grant cooperatives a credit against the industry-wide assessments for their branded marketing, research, and information programs. The conference committee report explained,

The Managers recognize the important role of farmer-owned cooperatives in carrying-out [sic] industry financed generic promotion, research and information activities for and on behalf of their members. The Managers also recognize that in many cases, such cooperative marketing efforts have involved the successful establishment of specific brands for many agricultural products. Further, that producers through their cooperatives have invested and continue to invest significant resources related to market research, promotion and advertising to enhance the sale of the products and improve their income. . . . [The credit] would ensure that producers would be able to engage in such cooperative marketing activities without adding to their cost relative to other industry members.

HOUSE CONF. REPORT NO. 104-494 at 406-07, *reprinted in* 1996 U.S. CODE CONG. & AD. NEWS 683, 772 (1996).

In light of the cooperatives' ability to provide the benefits of industry action on a voluntary basis, without the severe infringements on First Amendment freedoms caused by mandatory industry-wide funding of generic promotion, **such mandatory programs should always provide an exception for cooperative members, and**

compulsory advertising assessments should be permissible, if at all, only in industries where the voluntary cooperative is not a possible alternative.

Moreover, First Amendment considerations dictate that credits for private branded promotion and advertising should *always* be required if an industry advertising program is to survive constitutional scrutiny.¹⁵ Such credits would clearly solve any "free rider" problems, while reducing the compulsory aspects of the industry program (of course, such a program would still have the effect of compelling every member of the industry to spend money on *some* form of promotional activities, and thus would remain questionable). In light of the problems found by the Ninth Circuit in the almond program, where the credits were unreasonably restrictive and seemed "designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers," *Cal-Almond, Inc. v. U.S. Dep't of Agriculture*, 14 F.3d 429, 440 (9th Cir. 1993), such credits must be required to be full, fairly administered, and available

¹⁵ "To the extent the state has a legitimate interest in preventing 'free riders,' no reason has been advanced why it could not satisfy this concern and meet its interest . . . by requiring growers either to pay the assessments or spend an equivalent amount on individual advertising. Although this still would result in compelled commercial speech [citing *Cal-Almond*], it would be less restrictive of the growers' First Amendment rights as it would allow a grower to decline to participate in the mass advertising program, thereby precluding coerced association." *California Kiwifruit Commission v. Moss*, 45 Cal. App. 4th 769, 790, 53 Cal. Rptr. 138, 152 (3d Dist. 1996) (Scotland, A.P.J., concurring), review granted, 96 Daily Journal D.A.R. 10167 (August 14, 1996).

to all who engage in branded promotion. As noted above, Petitioner opposes mandatory credits because "there would be a strong incentive for each individual handler to tailor its own advertising to inure to its own benefit." Brief for Petitioner at 46. But, as discussed more fully above, the government does not have a legitimate interest in suppressing competitive divergences, cannot require them to subsidize advertising that is *not* in their own interests.

The *Abood/Keller* "compelled financing" line of cases suggests another element that any government-compelled advertising program must contain: regular, careful review justifying the program and ensuring that the monies are being used for legitimate purposes. See *Keller*, 496 U.S. at 16-17. The fact-specific nature of each program should not be overlooked: needs and effects will differ between industries. (For example, in this case a number of *amici* have stressed the perishability of the commodity as a justification for government programs to regularize demand; but perishability is not so much a factor in Sun-Maid's business, where raisins last a long time and can be stored.) We note that Congress this year adopted such independent review requirements in section 501(c) of the FAIR Act.

The Ninth Circuit found it particularly significant that the nectarine and peach promotion programs at issue here had no credit provisions whatsoever. 58 F.3d at 1380. Although this Court may hold that the Ninth Circuit should have used the *Abood* test, or some other test, rather than the *Central Hudson* analysis, this does not change the conclusion that the programs were unduly

restrictive and constituted substantial additional burdens on free speech.

CONCLUSION

Because the generic promotion programs at issue here do not meet any of the possible legal tests, they cannot be sustained under the First Amendment. The decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: September 26, 1996

No. 95-1184

26

Supreme Court U.S.

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In The
Supreme Court of the United States

October Term, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,

Petitioner,

vs.

WILEMAN BROS. & ELLIOTT, INC., et al.,

Respondents.

*On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit*

**BRIEF FOR AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE AMICI

United Sheep Producers is a non-profit membership organization of sheep and wool producers. It is presently active in opposing the referendum to establish a sheep and wool promotion program similar to the program at issue in this case. Handlers Against Promoflor is an unincorporated association of handlers of cut flowers and cut greens who must pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Research and Promotion Act, 7 U.S.C. § 6801, *et seq.*, and its implementing regulations. Family Farm Defenders is a coalition of organizations and individuals committed to the creation of a farmer controlled and consumer oriented dairy industry. FFD's mission statement provides in part: "Agribusiness and government agricultural policies have devastated rural America, forced the majority of small and medium-sized family farms out of business, squandered our topsoil, polluted our water, lowered food quality and encouraged the creation of huge, government-subsidized corporate farms. These policies are responsible for impoverishing rural families and contribute to accidents, crime, hunger, disease and general hopelessness. When a nation allows its land and food production to fall into the hands of a few powerful corporations, individual freedoms are soon undermined. The demise of small farms and the rural communities they support — the foundation and source of our nation's most cherished values — are emblematic of the most serious problems facing America. The Family Farm Defenders is dedicated to speaking out against all forces threatening the long-term survival of rural America and to preserving a wholesome and diverse food supply; the vital connection between land, farmers, and consumers; and our irreplaceable natural resources.

Founded in 1988, amicus U.S. Association of Importers of

Textiles and Apparel has more than 165 members involved in the textile and apparel business, including manufacturers, distributors, retailers, and related service providers such as shipping lines and customs brokers, accounting for over \$44 billion in U.S. sales annually and employing more than one million American workers.

Cal-Almond, Inc., Gold Hills Nut Company, Inc., Central Valley Grower Packing, Hocker Nut Farm, Jardine Organic Ranch, Rotteveel Orchards, Frazier Nut Farms, Inc., Theron Shamgochian, Inc. dba Monte Cristo Packing Company, Beards Quality Nut Company, Amaretto Orchards and Bal Nut, Inc. are all almond handlers regulated by the Almond Marketing Order (7 C.F.R. § 981.1, *et seq.*) issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.*, and are required under the Act and the Order to pay assessments for mandatory promotion and advertising, similar to the mandatory advertising and promotion program at issue in this case. These almond handlers are all currently challenging, and several have successfully challenged in the past, the Almond Marketing Order advertising and promotion program regulations and assessments. Cal-Almond successfully convinced the Ninth Circuit Court of Appeals to rule that the assessments for promotion and advertising violated the handlers' rights guaranteed under the First Amendment of the United States Constitution, in a case prominently cited by the Solicitor General in the case herein. *Cal-Almond, Inc., et al v. United States Department of Agriculture*, 14 F.3d 429 (9th Cir. 1993).

Bidart Bros. is currently challenging the California Apple Commission advertising and promotion assessments. John I. Haas, Inc. is currently challenging the State of Washington HopCommission advertising and promotion assessments. Duarte Nursery, Inc. is currently challenging the California Grape Rootstock Improvement Commission assessments for

grape rootstock research and the dissemination of that information. Matsui Nursery, Inc., Kohara Nursery, Inc., Figone Nursery and Fogbelt Growers are currently challenging the California Cut Flower Commission promotion and advertising assessments and program. Donald B. Mills, dba DBM Mushrooms is currently challenging the Federal Mushroom Promotion, Research and Consumer Information (7 U.S.C. § 6101, *et seq.*) assessments for advertising and promotion. David Moss, dba TJ Farms, is currently challenging the California Kiwifruit Commission assessment for promotion and advertising. Gallo Cattle Company is currently challenging the National Dairy Promotion Program (7 U.S.C. § 4501, *et seq.*) and the California Milk Advisory Board promotion and advertising program and assessments. Delano Farms is currently challenging the California Table Grape Commission's promotion and advertising program and the assessments imposed for the same.

This brief in opposition to the Solicitor General's brief is presented on behalf of the undersigned with consent of all parties. *Amici Curiae* supports Respondents.

INTRODUCTION

The First Amendment protects the information marketplace for the benefit of both speakers and listeners. See, e.g., *44 Liquormart, Inc. v. Rhode Island Liquor Stores, Inc.*, 116 S. Ct. 1495 (1976) (rejecting paternalistic state desire to manipulate consumer choice in purchasing liquor by restricting access to information); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (speech for profit valuable because consumer's and society's interest in free flow of information promotes efficient allocation of resources). Speaker autonomy is protected against compelled, forbidden, and regulated speech. A debate has

arisen in the agriculture sector of our economy as to how best to promote the sale of agricultural commodities. Some believe that collective promotion of the entire industry through generic messages is best. While others believe that the promotion efforts of individual entities motivated by their own self-interest is best. Rather than staying clear of this debate and allowing the competing theories to sort themselves out in the marketplace, the government has instead been pressed by the advocates of collective advertising to enter the fray. The government has made two choices which infringe the First Amendment rights of Respondents and amici. First, the government has chosen the speaker to speak on behalf of each industry, a committee of competitors. Second, the government has expressed a critically important content-based preference for one idea (generic promotion) over another (individual brand names plus a vast array of other individual and voluntary methods of promotion). Both of these choices infringe on the speaker autonomy of Respondents and amici protected by the First Amendment.

Amici share a common belief that the program at issue in this case and the similar programs under which they are assessed violate their First Amendment rights believe (1) the government has no interest, much less a substantial, compelling or vital interest, in choosing the message or the type of message amici use to promote their products; (2) the collective advertising program does not substantially advance the government's supposed objectives; and (3) it is more restrictive than necessary because it fails to provide, *e.g.* for brand credit, refunds, or other voluntary alternatives.

ARGUMENT

I.

THE PROGRAM IS A SEVERE INFRINGEMENT ON FIRST AMENDMENT FREEDOMS.

The programs at issue here impose an extraordinary burden on Respondents First Amendment freedoms, far worse than government attempts to compel speech previously struck down by this Court. *Hurley v. Irish-American Gay Group of Boston*, 115 S. Ct. 2338 (1995) (state cannot force parade sponsor to include unit whose message it did not wish to choose or carry); *McIntyre v. Ohio Elections Comm.*, 115 S. Ct. 1511 (1995) (ad sponsor not required to disclose identity); *Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781 (1988) (charities need not disclose percentage of contributions for administration and fundraising expenses); *Pacific Gas & Electric Co. v. Public Utilities Comm. of Cal.*, 475 U.S. 1 (1986) (utility cannot be forced to carry bill inserts provided by energy conservation public interest group); *Wooley v. Maynard*, 430 U.S. 705 (1977) (vehicle owner cannot be compelled to display state motto "Live Free or Die" on license plate); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper cannot be forced to publish response to allegedly libelous article); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943) (school child cannot be compelled to salute the flag); *see also, e.g., Elrod v. Burns*, 427 U.S. 347 (1976) (state cannot condition government job on support for political party).

Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject,

perhaps, to the permissive law of defamation. Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful. . . . [T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

Hurley, 115 S. Ct. at 2347-48 (citations omitted).

These industry collective advertising programs are a direct substantial content-based attack on the First Amendment rights of Respondents and amici. The most obvious infringement is the cost. The speech tax on Respondent Gerawan is over \$600,000 per year. The tax on amicus Gallo Cattle Company is several hundred thousand dollars per year. The tax on the sheep producer members of United Sheep producers and on the dairy farmer members of Family Farm Defenders often amounts to half of their net revenue. The marketing and promotion efforts of these entities are suffering because those on whom the speech tax is imposed are not typically able to pass it forward or backward. They must either forego their own marketing and promotion plans and/or engage in costly counter speech in an effort to distinguish their "brand" or product or unique combination of services in the marketplace.

There is almost an infinite variety of attributes that distinguish a particular firm's product and/or service combination in the market. A brief list would include timing of sale (early or late nectarines), variety and grade of product (roses, carnations, orchids, bouquets), marketing channel (mass market, Internet, personal selling, etc.), target audience (organic, health conscious, youth, aged, yuppies), geographic region (local or national), added value services (in-store merchandising, wedding counseling, design), marketing strategy (rapid growth, retention of loyal customers, concentration on new markets), and image identification (nostalgia, hip, quality, value). Forced reliance on a collective advertising tends to "dumb down" and make mediocre the rich diversity in an unfettered marketplace.

It is important to briefly note that these collective promotion programs are not government speech. The Solicitor General has specifically disavowed this claim, *Pet. Br.* at 25 n. 16, but his amici advance the argument anyway. The only government role is ministerial approval, coercion, and enforcement. The content of the programs is designed, administered, and implemented by the industry committees of competitors. USDA's Dairy Division Director recently described USDA's limited role as follows:

AMS strictly enforces the prohibition on the use of checkoff dollars to influence legislative or governmental policy or actions. Another oversight area deals with program content and strategies. We have received comments condemning and praising particular promotion programs. It is the policy of AMS in carrying out our oversight responsibilities to ensure that research and promotion boards satisfy all legislative, regulatory, and Department

policy requirements. *It is the responsibility of the boards to select program strategies and so long as the Board stays within the confines of the Act and the Order, it is not the Department's policy to substitute its judgment for the judgment of the Board.*

Statement of Richard M. McKee, Director, Dairy Division, Agricultural Marketing Service, USDA, before the Committee on Agriculture, Subcommittee on Livestock, Dairy and Poultry, U.S. House of Representatives, July 26, 1996 (emphasis added). AMS's Deputy Administrator described USDA's role as follows:

[W]e view these programs as industry, self-help measures and largely have limited our oversight to: (1) assuring that funds are expended only for activities authorized by statute; (2) maintaining proper program administration; (3) ensuring that these programs conform to USDA policies and other relevant federal laws.

Clayton, "Issues Facing Domestic Commodity Research and Promotion Programs," at 4-5, in W. Armbruster and L. Lenz (eds.), *Commodity Promotion Policy in a Global Economy* (Farm Foundation, 1993). Finally, counsel for the Solicitor General's amicus has described the self-help programs as follows:

Most federal statutes for promotion programs, as they are written today, include, within the purposes section of the legislation, a specific statement as to need. Therefore, the proponents of the program no longer are required to present an argument to

the USDA relating to the need for the program. . . . Another milepost has been the legal acceptance of the no refund policy advanced by proponents of research and promotion programs. They argue that refunds of assessments to dissidents, and to others who may assume a dissident role even though they support the results of the program, should be prohibited because such producers are merely freeloaders on successful research and market promotions paid for by others. All should carry their fair share. . . . These promotion programs are commercial in nature. They are developed and funded by an industry to promote their products. *As we learned in the Frame case, this is commercial speech, not government speech.*

Watkinson and McLeod, "Legal Concerns Facing Commodity Promotion Programs," at 20, 26, in W. Armbruster and L. Lenz (eds.), *Commodity Promotion Policy in a Global Economy* (Farm Foundation, 1993). As this Court recognized in *Keller*, 496 U.S. at 12-13, these programs are not government speech because they are paid for by a small defined group and designed and implemented by the leadership of that group.

II.

THE GOVERNMENT HAS NO INTEREST IN INFLUENCING CONSUMERS' CHOICES OR INTERFERING WITH SPEAKER AUTONOMY.

The government's justification for this program is at best vague and illusory, and at worst, diabolical. To ensure the proper respect for First Amendment freedoms, this Court has

required the government to precisely specify the interest allegedly served by the restriction on speech, and has carefully scrutinized legislative findings for substantial evidence. *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1505 (1995); *Turner Broadcasting Systems, Inc. v. FCC*, 114 S. Ct. 2445 (1994); *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). Assuming, *arguendo*, that speech can be compelled to combat fraud, or address health or safety concerns, no such purpose is apparent here. As the Court said in *Hurley*:

While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

115 S. Ct. at 2350.

The government has variously described its interest in the program at issue as restoring order to disrupted markets, generally improving the economic well-being of producers, and, finally, expanding the market for the commodity, increasing demand, and increasing the size of the industry. But, completely lacking in the record is any showing that a problem exists. There is no analysis of the economic status of the fruit growers before or during the program. There is no analysis of supply and price variability, and therefore no conclusion as to whether the market is orderly or disorderly. USDA has not claimed that these fruit industries are characterized by any form of market failure. USDA has not explained why or how a bigger industry is a better industry. USDA has not explained how or whether the higher prices paid for by consumers, if the

programs do in fact work to stimulate demand (which is questionable), are transferred to the producers and handlers who fund the program. USDA doesn't know whether or not these programs are helpful or not, or even whether they effectuate the statutory objective. As the General Accounting Office explained:

USDA does not have a formalized system to measure whether marketing orders are performing in accordance with the orderly marketing objectives of the AMAA. Without such criteria, USDA is not in a position to evaluate marketing order performance or to appropriately judge the merits and shortcomings of marketing orders.

General Accounting Office, "The Role of Marketing Orders in Establishing and Maintaining Orderly Marketing Conditions," at 59-60 (July 31, 1985).

The recently enacted *post hoc* "findings" cited by the Solicitor General, Pet. Br. 6 n.3, cannot possibly justify programs which, at the time, were designed allegedly to restore order to disrupted markets. They were inserted in the bill at the last minute without hearings or debate. As Senator Feingold explained:

Are Senators aware that section 501 of this bill attempts to rewrite 35 years of legislative history with respect to commodity promotion programs in an effort to combat federal court challenges to these programs. Mr. President, that language was in neither the House nor the Senate bill and it

has not been the subject of hearings or debates in either chamber of Congress. I want to make clear that the legislative findings in section 501 of this bill are not indicative of the views of more than a handful of farm bill conferees. Many of these findings in fact do not even make sense unless one is aware of the efforts of dissenting farmers to reform programs or are familiar with the First Amendment challenges to these programs. Indeed, Mr. President, this bill contains some very creative language intended to rewrite an already well-established history as to the purpose and intent of these programs. I think this has been a shameful process, Mr. President, irresponsible to farmers, consumers, and taxpayers, and completely inconsistent with our responsibilities to carry out a deliberative legislative process.

142 Cong. Rec. S3070 (daily ed., Mar. 28, 1996).

III.

THE GOVERNMENT HAS NOT DEMONSTRATED ANY NEED TO COMPEL SPEECH.

The government must make an especially compelling showing to justify compelling speech. This is particularly true where, as here, the speech (or silence) choices at issue has the potential for assisting individual speakers in making a profit (or avoiding a loss). As this Court has pointed out in its struggles to classify speech, *e.g.*, by motive, content, or audience, in order to establish its place in a supposed hierarchy of protection under

the First Amendment, speech motivated by a profit is more robust, more capable of independent verification, and less subject to threats and chills than speech not so blessed with the potential for reward. If collective generic speech is, in fact, better than individual speech, then the constitutional presumption must be that rational speakers will join in.

The government has been completely unable to specify a problem or a need for government intervention, especially a need compelling enough to justify the infringement on First Amendment rights. So instead, the government has focussed its ire on the so-called "problem" of "free riders," *i.e.*, those who benefit from the collective advertising program but who would not voluntarily choose to pay their "fair share" absent coercion, including huge civil and criminal fines.

This Court has never upheld a speech restriction solely because of free riders without some compelling independent basis to restrict or require speech. This so-called problem is not a problem at all, but simply the natural consequence of autonomous speakers choosing to speak differently than the orthodoxy preferred by the collective. These industries are nothing like the *Abood-Keller* line of cases dealing with unions appointed as agents for all under collective bargaining arrangements or mandatory bars. The government has not chosen to appoint a single entity to bargain with buyers on behalf of all fruit sellers. *Cf. Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 222 (1991). Nor is there at issue here the public interest in attorney discipline and in quality of legal services that underlies the requirement for participation in mandatory bars.

The government's claim that compulsion is necessary to

eliminate free riders is at best disingenuous. First, the programs at issue in this case don't do that. California fruit growers are taxed to support speech that benefits to growers in the many other states that produce these fruits. Most of USDA's programs have an abundance of free riders. For example, exemptions from the speech tax have been provided to handlers of cut flowers and cut greens with less than \$750,000 in annual gross sales, 7 U.S.C. § 6801, *et seq.*; egg producers with less than 75,000 laying hens (this level having been previously raised from 3,000 to 30,000), 7 U.S.C. § 2701, *et seq.*; dairies who process less than 500,000 pounds of milk in consumer-size packages per month, 7 U.S.C. § 6401, *et seq.*; kiwi fruit producers of less than 500 pounds per year, importers of less than 10,000 pounds per year, direct sales to consumers, and production and imports for processing, 7 U.S.C. § 7461, *et seq.*; lime producers, importers, and handlers of less than 200,000 pounds per year, 7 U.S.C. § 6201, *et seq.*; fresh mushroom producers and importers of less than 500,000 pounds per year and all mushrooms for processing, 7 U.S.C. § 6101, *et seq.*; popcorn processors of less than 4 million pounds per year, 7 U.S.C. § 7481 *et seq.*; potato producers with less than five acres, 7 U.S.C. § 2611, *et seq.*; importers of raw wool, 7 U.S.C. § 7101, *et seq.*; and watermelon producers with less than ten acres and importers with less than 150,000 pounds annually, 7 U.S.C. § 4901, *et seq.*

The "free riders" in these industries were created for political, not economic, reasons. Generally, smaller producers tend to vote no in industry referenda, so they must be excluded for the programs to pass. In the egg industry, a producer vote failed an initial referendum.

The proposed sheep and wool industry promotion program provides another excellent example of the sway of politics over economics. The initial February, 1996 referendum passed by a narrow margin, but was canceled due to voting irregularities. A

new referendum will be held October 1, 1996, but only the proponent group, American Sheep Industries, was allowed by USDA to use the voter list from the terminated wool incentive program to mail out its pro-program propaganda. Imported raw wool is exempt from the speech tax, yet it will benefit from the wool promotion program. Since domestic textile mills presently use about 70% imported raw wool, this exemption is a very large "free ride" for them to carry. The reason given for the exemption, worth at least \$1 million, in a recent pro-vote propaganda piece mailed by American Sheep Industries was pure politics:

Imported raw wool is excluded from the checkoff because of the strong opposition encountered from textile interests at the time the legislation was passed. Southern senators said they would block the legislation unless it was removed.

American Sheep Industries, Inc., Checkoff Express, Summer, 1996.

The breadth of the problems with domestic promotion programs is highlighted by their expansion to imports of those products and to multiple products within the same program. Two programs that exhibit such problems are the "Cotton Program", established under the Cotton Research and Promotion Act of 1966 (the "Cotton Act"),¹ and the "Sheep and Wool Program", established under the Sheep Promotion, Research, and Information Act of 1994 (the "Sheep Act").² The

1. 7 U.S.C. § 2101 *et seq.*

2. 7 U.S.C. § 7101 *et seq.* Before the Sheep and Wool Program takes effect, the governing Act requires a referendum approving the Program. 7
(Cont'd)

special circumstances faced by imports of products subject to these programs demonstrate that mandatory participation in orderly marketing agreements does not further the policies underlying those programs.

One of the policies underlying generic promotion programs is that collective generic advertising expands overall consumption of the product, thus benefitting all producers.³ In the context of these programs, "generic" has meant non-brand specific. That definition of generic advertising becomes problematic, however, when imports are added to the pool of promoted products. The problem faced by importers when they are brought under marketing orders is entrenched domestic country of origin advertising campaigns which promote, and therefore benefit, only domestic product and producers. For example, the Cotton Board, the body administering the Cotton Program, beginning in 1966 developed an advertising campaign that included the tag line "Brought to you by America's cotton growers." Initially, this campaign did not implicate the First Amendment rights of cotton imports because importers were not covered by the Cotton Program and therefore were not subject to any assessments. In 1990, however, the Cotton Act was amended to include imports of cotton within the program, and in 1992, the Department of Agriculture started collecting assessments on imports of cotton products. Notwithstanding the fact that importers of cotton products started contributing to the advertising budget of the Cotton Program in 1992, it was not until 1995 that they were

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U.S.C. § 7105(a). A referendum was held on February 6, 1996, and the Order was initially approved, but the Department of Agriculture declared the vote invalid because of procedural inconsistencies. Another vote is scheduled to take place on October 1, 1996.

3. Pet. Br. at 16.

able to force a change in the advertising campaign to reflect the contribution of imported products. Thus, for three years, importers' contributions paid for an advertising campaign that did not promote their products, but rather promoted only domestic goods over imported goods.

The drafters of the regulations implementing the Sheep and Wool Program would contend that they have eliminated the problem, faced by the cotton importers, of imports paying for promotion of domestic products, but in fact they have created another inequity in its stead. The Department's regulations provide that only domestic assessments collected under the Sheep and Wool Program may be used to fund domestic country of origin promotions; assessments collected on imported products may be used only for generic advertising.⁴ This means that domestic assessments may promote "American Lamb", benefitting only domestic producers, whereas importer assessments will be used to support generic advertising, benefitting both domestic and imported products. In this fashion, domestic products benefit twice — from country specific advertising and generic advertising — whereas imports benefit only once — from generic advertising. This inequitable return on advertising dollars exists notwithstanding the fact that domestic producers pay the same assessment as the importers. A program that, by definition, disproportionately benefits a subset of a class at the expense of the remaining members of the class cannot, or, at a minimum, should not, promote the government's interest, as required by *Central Hudson*.⁵

4. 7 C.F.R. § 2180.215(a)(1).

5. See *Central Hudson*, 447 U.S. at 566. Moreover, a "generic" advertising program that disproportionately promotes domestic products over imports will, no doubt, fail the *Cal-Almond* test that the "mandatory generic advertising program sell[] the product more effectively than the

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The second policy underpinning mandatory assessments, according to the government's brief, is prevention of "free riders" — without mandatory assessments, some could benefit from generic advertising without contributing.⁶ This argument is based on the assumption that "as a matter of law advertising increases consumption of the product being advertised." *Wileman*, 58 F.3d at 1378 citing *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986). Indeed, in the Federal Agricultural Improvement Reform Act of 1996 ("FAIR"), Congress specifically found that generic advertising "is intended to increase the overall demand . . . and increase the size of the market."⁷ Accordingly, because the generic advertising increases the pie for everyone, everyone should contribute. This assumption, however, fails if a participant in the market is prevented from benefitting from the increased consumption. Textile imports, including those of cotton and wool products, are subject to quotas, under which import quantities are limited.⁸ Thus, the core justification for generic advertising — increased demand for the product — does not apply to textile imports. The Cotton Board and the

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specific, targeted marketing efforts" of the individual. *Wileman*, 58 F.3d at 1378, quoting *Cal-Almond*, 14 F.3d at 439.

6. Pet. Br. at 27-34.

7. Section 509(b)(7), P.L. 104-127, 104th Cong., 2nd Sess., 1996; see also USG Brief at fn. 3.

8. 7 U.S.C. § 204, as amended. Imports are limited at an absolute number of pieces, not as a percentage of U.S. consumption. U.S. quotas on imports of wool products are particularly small, largely because of the small number of domestic wool producers. While the quotas are country-specific, as opposed to global, new entrants into the U.S. market are generally capped at levels below that of existing suppliers, thereby greatly limiting the ability of imports to increase substantially.

Sheep Board could each spend a million dollars on generic advertising, but there would be no benefit to importers so long as Congress continues to limit imports of cotton and wool products. Instead what is happening is that importers' assessments under the Cotton Program and the Sheep and Wool Program are being used to increase demand for cotton and wool products, respectively, without the possibility of any benefit from increased consumption because the quantities that may be imported are limited by another U.S. policy. Consequently, the "free-riders" chimera can not apply to importers because there is a limit on the extent to which they may "free-ride".

One of the most important aspects of speaker autonomy protected by the First Amendment is accountability. A speaker who voluntarily sends or supports a message can and must make an individualized determination that the message will be beneficial. But once the speaker's support is coerced by government mandate, the speaker (in this case a committee of competitors) need no longer be accountable to the supporter for the benefits, if any, of the message. It may be that the money is simply wasted on ineffectual messages. Or, it may be that the speech, if successful in stimulating demand, has long-run consequences contrary to the interests of the producers and handlers who are taxed to support the message. For example, producers would respond to a short-run increase in demand (price) by producing more of the commodity. This supply side response can easily overtake the increase in demand because so many producers are making individual decisions to increase production in response to higher prices. The collective advertising program cannot advertise itself off this ever-faster treadmill because each additional dollar spent yields declining marginal returns (the human stomach being finite). Professor Shepard has explained how this supply-side response can actually harm producers (the intended beneficiaries under the AMAA) in the context of another of the AMAA's regulatory

tools, shipment quotas on California-Arizona citrus to provide an orderly flow to market:

Rising diversions [by quotas on fresh to juice] coincided with much reduced returns in the processing sector, and in the long run, appear to have eroded the overall returns to growers of the market-allocation program. In the case of *Navel*s, successively lower fresh market utilization after 1960, surging shipments to the processing market, and declining average domestic returns similarly suggest that marketing order provisions that raise fresh fruit prices fail to increase overall grower returns. . . . Since farmland prices represent the capitalized value of rents, including regulatory benefits, declining orange grove prices tend to confirm the hypothesis that regulation of the California-Arizona orange industry on the basis of enhancing short run producer returns has had a contrary long-run effect. . . . The market allocation cum price discrimination program enforced by the marketing orders thus begets long-run market responses that are hostile to the very objectives that underlie the marketing orders.

Shepard, "Cartelization of the California-Arizona Orange Industry, 1934-1981," J. Law & Econ. 83, 95, 112 (April, 1986) (simulation results demonstrated that producer returns were about 50% lower than they would have been without shipment quotas because of long-run supply response).

These long-run supply effects have already begun to show up in some of USDA's programs. For example, over the 12-year history of the flagship dairy promotion program producer returns have steadily declined to historic lows, while consumer prices have continued to climb. Beef producers are also facing chronically low prices despite ten years of aggressive promotion under that industry's checkoff program. The Beef Board's 1995 annual report explained:

Since the early summer of 1994, however, the stakes have been changing for the beef industry, and the checkoff's limitations have become evident. Producers have learned that while the checkoff program can do many things, it cannot repeal the Law of Supply and Demand. And therein lies the essence of the industry's crisis. Currently, the U.S. cattle industry has a huge supply of beef, and, unfortunately, that supply is continuing to grow.

Beef Board Annual Report, "Changing Stakes," at 5 (1995).

IV.

THE GOVERNMENT IGNORES READILY AVAILABLE ALTERNATIVES TO COMPELLED SPEECH.

The restriction on free speech must be narrowly tailored, *i.e.*, no more restrictive than necessary to achieve the government's objective. The availability of less restrictive alternatives either dooms the programs under the fourth *Central Hudson* prong, or, preferably, these non-speech alternatives demonstrate the lack of a legitimate governmental interest under the first *Central Hudson* prong. The Ninth

Circuit correctly noted that the government could have provided a brand credit for each handler's own promotion efforts. This would have resulted in the same amount of advertising, but the overall effectiveness would have been improved because each handler could choose to join the generic campaign or perform individual efforts. Other alternatives involving a role for government but which are less burdensome of First Amendment rights include the use of general tax revenue to fund generic messages, *e.g.*, the "five a day" dietary pyramid and anti-smoking and anti-drug ads. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 10-13 (1990). Or, the government could simply provide direct subsidies or tax credits to fruit farmers found by Congress to be in sufficient economic distress, as is done for many "basic" agricultural commodities.

The agricultural marketplace is replete with a rich variety of promotional alternatives to the mandated industry-wide collective generic programs. The most obvious and successful of these alternatives is the agricultural cooperative. Sunkist and Sun Maid, for example, have world renowned trademarks. They are readily able to distinguish their products in the marketplace and invest tens of millions annually in advertising despite the homogeneity of the products. Not only do Sunkist members earn a premium in the market because of the value of the Sunkist name, they also earn substantial revenue from licensing the use of that name to manufacturers of other products, *e.g.*, soda and vitamins. According to Sunkist's 1994 Annual Report, licensing income totaled over \$14 million. The ability of farmers to easily differentiate their homogeneous, if not virtually identical, products in the marketplace sufficiently to justify this huge annual investment, and capture the benefits therefrom, is especially important compared to the dissimilarity and uniqueness of the fruits at issue here. Not only are nectarines, peaches, and plums obviously different from each other, there are dozens of varieties of each, with quite different colors, seasons, handling characteristics, and tastes.

Other alternatives include joining trade associations, shipping with a recognized brand name, and even federal and state-sponsored voluntary promotion programs. Indeed, major national farmer organizations have policies calling for checkoff programs to be voluntary. *See, e.g.*, Statement of National Farmers Union to the Grains Subcommittee of the U.S. House Committee on Agriculture relative to H.R. 2209, Soybean Promotion, Research, and Consumer Information Act, June 8, 1989; Statement of Doyle Rahjes for the American Farm Bureau Federation to the Subcommittee on Wheat, Soybeans, and Feed Grains of the U.S. House Committee on Agriculture, June 8, 1989. The federal programs for cotton and eggs were voluntary and were widely supported. By the time the egg program was made mandatory in 1990, only about 43% of the checkoff was requested as a refund. Here again, the main advantage of all forms of voluntary cooperation is accountability, *i.e.*, firms can join or leave depending on the ability of the program's managers to demonstrate the effectiveness and utility of the message.

The government in its brief asserts that not only are mandatory assessment necessary to prevent free-riders, but that the "benefits of collective action would be virtually impossible to achieve in the absence of mandatory assessments".⁹ This argument ignores the success of cooperative programs which have functioned successfully on a voluntary basis. When the Cotton Program was first introduced, it was a voluntary "check-off" program (*i.e.*, producers not in support of the research and promotion programs could seek a refund of the assessments).¹⁰

9. Pet. Br. at 27.

10. In 1990, the Cotton Act was amended to preclude such refund requests in the event that the referendum on the proposed amendments was passed. 7 U.S.C. § 2110(b), as amended Pub. L. 101-624, Title XIX, (Cont'd)

In the last two years before the program became mandatory, more than 60 percent of all cotton producers voluntarily chose to participate.¹¹ Yet, even with that "limited" participation, net collections in 1989 exceeded \$21.5 million, and \$27.7 million in the following year.¹² Furthermore, as evidenced by the continued participation of the vast majority of cotton producers and its extension to include importers, the *voluntary* program was both successful and beneficial to the participants. A strong argument also could be made that those responsible for administering the research and promotion programs are more responsive to those being assessed when the program is voluntary than when it is mandatory, a reality with which contributors to the cotton program are now coming to grips.

Another highly successful voluntary program is the "Woolmark" program, administered by the International Wool Secretariat ("IWS") and its national representatives. Created in 1964, the Woolmark is a widely recognized international trademark, and, in fact, is one of the best known and trusted textile marks. That mark, and its "sister" mark, "Woolblend," are owned by the IWS, and administered in the United States by the Wool Bureau. The Wool Bureau licenses the mark to companies in the United States who meet strictly monitored and enforced quality standards. Currently, there are 71 licensees in the United States. Under the license, a fee is paid for the right to

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§ 1996(2). The referendum was approved in a referendum conducted July 17-26, 1991. See 57 Fed. Reg. 29181 (July 1, 1992).

11. In 1989, the Department of Agriculture refunded 33 percent of all assessments collected, and in 1990, refunded 36 percent. Department of Agriculture, Agricultural Marketing Service, Cotton Division, "Cotton Research and Promotion Program History of Collection".

12. *Id.*

use the mark, which fees are used to promote the use of wool, to assist wool manufacturers and retailers through technical advice, and to conduct product research and development — the same objectives described in the Sheep Act. The success of the voluntary Cotton Program and of the Woolmark belie the government argument (and FAIR's assumption) that without government guidance, individual business people will not act in their own best business interest by pooling resources with others to their mutual benefit.

Mandatory contributions for generic advertising pose another difficulty for importers of textile products that is not faced by domestic producers of cotton or wool products. In *Cal-Almond*, the Court assumed that almond growers have a finite amount of funds to use for advertising.¹³ Funds that were spent, involuntarily, on generic advertising cannot be spent on other advertising efforts.¹⁴ The harm to producers caused by such mandatory expenditures is compounded for importers. Most agricultural producers concentrate on a single fruit crop, or a small number of crops, limiting the products on which they would expend advertising dollars. Textile importers, by contrast, import a wide variety of textile products. Consequently, whereas a peach farmer, for example, can focus his advertising dollars on promoting peaches, a textile importer, by contrast, must divide his advertising budget among a wide variety of textiles both in terms of fiber — cotton, wool (including lambs wool, angora wool, Shetland wool, and cashmere wool), rayon, silk, polyester, other man-made fibers, or blends — and in terms of products — such as skirts versus dresses. Accordingly, for textile importers, not only is the issue of *how* to advertise being taken out of their hands, but the decision as to *which products* to advertise is also being usurped

13. 14 F.3d at 438-9.

14. *Id.* at 439.

by the mandatory contribution requirement of the Cotton Program and the Sheep and Wool Program.

There is yet another burden imposed on importers, but not on domestic producers, when assessments are collected on the production of a raw commodity product that is then exported, such as cotton or wool, as well as on imports of finished products using that commodity. Specifically, U.S. producers are major exporters of raw cotton which is then used to produce finished products that are then re-imported into the United States. That means that the assessment program covering both domestic and imported goods results in the double taxation of some imported cotton products. For example, the Cotton Act and accompanying regulations provide for the collection of the cotton levy on bales of domestically-produced cotton.¹⁵ Because the regulations provide specifically that "[s]uch assessment shall be payable and collected only once on each bale," no assessment is levied on products manufactured in the United States from domestic cotton (*i.e.*, cotton clothing).¹⁶ By contrast, the levy imposed on imports is assessed against either bales of cotton or the "bale equivalent" of "cotton in cotton containing products"¹⁷ Because the cotton levy is collected on imported "cotton containing products", imported cotton products may be subject to a double assessment — first on the U.S.-produced cotton prior to exportation for processing, and again upon reimport as a cotton product (such as a cotton shirt or cotton trousers).¹⁸ Thus, imported cotton products may,

15. 19 C.F.R. § 1205.510.

16. *Id.*

17. 19 C.F.R. § 1205.510(b).

18. The same problem could arise under the Sheep and Wool Program,
(Cont'd)

if produced from cotton grown in the United States, be taxed twice, whereas domestically produced cotton products are taxed only once.¹⁹

Even more indicative of the dangers of the ever-expanding reach of domestic promotion programs under agricultural marketing programs is the inclusion of multiple products, such as has happened under the Sheep and Wool Program. Not only does this program include domestic producers and importers, who, as demonstrated above, often have different interests and goals, but it includes two significantly different products, with dissimilar interests and concerns — lamb meat and wool products.²⁰ Those in the lamb meat industry have no common interests with those in the textile industry — the lamb meat industry wants a sheep that grows fast and is low in fat whereas the wool industry wants a hearty sheep with a thick coat. Furthermore, there is no overlap in advertising that could promote a meat product at the same time it promotes a woolsuit. The complete lack of common interest between these two products calls into question the justification for including them in the same program and will likely undermine the efficacy of the program.

Whereas the lack of common interest might simply reduce

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but because the United States exports very little wool, the double taxation issue will not occur as frequently.

19. Whether or not the control on the quantity of imported cotton products, by means of double taxation, is a worthy purpose, such a result is not the purpose of agricultural marketing orders. Any interest in protecting the domestic cotton textile industry is within the purview of the trade laws and should not be hidden between the lines in an agricultural support program.

20. Raw wool, however, is exempted from the levy, clearly following significant pressure from domestic mills.

the effectiveness of any such program, the composition of the governing Sheep Board virtually guarantees that the interests of importers, and wool importers in particular, will be subjugated to the interests of the lamb meat domestic industry. The Sheep Act establishes a governing Board that consists of 120 members,²¹ of which 95 seats are reserved for the domestic sheep industry and the remaining 25 seats are allotted to importers. This distribution of seats is grossly disproportionate to projected revenues. According to figures from the domestic sheep industry itself, imports (of both lamb meat and wool products) are projected to account for approximately 45 percent of projected revenues. Importers, however, are allocated only about 20 percent representation in the essential decision-making bodies.²² Nor does the Sheep Act provide any mechanism for ameliorating this distortion. Unlike the Cotton Act, which provides for the reallocation of seats on the Cotton Board to reflect shifts in contributions, the Sheep Act provides no mechanism for reallocating the membership of the Sheep Board.²³ It strains credulity to believe that the Sheep Board, dominated by domestic producers, will evenly disburse dollars to encourage consumption of imported products at the expense of their own production.

One justification given by the courts in upholding

21. By comparison, the Cotton Board, with revenues exceeding \$62 million, has 24 members. The Sheep and Wool Program is projected to collect only \$14 million, but has 120 Board members.

22. It is ironic that the Department has noted that "the Secretary should have the latitude to appoint representatives to the Board in a manner that best reflects the interests of the various importer segments", 60 Fed. Reg. 62298, 62303 (December 5, 1995), while the composition of the Board as a whole ignores proportionate representation.

23. 7 U.S.C. § 7104(b); 60 Fed. Reg. at 62303.

mandatory assessments is that the marketing boards overseeing the generic advertising programs are themselves producers of the subject product. Thus, the Peach Board, comprising peach growers, would be well-equipped to oversee a peach promotion program. At least participants in single product programs (such as the peach program or nectarine program) can find comfort in the knowledge that those on the Board overseeing the advertising budget are knowledgeable about the industry and have a vested interest in its success. Wool importers have no such comfort. The Sheep Board is composed primarily of sheep producers who are in the lamb meat business, not the wool clothing business. Therefore, wool importers' mandatory contributions for advertising are being spent by a Board, the vast majority of whose members know nothing about the wool industry, and have no financial interest in its success. In short, the Sheep and Wool Program manifests nearly the worst example of an agricultural marketing agreement — one including diverse products with no coincidence of advertising interests, conflicting research and development needs, covering both domestically-produced products as well as imports, while the governing Board is disproportionately weighted in favor of one group's interests.

CONCLUSION

The messages at stake in this case are not those of the speakers who are forced to pay for them despite their disagreement with both the message and the messenger. They have been forced to accept the government's choice of messenger, the government's content-based preference for the type of message, and their competitors' choice of the specific messages. The Ninth Circuit was entirely correct in ruling that the speech tax at issue in this case is unconstitutional. The government was completely unable to demonstrate either that its chosen messenger, a committee of Respondents' competitors, or its content-based preference of message,

generic collective advertising versus the vast array of promotional efforts undertaken by individual firms including brand advertising, were more effective at promoting the government's albeit vague and ill-defined ends. Moreover, the speech tax was not narrowly tailored and was more restrictive than necessary to achieve the government's objective. While unquestionably the correct result, the litigation was excruciatingly painful. At first, for example, USDA refused to accept that there was even a First Amendment issue at stake. Respondents had to suffer through a lengthy exhaustion of administrative remedies process, arguably a "kangaroo court" because the Secretary (wearing his judicial hat) rarely rules against his policy choices concerning marketing orders, while facing injunctions, enforcement actions, and blatantly misleading promises regarding a refund of the tax.

Amici respectfully request that this Court simplify the process of challenging these programs by (1) clarifying that a government interest no more compelling than choosing one form of advertising over another can never be important, substantial, or compelling enough to justify forced support for the speech of others; (2) clarifying that the government must meet this high threshold burden before questions of effectiveness and the availability of less restrictive means or non-speech restrictive alternatives are examined; and (3) clarifying that wealth redistribution and the avoidance of so-called "free rider" problems can never be a sufficient government interest to justify such programs.

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Supreme Court, U.S.

FILED

SEP 27 1996

No. 95 - 1184

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DANIEL R. GLICKMAN,
SECRETARY OF AGRICULTURE,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., et al.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF TREEHOUSE FARMS, INC.
AS AMICUS CURIAE IN SUPPORT OF THE
RESPONDENT

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p. 14,381	7
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Miscellaneous

N. Powers, U.S. Dept. of Agriculture, <i>Agricultural Economic Report No. 629, Federal Marketing Orders for Fruits, Vegetables, Nuts, and Specialty Crops</i> (1990)	23, 24
O. Forker & R. Ward, <i>Commodity Advertising: The Economics and Measurement of Generic Programs</i> (1993)	11, 21, 23

INTEREST OF THE AMICUS CURIAE¹

Amicus curiae Treehouse Farms, Inc. is a handler of California almonds. In May 1994, Treehouse filed a petition, pursuant to 7 U.S.C. § 608c(15)(a), challenging the constitutionality of the United States Department of Agriculture's marketing orders for the almond industry for the period 1987 forward. Treehouse's petition was based on its assertion that the almond marketing orders violated Treehouse's rights under the First Amendment. Treehouse's petition was filed only months after the December 1993 decision of the Ninth Circuit, in which the panel held that the almond marketing order in effect from 1980 to 1993 had violated the First Amendment rights of the handlers in that case. *Cal-Almond, Inc. v. United States Dept. of Agriculture*, 14 F.3d 429 (9th Cir. 1993).

Treehouse's petition was consolidated with petitions filed by several other almond handlers. In June 1995, following a two-week evidentiary hearing, a USDA administrative law judge ruled in favor of all of the petitioners, holding that the almond marketing orders in effect from 1987 forward violated petitioners' First Amendment rights. That decision remains on administrative appeal.

Accordingly, the result in this case could have substantial implications for the almond handlers and could affect the enforcement of the decisions issued by the Ninth Circuit in the *Cal-Almond* litigation. Indeed, there are now petitions for certiorari pending before this Court in connection with the second Ninth Circuit decision affecting the almond industry. See *United States Dept. of Agriculture v. Cal-Almond Inc.*, 65 U.S.L.W. 3002 (U.S. July 2, 1996) (No. 95-1879).

Treehouse believes that the constitutionality of the USDA's marketing orders should be evaluated under the test set forth by this Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). Application of this test

¹ Petitioners as well as respondents have consented to the filing of this brief. Their letters of consent have been filed with the Clerk under Rule 37.3(a) of this Court.

to the facts before the Ninth Circuit in *Wileman Bros.* — as well as to the somewhat unusual facts that have been presented with respect to the almond industry — compels a finding that the USDA's marketing orders have substantially infringed the First Amendment rights of the handlers. The regulations have forced handlers to contribute to generic advertising campaigns with which they disagree. These campaigns have been ineffective and are inherently incapable of meeting the objectives that they were designed to achieve on behalf of the handlers or members of their industries.

SUMMARY OF ARGUMENT

Generic commodity advertising programs promulgated under the Agricultural Marketing Agreement Act (AMAA) violate the First Amendment. Congress enacted the AMAA in the wake of the Great Depression to respond to problems brought on by that economic crisis. Congress, however, did not authorize compelled advertising programs under the AMAA until the 1960s, and initially, only for cherries. Congress later authorized advertising for other commodities, including peaches, plums, nectarines, and almonds. With respect to all of these commodities, the legislative history and findings of the Secretary of Agriculture do not establish that compelled advertising programs are necessary for the economic health of these industries.

The First Amendment propriety of these compelled advertising programs must be assessed under this Court's decision in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). That the current case involves a commercial speech compulsion rather than a prohibition does not change the analysis. This Court historically has applied the same constitutional scrutiny in compelled speech cases as it has in prohibition cases. Importantly, the danger presented by the compulsion in this case, paternalistic government manipulation of consumer information, is the same danger that this Court has identified with respect to commercial speech prohibitions.

The case for application of *Central Hudson* is even stronger where the government's program functionally operates like a prohibition. There is no question that the assessments in this case reduce the handlers' ability to pursue their own speech. This Court has recognized that speech may be effectively prohibited where businesses with limited resources are subject to government speech requirements. Furthermore, the assessments in this case are unlike general taxes where revenues are funnelled into a general revenue fund. These assessments are used exclusively for the dissemination of certain messages.

The Government erroneously claims that *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *Keller v. State Bar of California*, 496 U.S. 1 (1990) establish that these regulations are to be judged by a lax "germaneness" test. In those cases, there was no argument that the regulations operated effectively to prohibit speech. In addition, the government in those cases did not determine the content of the speech of the organization, as it does in this case. Finally, this Court has not employed the "germaneness" analysis to evaluate the constitutionality of a compelled government program but only to determine whether, on the margin, a particular activity falls within the constitutional area once the program itself has been judged constitutional.

The Government has also failed to carry its burden of proving that the regulations in this case satisfy the *Central Hudson* test. The Government's showing rests entirely on "mere speculation [and] conjecture."

The Government has attempted to justify the mandatory assessments in three ways, none of which is persuasive. The Government's claim that collective advertising will not take place absent mandatory assessments is not supported by Congressional findings or record evidence. Second, even if collective advertising were to decline absent government compulsion, the Government fails to establish that the individual advertising would not adequately serve the objective of increasing consumption. Finally, the Government's proffered concern about fairness and

free-riders is untenable in light of the fundamental unfairness that actually results from these programs.

ARGUMENT

This case presents a First Amendment challenge to government regulations compelling generic commodity advertising.² The Government's brief reflects two errors that are both fundamental and pervasive.

First, the Government urges that the test established by this Court in *Central Hudson* for determining the constitutionality of government regulation of commercial speech is inapplicable. It urges that the constitutionality of compelled commercial speech should instead be judged by a far lesser level of scrutiny, requiring only that the Government establish that the regulation is "germane" to a legitimate government objective.

The second error lies in the Government's contention that the compelled advertising involved here satisfies *Central Hudson*. In fact, the Government has failed to make the factual showing required by *Central Hudson* and later decisions of this Court. The Government's showing rests entirely on assumption and speculation, rather than concrete support from the legislative history, administrative proceedings, or the factual record.

I. THE HISTORY OF GOVERNMENT COMPELLED SPEECH IN THE COMMODITIES FIELD.

The statutory authorization for the generic commodity advertising programs in this case, and for programs covering numerous other commodities, is found in amendments added to the Agricultural Marketing Agreement Act of 1937 (AMAA), beginning in the early 1960's. 7 U.S.C. § 608c(6)(I).

² See, e.g., 7 U.S.C. § 608c(6)(I); 7 C.F.R. § 916.45 (California nectarine advertising); 7 C.F.R. § 917.39 (California peach and pear advertising); 7 C.F.R. § 981.41 (California almonds).

As the Government recognizes (Pet. Br. 3), the original 1937 Act sought to achieve price and supply stability in the farm industry during the Great Depression. The enactment was designed to address the "disruption of the orderly exchange of commodities in interstate commerce" in order to preserve "the purchasing power of farmers" and "the value of agricultural assets which support the national credit structure." 7 U.S.C. § 601.

The Secretary of Agriculture was to implement the statute by issuing marketing orders regulating certain commodities. See Act to Amend Agricultural Adjustment Act, ch. 641, § 5, 49 Stat. 750, 753 (1935).³ With respect to fruits, the Secretary's powers originally encompassed, for example, the abilities to limit the quantities marketed by grade and quality of fruit, and to allot the amount fruit handlers could purchase or market. See 49 Stat. 755-56. Congress evidently did not believe it necessary to include provisions authorizing compulsory advertising, and did not do so.

Under 7 U.S.C. § 610(b)(2)(ii), which was added in 1947, any marketing order issued by the Secretary was to provide for assessments against fruit handlers for the pro rata share of expenses associated with that order. In 1954, paragraph (I) of § 608c(6) was added to the AMAA. This provision allowed the Secretary to establish "marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption" of certain commodities. Agricultural Act of 1954, ch. 1041, tit. IV, § 401(b), 68 Stat. 906. The expenses of these projects were "to be paid from funds collected pursuant to the marketing order." *Id.* However, neither

³ What is now 7 U.S.C. § 608c was originally enacted as an amendment to the Agricultural Adjustment Act in 1935. It was reenacted as part of the Agricultural Marketing Agreement Act of 1937. Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246 (codified as amended at 7 U.S.C. §§ 601-626).

the 1947 nor the 1954 provisions authorized the Secretary to compel paid advertising of commodities.

A provision for the first time authorizing the Secretary to compel paid advertising for cherries (but not other commodities) was added in 1962, and its genesis is instructive. Section 403 of the Food and Agriculture Act of 1962 amended 7 U.S.C. § 608c(6)(I) to provide specifically that marketing orders for cherries could include paid advertising. Pub. L. No. 87-703, tit. IV, § 403, 76 Stat. 632. The provision authorizing compulsory cherry advertising was proposed by Senator Hart from Michigan and was adopted as a floor amendment by the Senate, apparently as a concession to the cherry industry. The provision was hardly seen as a solution to a pervasive economic problem; indeed, at the time there was "real opposition to including this provision in marketing agreement legislation generally for all products." 108 Cong. Rec. 9324 (1962) (statement of Sen. Holland). The provision was adopted, however because cherries were "a relatively small product" and the industry desired "the same advantage that citrus growers have in Florida, California, and Texas by State law." *Id.*

Congress added other commodities to the statutory paid advertising clause in subsequent years. Nectarines, plums, and other commodities were included in 1965. *See Produce-Marketing Orders—Advertising*, Pub. L. No. 89-330 § 1(b) 79 Stat. 1270. Almonds were added in 1970. *See Agriculture—Marketing Orders—Almonds*, Pub. L. No. 91-522, 84 Stat. 1357. California-grown peaches were added to the statutory paid advertising provision in 1971. *See Agriculture—Marketing Orders—California Peaches*, Pub. L. No. 92-120, 85 Stat. 340. In each of these instances, the legislation was apparently responsive to the Secretary of Agriculture's views, *see* S. Rep. No. 295, 92d Cong., 1st Sess. (1971); S. Rep. No. 1204, 91st Cong., 2d Sess. (1970); H.R. Rep. No. 846, 89th Cong., 1st Sess. (1965), that "any fruit or vegetable commodity group which actively supports the development of a promotion program by [mandatory assessments] should be given an opportunity to do so." S. Rep. No. 295 (1971), *reprinted in* 1971 U.S.C.C.A.N.

1406, 1407 (California-grown peaches); *accord* S. Rep. No. 91-1204 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4780, 4782 (almonds); H.R. Rep. No. 846 (1965), *reprinted in* 1965 U.S.C.C.A.N. 4142, 4144 (nectarines, plums & others). In other words, the compelled advertising was an effort to accommodate industry demand rather than a governmental judgment that such advertising was essential.

As Congress added commodities, the Secretary issued marketing orders authorizing the advertising programs for those commodities. Compulsory advertising for California nectarines was included in an administrative marketing order from the Secretary beginning in 1966. *See* 31 Fed. Reg. 5635 & 8176 (1966); 7 C.F.R. pt. 916. Compulsory advertising for plums began in 1971. 36 Fed. Reg. 8735 & 14,381 (1971).⁴ Compulsory advertising on behalf of California peaches was authorized by marketing order starting in 1976. *See* 41 Fed. Reg. 14,375 & 17,528 (1976); 7 C.F.R. pt. 917.⁵

When adopting the nectarine paid advertising authorization, the Secretary made no findings that paid advertising was essential to the continued health of the industry. Rather, the goal was to enable this product to better compete with others. He noted that "nectarines are marketed in a highly competitive situation," and compete "with a host of processed and fresh fruits, many of which are nationally advertised and promoted." 31 Fed. Reg. at 5636; *accord* 36 Fed. Reg. at 8736 (similar finding with respect to plums). Moreover, the Secretary determined that paid advertising "is needed in the [marketing] order so the [producers] committee will possess the means to strengthen the competitive

⁴ Compulsory advertising for plums ended in 1991. Pet. App. 5a n.1.

⁵ According to 7 U.S.C. § 608c(6)(I), paid advertising is now authorized for "almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, or Florida-grown strawberries."

position of nectarines and to maintain or expand sales as the occasion demands." 31 Fed. Reg. at 5636. In authorizing peach paid advertising, the Secretary concluded that the authority "would place the peach and pear industries in a better position to advance the interests of growers." 41 Fed. Reg. at 14,377. The Secretary also found that the "sharing of overhead and administrative costs reduces the costs of promotional activities for each fruit." *Id.*

In each of these instances, the Secretary's approach was the same. Following the issuance of an order, a committee of producers formed pursuant to the marketing order could decide, by majority vote, to adopt a compulsory program. *See, e.g.*, 7 C.F.R. § 916.45; 7 C.F.R. § 917.39. If the producers committee voted to adopt such a program, the handlers, who had no say in whether the advertising program was adopted in the first place, were compelled to financially support the program. The content of the proposed advertising would be determined by the producers committee.

Thus, for example, the regulations regarding California-grown nectarines, found in part 916 of Title 7 of the C.F.R., provide for a body to administer the regulations called the Nectarine Administrative Committee, and it is composed of eight members appointed by the Secretary. 7 C.F.R. § 916.20. Each member must be a "grower," defined as "any person who produces nectarines for the fresh market and who has a proprietary interest therein." § 916.9. The Committee is in charge of establishing the marketing advertising programs, subject to the approval of the Secretary. § 916.45. The Committee's projects are financed by assessments paid by "handlers"; a handler is "any person (except a common or contract carrier transporting nectarines owned by another person) who handles nectarines." § 916.10. "Handle" means to "sell, consign, deliver, or transport nectarines. . . between the production area and any point outside thereof, or within the production area." § 916.11. The Committee submits a yearly budget, including amounts for advertising and a

recommendation for an assessment rate, to the Secretary for approval. § 916.31(c); § 916.62.⁶

When the Secretary adopts a budget from an administrative committee, he fixes an assessment rate on handlers to finance that budget. *See* 7 C.F.R. §§ 916.41 & 917.37. Handlers who object to the provisions of marketing orders promulgated by the Secretary may petition for a modification of the order or a specific exemption from that order, but only on the ground that the assessment is contrary to law. *See* 7 U.S.C. § 608c(15)(A).

The most recent final rule adopting an assessment rate for peach and nectarine handlers was issued by the USDA on October 5, 1995 and remained effective from March 1995 through February 1996. According to that ruling, there are about 300 handlers of nectarines and peaches in California subject to USDA marketing orders. In addition, there are about 1,800 producers of nectarines and peaches in California. 60 Fed. Reg. 52,067 (1995). The USDA accepted the Nectarine Administrative Committee's recommendation \$3,683,031 for expenses for the 1995-96 fiscal year. Of this amount, \$1,534,593 was allocated for "domestic market development." *Id.* at 52,068. The Peach Commodity Committee recommended a budget of \$3,736,531 with \$1,534,593 for "domestic market development."⁷ The assessment rates approved to meet those expenses were \$0.1850 per 25-pound container or equivalent of nectarines handled and \$0.19 per 25-pound container or equivalent of peaches handled.

⁶ The peach, pear, and (when they were included) plum regulations are found in part 917 of title 7, and, as with nectarines, advertising and marketing project decisions, subject to the Secretary's approval, are made by a Commodity Committee, which consists of growers only. *See* 7 C.F.R. §§ 917.35 & 917.39. Each Commodity Committee submits a yearly budget, including money designated for advertising and recommended assessment, to the Secretary for approval. § 917.35(f).

⁷ For both peaches and nectarines, expenses fall into one of four general categories: "administration costs, inspection services, research, and the largest of the four, advertising and promotion." Pet. App. 52a.

While it appears in the same code provision, Congressional authorization for paid advertising for almonds is slightly different than that of tree fruit. Congress included a provision that allows the Secretary to credit almond handlers for direct marketing expenditures, including paid advertising, when calculating pro rata expense assessment for those almond handlers. See Agriculture—Marketing Orders—Almonds, Pub. L. No. 91-522, 84 Stat. 1357. Section 608c(6)(I) also provides for possible credits for handlers of filberts, raisins, walnuts, olives, and Florida Indian River grapefruit. 7 U.S.C. § 608c(6)(I). This almond program was invalidated by the Ninth Circuit as contrary to the First Amendment.⁸

In addition to the commodities listed in § 608c(6)(I), Congress has authorized paid advertising and promotion for numerous other commodities in stand-alone legislation now found in separate sections of the Code.⁹ Moreover, as part of the recent Federal

⁸ *Cal-Almond, Inc. v. United States Dept. of Agriculture*, 14 F.3d 429 (9th Cir. 1993).

In the almond situation, the credit system actually promotes unfairness. Because, as the Government acknowledges, one retailer (Blue Diamond) maintains a 90% market share and does a considerable amount of retail advertising, it can avoid major contributions to the generic campaign. *Cal-Almond*, 14 F.3d at 438-39. Most of the rest of the handlers who must contribute to the campaign sell almonds as ingredients to foreign purchasers. Thus, those handlers contribute much money to a generic advertising campaign that benefits only one retailer. *Id.* at 440 (restrictions on creditable advertising “are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers . . . who sell primarily to ingredient manufacturers”).

⁹ See, e.g., Soybean Promotion, Research and Consumer Information Act of 1990, Pub. L. No. 101-624, 104 Stat. 3881 (codified as amended at 7 U.S.C. §§ 6301-6311); Watermelon Research and Promotion Act of 1985, Pub. L. No. 99-198, tit. XVI, 99 Stat. 1622 (codified as amended at 7 U.S.C. §§ 4901-4916); Pork Promotion, Research and Consumer Information Act of 1985, Pub. L. No. 99-198 tit. XVI, 99

Agricultural Improvement And Reform Act of 1996 (FAIR Act), Congress enacted the “Commodity Promotion, Research, and Information Act of 1996,” which grants the Secretary broad power to pursue generic advertising programs for any “agricultural commodity.” See Pub. L. No. 104-127, tit. V, §§ 511-525, 110 Stat. 1032.¹⁰

II. THE PROPER FIRST AMENDMENT ANALYSIS IS THAT SPECIFIED IN *CENTRAL HUDSON GAS & ELEC. CORP. V. PUBLIC SERV. COMM’N OF N.Y.*

A. The *Central Hudson* Test Applies To Government-Compelled Commercial Speech

Beginning with its *Virginia Pharmacy* decision in 1976, and overruling long-standing precedent, this Court held that commercial speech is protected by the First Amendment. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976). In *Central Hudson*, this Court established for the first time a comprehensive test for judging the constitutionality of commercial speech restrictions that is less stringent than the test used to judge the constitutionality of non-commercial speech. This Court has thus concluded that the government “may regulate some types of commercial advertising more freely than other forms of protected speech.” 44

Stat. 1606 (codified at 7 U.S.C. §§ 4801-4819); Beef Promotion and Research Act of 1985, Pub. L. No. 99-198, tit. XVI, 99 Stat. 1597 (codified at 7 U.S.C. §§ 2901-2911); Egg Research and Consumer Information Act of 1974, Pub. L. No. 93-428, § 3, 88 Stat. 1171 (codified as amended at 7 U.S.C. §§ 2701-2718).

¹⁰ According to one publication: “Commodity groups tend to prefer stand-alone legislation over the AMAA of 1937 because it provides for a more informal rule making procedure and the program can be tailored more to their specific needs.” O. Forker & R. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs* 82 (1993).

Liquormart v. Rhode Island, 116 S. Ct. 1495, 1505 (1996) (plurality op.); *Central Hudson*, 447 U.S. at 563.¹¹

The *Central Hudson* Court outlined a four-part analysis by which government regulation of commercial speech is to be judged. First, the commercial speech must "concern lawful activity and not be misleading." 447 U.S. at 566. Next, a court must determine whether the interest that the government asserts to justify the regulation is "substantial." *Id.* Finally, a court must determine "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* Significantly, with respect to these latter two inquiries, the government bears the burden of proving that the more limited regulations "would not serve adequately the State's interests." *Id.* at 570. The *Central Hudson* analysis was performed by the Court of Appeals in this case when it struck down the compelled contributions. Pet. App. 16a.

That the regulation involved here is not a traditional government prohibition on speech, *see, e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1587 (1995) (concerning federal labeling prohibitions), does not change the propriety of evaluating this case under the *Central Hudson* analysis.¹² This Court has noted that speech compelled by the government may be just as offensive

¹¹ But *see 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1518 (1996) (Thomas, J., concurring) (finding no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech"); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418-19 (1993) (cautioning against placing too much weight on the distinction between commercial and noncommercial speech).

¹² The fact that a government regulation, on its face, does not prohibit speech (Pet. Br. 17) is irrelevant to whether it burdens the First Amendment. *See United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1014 (1995); *Simon & Schuster, Inc. v. Members of The New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991).

as government prohibition of speech especially where, as here, such compulsion operates to displace the free flow of information.

In the context of non-commercial speech, it is well-established that the First Amendment protects not only the right to be free from government restrictions on speech, but also the right to be free from government compulsion requiring the presentation of a particular message.¹³ This freedom has been protected in a wide variety of contexts. *See, e.g., Hurley v. Irish-American Gay Group Of Boston*, 115 S. Ct. 2338, 2347 (1995) (message in a parade); *Wooley v. Maynard*, 430 U.S. 705 (1977) (display of state motto on license plate); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compelled flag salute and pledge of allegiance). This right not to speak includes the right not to fund certain speech activities with mandatory contributions. *Keller v. State Bar Of Calif.*, 496 U.S. 1 (1990) (State bar dues may not be used to fund ideological or political activities). The right to be free of government compulsion is a corollary of the right to be free from government speech restrictions. The *Wooley* Court stated that the right to speak and the right to refrain from speaking are "complementary components of the broader concept of 'individual freedom of mind.'" 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637). Consequently, this Court has applied the same constitutional scrutiny to compelled speech cases as it has in the corresponding prohibition cases. Thus, in *Wooley*, the Court required the State to show a compelling justification for the compulsion, just as the state would be required to show a

¹³ As this Court concluded in *Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 797 (1988) (plurality op.), "'freedom of speech' . . . necessarily compris[es] the decision of both what to say and what not to say." *See also Pacific Gas And Elec. Co. v. Public Utilities Comm'n Of Calif.*, 475 U.S. 1, 16 (1986) ("the choice to speak includes within it the choice of what not to say") (plurality op.); *cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.").

compelling justification for restrictions on political speech. 430 U.S. at 716; see *Pacific Gas & Elec. Co. v. Public Utilities Comm'n of Calif.*, 475 U.S. 1, 19 (1986) (plurality op.); *Barnette*, 319 U.S. at 642. So, too, in the case of commercial speech, while the overall standard is less stringent, the test should not vary depending on whether compulsion or prohibition is involved.

Compelling commercial speech presents the same dangers as prohibiting commercial speech. In each case, the government is attempting to manipulate the choices of consumers through advertising, an approach which this Court has disapproved, viewing the government's paternalistic efforts to regulate the flow of information as inherently suspect under the First Amendment. See 44 *Liquormart*, 116 S. Ct. at 1508 (plurality op.). While in the case of compelled speech the government is not cordoning off information from the public, it acts just as paternalistically in compelling speech about the products the government prefers and thinks that consumers should also prefer. As this Court stated in *Virginia Pharmacy*, the ability of consumers to make "private economic decisions" free from government manipulation of speech is of primary importance in a free enterprise economy. 425 U.S. at 765.¹⁴

¹⁴ This Court has sometimes allowed the government to require the disclosure of information in the commercial context, in order to protect consumers. See *Hurley*, 115 S. Ct. at 2347. But these cases are limited strictly to circumstances in which warnings or disclaimers are appropriate "to dissipate the possibility of consumer confusion or deception," *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (internal quotation omitted). The *Zauderer* Court upheld Ohio's requirement that legal advertisements contain "purely factual and uncontroversial information about the terms under which [legal] services will be available." *Id.* The first part of *Central Hudson* directly takes account of this problem.

The government program in this case is far removed from a mandatory disclosure designed to serve accurate information. The Government does not stand in the position of a regulating body

Moreover, the use of the *Central Hudson* test is particularly appropriate here because the government program actually operates to prohibit commercial speech. This Court has recognized the economic realities that accompany businesses with limited resources. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court found that one of the penalties borne by newspapers who were forced by state law to publish replies from persons who were subject to negative editorials was "the cost . . . in taking up space that could be devoted to other material the newspaper may have preferred to print." *Id.* at 256. The Court stated that the "Florida statute operates as a command in the same sense as a statute or regulation forbidding [the newspaper] to publish a specified matter." *Id.* The Court recognized that it was not correct to conclude that, "as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines." *Id.* at 257.

Here also, where businesses with limited advertising budgets are subject to compelled-contribution speech programs, the regulations functionally operate like prohibitions. By compelling speech, the Government effectively displaces the information that these handlers would like to provide to the public, thereby disrupting the free-flow of information to consumers that this Court has emphasized as the primary concern in the commercial speech area. *Virginia Pharmacy*, 425 U.S. at 763-64.

The Court of Appeals recognized that some larger handlers were required to contribute over \$50,000 in some years - "a significant sum of money that could have been used in their own marketing efforts." Pet. App. 18a. The testimony indicated that some handlers were assessed even greater amounts. J.A. 553-54. The testimony clearly showed that the burdens caused handlers to forego advertising of their own. J.A. 567, 749.

attempting to prevent deception, but stands in the place of a manipulator of consumer behavior.

The Government urges that this argument proves too much. According to the Government, any government tax or fee reduces the amount of funds available for marketing efforts, and under our theory any such tax would be presumptively unconstitutional. Pet. Br. 20-21. The Government's argument vastly overstates the impact of the constitutional analysis that we propose. The assessments in this case are not general taxes the funds from which are funnelled into a general revenue fund for government expenditures. These are specific assessments imposed for a particular purpose. The focused nature of the assessments distinguishes this case from other economic regulation: "where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes." *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

This Court similarly has distinguished generally applicable taxes from taxes focused on particular groups. In *West Lynn Creamery v. Healy*, 114 S. Ct. 2205 (1994), the Court struck down a state tax scheme designed to help Massachusetts dairy farmers. All milk sold by dealers to Massachusetts retailers was taxed, but the proceeds were distributed exclusively to in-state farmers. This Court held that the tax could not be separated from the distribution of the proceeds: "A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business. The pricing order in this case, however, is funded principally from taxes on the sale of milk produced in other States." *Id.* at 2212. As a result, the tax was found to discriminate against interstate commerce.

Therefore, the fact that the compelled speech program in this case does not appear, on its face, to be a speech prohibition, does not mean that it is not one in practice. It is particularly important that government regulation of commercial speech should be judged under the *Central Hudson* test if in theory or in practice it operates to prohibit speech.

B. The Government's Cases Are Inapplicable.

In place of *Central Hudson* the Government argues for a far less stringent analysis derived from the line of First Amendment cases concerning union and State bar dues. Pet. Br. 18-19. This Court has determined that the mandatory exaction of fees from non-union employees who might benefit from union collective-bargaining activities does not violate the First Amendment so long as the speech is limited to matters germane to the collective bargaining process. *Abood*, 431 U.S. at 232. This Court has also held that mandatory bar dues used to support a State bar organization's activities do not violate the First Amendment if their activities are germane to the professional activities of attorneys. *Lathrop v. Donohue*, 367 U.S. 820 (1961). However, this Court has concluded that the government may not compel contributions to support political or ideological causes not germane to the union's duties as a collective bargaining agent or the State bar's duties as regulator of the legal profession. *Abood*, 431 U.S. at 235; *Keller*, 496 U.S. at 14.

The Government now argues that the proper analysis in this case too is the "germaneness" or relevance of the subsidized activities to the government's general regulatory objectives. Pet. Br. 18; *see Abood*, 431 U.S. at 235. The Government seriously misconstrues the union and State bar dues cases.

First, there were no efforts, and no arguments, in either the union dues or bar dues cases that the effect of the regulation was to effectively prohibit speech. The amount of the mandated contributions were obviously small in amount. No credible argument could have been made that the impact of the assessments effectively prohibited the contributors from supporting other speech activities, and this Court found that they did not. *See Abood*, 431 U.S. at 230.

Second, the amount of government intrusion here is much greater than in the union and State bar dues cases. In those cases the government did not determine the content of the speech. The unions and State bars were free to pursue their speech activities without government dictation. Here, the Government, through

the operation of the commodity committees and with the final approval of the Secretary, compels the content of the speech. See Pet. Br. 25 n.16 (there is a "substantial degree of governmental involvement in the development and adoption of the promotional efforts"). Thus these are "[l]aws that compel speakers to utter or distribute speech bearing a particular message." *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2459 (1994) (plurality op.).

Finally, and most fundamentally, the line of cases that apply the "germaneness" test do not use that standard to judge the constitutionality of the compelled activity, but only to judge whether a particular compelled activity is within the constitutional area.

This Court recognized in *Abood* that the very decision to allow the union shop in the first place "countenanced a significant impingement on First Amendment rights." *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984); *Abood*, 431 U.S. at 222. According to *Ellis*, such an infringement "is justified by the governmental interest in industrial peace." 466 U.S. at 456. Once, however, the determination had been made that the union shop was allowed, the Court was left only to determine whether specific expenditures of funds were "germane" to the union's core purpose and whether the marginal infringement of First Amendment rights by the specific expenditures was enough to strike those regulations. *Id.* Not surprisingly, the *Ellis* Court found the marginal infringement of First Amendment rights by expenditures related to union conventions and publications was negligible. *Id.* With respect to the two expenditure categories that did implicate the First Amendment, the Court found that there was "little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself." *Id.*

Similarly in the State bar context, before the Court began analyzing the propriety of individual uses of funds with the "germaneness" analysis, see *Keller* 496 U.S. at 13, the Court analyzed whether forcing an attorney to pay dues to the State bar

in the first place violated the First Amendment, see *Lathrop* 367 U.S. at 827. In *Lathrop*, the Court held that compulsory dues payments did not violate the attorney's First Amendment rights. The Court noted that the State bar served a purpose almost wholly outside of the political arena. With respect to the plaintiff's claim that the State bar's activities resembled those of a political party, the Court stated that "on their face the purposes and the designated activities of the State Bar hardly justify this characterization." 367 U.S. at 833. Given the non-political nature of the State bar's function and the fact that a person's participation in the organization was limited only to payment of the dues, the Court rejected the First Amendment claim. *Id.* at 843.¹⁵ The germaneness test was used later in *Keller* only to determine the outer boundaries of government authority. 496 U.S. at 13-14.

There is no issue in this case as to whether the Government acts unconstitutionally in compelling fruit producers and handlers to become members of the associations, and to contribute to the non-speech activities of those associations. Thus, the First Amendment question arises here only when the Government seeks to compel particular speech, and at that point of the analysis nothing in the union dues or bar dues cases suggests that a mere germaneness test is all that should be required. Application of the *Central Hudson* test to judge the constitutionality of the speech activities is perfectly consistent with the Court's approach to the union dues and bar dues cases, where the initial First Amendment restriction was judged by a traditional constitutional test. The corollary to that test in the commercial speech area is the test articulated in *Central Hudson*.

¹⁵ The plaintiff's "core" claim was that he could not constitutionally be required to give support to the State Bar. The Court expressly reserved judgment on the plaintiff's claim that his dues specifically were being used to support political activities with which he disagreed. The Court determined that the record was not sufficient to decide the question. This question was later resolved by the *Keller* Court applying the "germaneness" test. 496 U.S. at 14.

III. THE COMPELLED ADVERTISING PROGRAM IN THIS CASE IS UNCONSTITUTIONAL UNDER THE *CENTRAL HUDSON* TEST

Just as the Government has not supported its efforts to jettison the *Central Hudson* test, it has failed to show how the *Central Hudson* test has been satisfied.

As discussed earlier, this Court's decision in *Central Hudson* established a three-part test for determining whether government regulation of lawful and non-misleading commercial speech violates the First Amendment. 447 U.S. at 566. The Government must have a substantial interest to justify the regulation, the regulation must directly advance the asserted interest, and the regulation cannot be "more extensive than is necessary to serve that interest." *Id.* The final two steps of the *Central Hudson* analysis "basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Rubin*, 115 S. Ct. at 1591 (internal quotation omitted). The Government bears the burden of proving that the speech regulations meet each part of this test. *See, e.g., Zauderer*, 471 U.S. at 647; *In re R.M.J.*, 455 U.S. 191, 203 (1982).

While this Court has made clear that the Government cannot rely on "mere speculation or conjecture" to justify a regulation on commercial speech,¹⁶ that is all that the Government offers in this case. The Government's argument in this case is reminiscent of the State of Rhode Island's assertions in *44 Liquormart*. In that case, this Court refused to accept the State's assertion that a liquor price-advertising ban advanced the State's temperance interest: "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the

¹⁶ *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993); *see Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (courts "may not simply assume that [a statute] will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity") (internal quotation omitted).

price advertising ban will significantly advance the State's interest in promoting temperance." 116 S. Ct. at 1509.

The most important interest that a government can assert justifying regulation on commercial advertising is the protection of the consumer.¹⁷ The Government has not, and cannot plausibly, justify the compelled speech program in this case on the grounds that it protects the health or safety of consumers. The Government instead asserts that it has a substantial interest in enhancing the consumption of nectarines, peaches, and plums in order to preserve American agriculture, and that advertising serves this interest by increasing consumption. Pet. Br. 35. The advertising programs at issue here were not, contrary to the Government's implication, adopted as a result of the agricultural collapse during the Great Depression, but are of far more recent origin and designed to serve perceived competitive interests of the fruit producers.¹⁸

But, assuming *arguendo* that enhancing the consumption of the fruits at issue is a substantial government interest, this interest could justify the regulation only if the Court were willing to accept a series of tenuous propositions, which are open to serious question. Initially, the Government has not established that advertising increases consumption. With respect to the effect of advertising in general, the Court of Appeals cited this Court's decision in *Posadas* for the proposition that advertising is "presumed" to increase consumption. Pet. App. 17a. This Court's recent decision in *44 Liquormart*, however, casts doubt

¹⁷ *See, e.g., Rubin*, 115 S. Ct. at 1591 (within the context of alcohol labeling, "Government here has a significant interest in protecting the health, safety, and welfare of its citizens").

¹⁸ *See Forker & Ward, supra*, at 89-90 ("most of the large generic commodity promotion programs that now exist came about because of political pressure from the affected commodity group"); *id.* ("With few exceptions, a major commodity trade organization provides the funds and the lobbying effort to enact legislation for commodity promotion programs.").

on the viability of this presumption. The 44 *Liquormart* Court was unwilling to assume that the price advertising ban on alcohol in that case would reduce significantly alcohol consumption. 116 S. Ct. at 1509 (plurality op.). The assumption that advertising increases consumption is equally open to question.

Moreover, the assumption is more complicated in this case because the advertising must increase consumption of the commodity at issue but, in order to advance the Government's interests in all of the promotion programs, not at the expense of other commodities being promoted by the Government. However, in order to believe that these Government generic advertising programs are effective for all of the commodities that the government assists, every person in America would have to have an almost infinite capacity for the consumption of fruits, vegetables, meats, dairy products, and whatever other commodity is being promoted, at the same time that the Government is encouraging consumers to avoid obesity and reduce their intake of at least some of these commodities.¹⁹

The Secretary himself has recognized the existence of competition among these commodities. For example, with regard to nectarines, the Secretary's written findings state, as a

¹⁹ Promotion programs now cover at least 39 separate food products, and all dairy products, cotton, wool, and fresh-cut flowers. Moreover, Congress recently passed the "Commodity Promotion, Research, and Information Act of 1996," as part of Federal Agricultural Improvement And Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888, which sets the groundwork for government promotion of any "agricultural commodity." *Id.* at 110 Stat. 1033. This latter terms includes all "agricultural, horticultural, viticultural, and dairy products," as well as "livestock and the products of livestock." *Id.*

As described by one Senator, FAIR "gives broad authority to the Secretary of Agriculture to propose and implement commodity promotion programs without an initial congressional authorization." 142 Cong. Rec. S. 3070 (daily ed. March 28, 1996) (statement of Sen. Feingold).

justification for these programs, that "nectarines are marketed in a highly competitive situation. They compete for shelf space and retail advertising attention with a host of processed and fresh fruits, many of which are nationally advertised and promoted." 31 Fed. Reg. at 5636; *accord* 36 Fed. Reg. at 8736 (similar finding made with respect to plums). In fact, the Government, by purporting to help all commodities, may end up helping none of them. Even the USDA has acknowledged that "[p]er capita total food consumption is relatively constant, and advertising a given food product generally reduces demand for close substitutes." N. Powers, U.S. Dept. of Agriculture, *Agricultural Economic Report No. 629, Federal Marketing Orders for Fruits, Vegetables, Nuts and Specialty Crops*²⁰ (1990).

The Government's brief offers no empirical data, but only "anecdotal evidence and educated guesses," as to whether paid advertising increases the per capita consumption of the tree fruit covered by the generic advertising programs in this case. *Rubin*, 115 S. Ct. at 1593. The Government cites one study that suggests that consumers who were exposed to the advertising purchased tree fruit more "frequently" than those who did not. *Pet. Br.* 36. However, the Government fails to give any information on whether the peaches, pears, plums, and nectarines purchased by these Kansas City consumers in fact came from California. Furthermore, simply because a person makes more trips to the store does not mean that their net consumption of all four fruits increased. In fact, the study cited by the Government reports that "[i]n net terms, respondents reported purchasing peaches and plums less often than last year, and about the same amount of pears and nectarines." J.A. 425. The most that one USDA report could say on the effect of advertising is that

²⁰ According to two commentators, this "full-stomach" argument, i.e. that commodity advertising is a "zero-sum game," has "some merit." Forker & Ward, *supra*, at 255. The only criticism of this argument that these commentators offer is that the argument ignores non-consumption benefits that might arise from the programs. *Id.* at 255-56, 259.

"[s]everal empirical studies suggest that generic advertising can temporarily boost sales." Powers, *supra*, at 20.

In any event, the Government's focus on its interest in increasing consumption merely obscures the real issue in this case. The issue is not whether the Government may suggest, encourage, or provide mechanisms for collective advertising. The issue is whether the Government has a substantial interest in *compelling* dissident fruit handlers to contribute to a mandatory advertising program. The Government urges that it does, apparently for three reasons.

First, the Government urges in the "germaneness" section of its brief (Pet. Br. 18-34) that the collective advertising program will "collapse" (Pet. Br. 27) and that the benefits of collective action "would be virtually impossible to achieve" (*id.*) absent the mandatory advertising program. Notably, the Government makes no such argument in the *Central Hudson* portion of its brief (Pet. Br. 34-48), and the reason is quite obvious. As required by *Central Hudson*, the Government is unable to find any evidence in the legislative history, the Secretary's marketing orders, or the record of this case to support any such assumption. There is no principal of classical economics which suggests that voluntary collective self-interested action by business entities is impossible to achieve. Indeed, the antitrust enforcement system is premised on the notion that such collective action is not only possible, but, in some instances, so tempting that it will be undertaken even when contrary to law.

While the legislative history of the advertising provisions suggests that advertising is beneficial and that the Government programs help to bring it about, there is no finding that mandatory participation is an essential feature. Even in the most recent legislation,²¹ where the Congressional findings were written in the light of the First Amendment litigation, no such

²¹ The Federal Agricultural Improvement And Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888. See J.A. 754-59.

finding appears. And while those findings assert that generic commodity promotion programs further the national public interest, there is no finding that mandatory assessments are necessary to accomplish this goal.²² The only legislative "finding" that the Government cites for this assertion is the Acting Secretary of Agriculture's 1965 letter, appearing in a House Report to the Act that authorized paid advertising for nectarines, plums and other commodities. Pet. Br. 27. That letter states: "voluntary efforts have shown that financing an advertising program is difficult without the help of State legislation or similar mediums such as under a Federal marketing order." H.R. Rep. No. 846, *reprinted in* 1965 U.S.C.C.A.N. at 4144. On its face, this letter does not say that the "benefits of collective action would be virtually impossible to achieve in the absence of mandatory assessments." Pet. Br. 27.²³

²² See, e.g., FAIR § 501(b)(1), J.A. 755 ("It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.").

According to the legislative history of FAIR, these findings were not in the Senate or House passed bills, which were reconciled into the Act, and were not "the subject of hearings or debate in either Chamber of Congress." 142 Cong. Rec. S. 3070 (daily ed. March 28, 1996) (statement of Sen. Feingold). The findings were specifically adopted as "an effort to combat Federal court challenges to these programs[.]" *Id.*

²³ The government cites this Court's decision in *United States v. Ruzicka*, 329 U.S. 287 (1946) as support for its argument that the promotional programs in this case would "collapse" without mandatory assessments. Pet. Br. 28. *Ruzicka*, however, is inapposite. It was decided before either marketing promotions or paid advertising was authorized by Congress.

Second, the Government argues at some length that individual advertising is not as effective as collective advertising.²⁴ The Government complains that individual advertising "aims to give each particular advertiser a larger share of that market," (Pet. Br. 39), will not educate "regarding the maturity and proper ripening" (Pet. Br. 40), or "educate the consumer about the fruit" (*id.*). Just why the Government should care what particular advertising copy is adopted, if the desired end (increased consumption) is achieved, is never explained. The Government's objections to individual advertising approaches are in fact no more than nit-picking.

When it comes to the question whether individual advertising increases consumption, the Government is forced to admit that it does. It concedes that individual "advertising, viewed in the aggregate, no doubt increases the overall market for a commodity." Pet. Br. 39. Most tellingly, the Government virtually concedes that it cannot show that individual advertising in general would not effectively address this broad goal. It admits that "there is no way definitively to determine what form and level of advertising individual handlers would engage in absent a system of mandatory assessments." Pet. Br. 42. Elsewhere, the Government appears to admit that "the government could not meet its burden of demonstrating that its approach would prove more effective than the efforts of individual handlers." Pet. Br. 43. In essence, the Government urges that the *Central Hudson* rule of proof be abandoned in favor of a rule permitting regulation by speculation. There is no support for such a radical revising of *Central Hudson*, either in logic or experience.

Finally, the Government argues that it has a substantial interest in preventing "free riders" from unfairly benefiting from collective advertising by others in the fruit industry. Pet. Br. 35. It is plain that the "free rider" "fairness" concern is the

²⁴ This argument also assumes that collective advertising would "collapse" in the absence of Government compulsion, an assumption which, we have shown, is based entirely on conjecture.

predominant asserted government interest. That this concern about free riders is the motivation behind this program is illustrated by the legislative history of the programs in this case. As noted above, paid advertising funded by mandatory assessments was authorized initially for one commodity only, cherries. That provision was sought by the cherry growers to compel fund advertising to compete with programs already existing by virtue of State law. See 108 Cong. Rec. 9324 (statement of Sen. Holland).

The legislative history of the 1965 legislation that added several other commodities to the paid advertising list contains more elaboration and suggests that this legislation was adopted for the convenience of certain members of the relevant commodity industries seeking to advertise collectively. According to a letter from the Acting Secretary of Agriculture, which was included in the House Report of the Bill, the Department had "not had any experience in the operation of an advertising program," but indicated that "if the growers of the commodities specified believe that advertising will benefit them, thereby tending to meet the objectives of the act, such authority should be added to the act." H.R. Rep. No. 846, reprinted in 1965 U.S.C.C.A.N. at 4144.

According to the Government it is "only fair that these handlers pay their pro rata share." Pet. Br. 48.²⁵ However, we have a real doubt as to whether this interest in "fairness" is a substantial government interest within the meaning of *Central Hudson*. Certainly no prior decision of this Court cited by the Government suggests that it is. But even on the assumption that it is, the Government regulation fails to achieve the "fairness" that it seeks. The producers of these commodities are not compelled to contribute a cent to the compelled advertising program. See Pet. Br. 25 n.16 ("although the assessments are

²⁵ Accord Pet. Br. 17 (program "fairly allocates" the burdens of participation); Pet. Br. 26 ("[i]t is only fair that the participants in that market pay their pro rata share"); Pet. Br. 27 (without mandatory assessments certain individuals "would unfairly benefit").

levied against the handlers of the fruits, the marketing orders are designed in large measure for the benefit of the producers (farmers)". Moreover, retailers also benefit from these programs without contributing.

So too, as the Court of Appeals in this case recognized, not all geographic regions are compelled to support the program. California is the only state where handlers are subject to these assessments even though there are thirty-three other states that commercially handle peaches and twenty-eight that handle nectarines. Pet. App. 21a. The Secretary found, with respect to nectarines, that "it is not widely produced in the United States," implying that there are significant numbers of foreign nectarines on the market. 31 Fed. Reg. at 5636. Thus, potentially, both out-of-state and foreign fruit handlers and producers may free ride on the advertising programs in this case. And in each instance, handlers of non-California fruit or handlers of foreign fruit are not asked to contribute. The testimony suggested that consumers are not aware of the origin of the fruit that they are buying. J.A. 653, 675.

In addition, the "fairness" justification is undercut by the existence of statutory exemptions for some participants in other programs. For example, the egg promotion program has a statutory exemption for egg producers who do not have over "75,000 laying hens." 7 U.S.C. § 2711(a). Significantly, with respect to this free rider "problem," Congress was not only aware of the situation, but acknowledged that the exemption was adopted precisely because it would create free riders. See S. Rep. No. 1109, 93d Congress 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 5418, 5419 (program designed so that small producers would benefit even though exempt from contributing); see also 7 U.S.C. § 6802(4) (cut-flower program exemption); 7 U.S.C. § 6102(11) (mushroom program exemption).

The almond situation presents a particularly egregious example of the unfairness and free-riding that these generic programs actually create. As the Government concedes in its brief, one retailer has approximately 90% of the domestic retail almond

market. Pet. Br. 47 & n.25. Other handlers do business by selling almonds as ingredients and overseas. See, e.g., *Cal-Almond*, 14 F.3d at 438 (Cal-Almond exports approximately 90 percent of its almonds for use as ingredient items). However, these latter handlers must pay assessments to promote the generic retail domestic marketing of almonds. Such advertising, if beneficial at all,²⁶ greatly benefits the one dominant domestic retailer but does not benefit ingredient sellers at all. *Cal-Almond*, 14 F.3d at 440.

The regulation here simply does not achieve the fairness which is its goal, and fails to directly advance the Government's goal as required by *Central Hudson*.

For all these reasons, the Government has (in some cases by its own admission) failed to bring forth proof that compelled advertising directly advances a substantial government interest and is not more extensive than necessary, proof which is essential to sustain the regulations under the First Amendment.

²⁶ The *Cal-Almond* court noted that the USDA has presented "little or no evidence regarding the effectiveness of the Board's promotional efforts," and thus failed to show that the creditable advertising program directly advanced a substantial government interest. *Id.* at 438. The court, in fact, concluded that "most of the evidence in the record indicates that the regulations hinder the handlers' efforts to increase sales and returns to growers." *Id.*

CONCLUSION

For the foregoing reasons the decision of the court of appeals should be affirmed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
v.
WILEMAN BROS. & ELLIOTT, INC., et al.,
Respondents.

On Writ of *Certiorari* to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICI CURIAE* OF
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AMERICAN ASSOCIATION OF
ADVERTISING AGENCIES,
MAGAZINE PUBLISHERS OF AMERICA,
AND DIRECT MARKETING ASSOCIATION
IN SUPPORT OF RESPONDENTS

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BRIEF AMICI CURIAE OF
AMERICAN ADVERTISING FEDERATION,
AMERICAN ASSOCIATION OF
ADVERTISING AGENCIES,
MAGAZINE PUBLISHERS OF AMERICA,
AND DIRECT MARKETING ASSOCIATION
IN SUPPORT OF RESPONDENTS

This brief is respectfully submitted pursuant to Rule 37 urging that the Court affirm the decision below of the United States Court of Appeals for the Ninth Circuit on the grounds that the mandatory federal agricultural commodity advertising programs at issue violate the Respondents' rights under the First Amendment to the Constitution of the United States.¹

INTEREST OF AMICI CURIAE

Together, the *amici* herein represent thousands of advertising agencies, advertisers, broadcasters, publishers, and others who participate in the advertising industry, as well as individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that the *amici* present their views to the Court. *Amici* are:

- The American Advertising Federation ("AAF"), a national trade association that traces its origins to 1903, representing virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio, and television broadcasters, outdoor advertising organizations, and other media. AAF members also include twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters, with more than 6,000 student members. AAF members use virtually all forms of media to adver-

¹ Counsel for both Petitioner and Respondents have consented to the participation of *amici* in this case, as evidenced in letters filed with the Court.

tise and communicate with consumers throughout the United States.

- The American Association of Advertising Agencies ("AAAA"), the national trade association of the advertising agency industry, formed in 1917, representing more than 600 advertising agencies with 2,000 offices located throughout the United States. Members of the AAAA create and place approximately 80% of all national advertisements, as well as significant portions of local and regional advertising. Most clients of AAAA members are businesses selling goods or services to the public. AAAA is dedicated to advancing the interests of the advertising industry and has actively represented its members in connection with governmental efforts to restrict speech.
- The Magazine Publishers of America, Inc. ("MPA"), a trade association for the consumer magazine industry. MPA was organized in 1919 and has a membership of approximately 200 publishers. Its members represent almost 800 general interest consumer magazines ranging from journals of literature to special interest publications, to multi-million circulation magazines. MPA members provide broad coverage of domestic and international news and publish periodicals covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.
- The Direct Marketing Association ("DMA"), a non-profit corporation. DMA is the oldest and largest trade association serving the vast community in direct-to-the-consumer advertising and marketing, its predecessor organizations having been founded in 1917. Its members are firms engaged in or associated with marketing goods and services through direct response efforts, which include the use of catalogs and other printed materials distributed directly to consumers.

Amici respectfully submit this brief to vindicate the principle that commercial speech should be entitled to the same constitutional protection as non-commercial speech.

SUMMARY OF ARGUMENT

The text and history of the First Amendment, as well as the "long accepted practices of the American people," support the view that truthful commercial messages about lawful products and services should be accorded the same constitutional protection as is non-commercial speech. This position is confirmed by the practice of state legislatures at the time the Bill of Rights was ratified. Although states regulated trade, the only restrictions on advertising concerned the promotion of unlawful activities, such as lotteries or horse-racing. This absence of state regulation is consistent with the colonial conception of a "free press," which included advertising, and with the Framers' political philosophy, which equated liberty and property. Full protection of commercial speech is also consistent with the history of the First Amendment, which was adopted in part to bar stamp acts that imposed taxes directly on advertising.

Advertising grew essentially unchecked and unregulated throughout the nineteenth century. While the number of states and statutes increased, advertising continued to be barred where it was used to publicize unlawful products, services, or activities. In addition, towards the end of the century, some restrictions began to be adopted limiting false and misleading advertising. This Court's treatment of truthful advertising during and immediately after Reconstruction was indistinguishable from the treatment accorded other forms of speech.

As was the case with capitalism generally, the Progressive Era witnessed both an increase in the power of advertising and attempts to limit it. But even these attempts overwhelmingly focused on ensuring that advertising was truthful and not misleading. During this time, courts analyzed constraints on commercial speech under the rubric of substantive due process. This confusion of categories caused the Supreme Court in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to erroneously treat restrictions on advertising as solely economic regulations subject only to rational basis scrutiny.

That error, which is in part perpetuated by this Court's continued distinction between commercial and non-commercial speech, conflicts with the "long accepted practices of the American people." Those practices—particularly state legislative practice at the times the First and Fourteenth Amendments were ratified by the states—support the contention that truthful commercial messages about lawful products and services are entitled to full First Amendment protection. Under that standard, the Secretary of Agriculture's mandatory advertising program is plainly unconstitutional.

ARGUMENT

At issue in this case is the appropriate test to be applied to the Secretary of Agriculture's regulations compelling California fruit growers to fund a "generic" advertising program whose message is determined by a committee of competitors appointed and supervised by the Secretary. See, e.g., 7 U.S.C. §§ 608c(7)(C) & 610; 7 C.F.R. 916.20, 917.16-25. The Secretary argues, among other things, that the forced advertising program is constitutional because of commercial speech's "'subordinate position in the scale of First Amendment values.'" Petitioner's Brief at 36 (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989)).² *Amici* demonstrate herein that, throughout most of this nation's history, the American people made no distinction between the constitutional protection for commercial and non-commercial speech.

These *amici* have previously addressed the central importance of advertising to the historical development of the American press and to the concept of the freedom of speech and of the press. See, e.g., Brief of *Amicus Curiae* American Advertising Federation, *et al.*, 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (filed July

² That "subordinate position" is exemplified by this Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Petitioners argue that the First Amendment rights of the fruit grower respondents are not even entitled to the lesser protections of the *Central Hudson* test. Petitioner's Brief at 20-21.

6, 1995). There, the Court acknowledged the importance of that historical context in unanimously striking down a state prohibition on advertising of liquor prices. The plurality opinion specifically referred to the historical materials discussed in our *amicus* brief, noting that:

Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on "commercial speech" for vital information about the market. . . . Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.

Id. at 1504 (Stevens, Kennedy, Souter & Ginsberg, J.J.) (citation omitted). Justice Thomas, relying in part on the historical analysis submitted by *amici*, rejected the notion that there was any "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *Id.* at 1518 (Thomas, J., concurring in part and concurring in the judgment).

Justice Scalia, concurring in the judgment, noted his "discomfort with the *Central Hudson* test," as well as his "aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them." *Id.* at 1515 (Scalia, J., concurring in the judgment). Justice Scalia found the historical material submitted by AAF, *et al.*, "consistent with First Amendment protection for commercial speech, but certainly not dispositive." *Id.* He stated that "the long accepted practices of the American people" were central to interpreting the First Amendment, and inquired about (1) state legislative practices at the time the First Amendment was adopted; (2) state legislative practices at the time of adoption of the Fourteenth Amendment; and (3) "any national consensus that had formed regarding state regulation of advertising after the Fourteenth Amendment, and before this Court's entry into the field." *Id.*

In this brief, *amici curiae* review the relevant history and seek to address these and related issues. *Amici* respectfully submit that the state legislative history and practice, like the available evidence surrounding the understanding of the generation of the Framers, supports the proposition that, until relatively recently, the American people would not and did not recognize a distinction in the protections afforded "commercial" and "non-commercial" speech, other than the advertising of illegal activities and the protections afforded against fraudulent or misleading claims.

I. ADVERTISING WAS UBIQUITOUS IN THE EARLY AMERICAN PRESS.

The development of a free press and of a commercial, advertising-driven press were inextricably linked. Verner W. Crane, *Benjamin Franklin's Letters to the Press, 1758-1775* xvi (1950) ("It was a commercial age, and it produced a commercial press."). As a result, the modern distinction between "commercial" messages and other forms of speech would not have occurred to colonial Americans. The First Amendment permits the regulation of commercial messages concerning lawful products and services only to ensure that they are truthful and not misleading.³ And, just as it does not otherwise countenance the suppression of those messages, the Constitution does not permit the forced expression of such messages to manipulate the marketplace.

³ The First Amendment was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation (as well as the torts of libel and slander). Sir William Blackstone acknowledged that "every kind of fraud is equally cognizable in a court of law." William Blackstone, 3 *Commentaries on the Laws of England* 431 (1768). See also Joseph Story, *Equity Jurisprudence* § 192 (1836) (defining misrepresentation); William F. Walsh, *A History of Anglo-American Law* 328-29 (1932) (tracing development of action of deceit from mid-fourteenth century).

A. Advertising Was an Integral Part of the "Press" in Colonial America.

The interrelationship between editorial and advertising content in the eighteenth century press illustrates the fallacy of differentiating for constitutional purposes between commercial and non-commercial speech. As one commentator has observed, "[w]ell before 1800 most English and American newspapers were not only supported by advertising but they were, even primarily, vehicles for the dissemination of advertising." James Playstead Wood, *The Story of Advertising* 85 (1958). Often, more than half of the standard colonial newspaper was taken up by advertising. Lawrence C. Wroth, *The Colonial Printer* 234 (1938). Also, for much of the colonial era, newspapers did not use layout techniques or differences in typeface to provide a visual distinction between the two; they were regarded as of equal interest to readers and treated the same. Kent R. Middleton, *Commercial Speech in the Eighteenth Century*, printed in *Newsletters to Newspapers: Eighteenth-Century Journalism* 277, 281 (Donovan H. Bond & W. Reynolds McLeod, eds., 1977).

The first daily newspaper in the United States was established in 1784 as a result of pressure for advertising space. When the *Pennsylvania Packet and General Advertiser* initially appeared, ten of its sixteen columns were filled with ads. Frank Presbrey, *The History and Development of Advertising* 161 (1929). The name of this paper (as well as that of New York's first daily, *The New-York Daily Advertiser*), reflected the common understanding that commercial advertisements were as much a part of the news of the day (and the purpose of the press) as reports of government activity. See also *id.* at 154 ("Advertisements had as much interest as the news columns, perhaps greater interest . . .").

The front pages of the Boston, New York, and Philadelphia newspapers were devoted almost exclusively to advertising. Frank Luther Mott, *American Journalism—A History: 1690-1960* 157 (3d ed. 1963) ("Most dailies in

these years used page one for advertising, sometimes saving only one column of it for reading matter.”); *see also* Wood, *supra*, at 85. The majority of the ads which appeared in colonial newspapers would today be considered “commercial speech.” Middleton, *supra*, at 282 (“The colonial press regularly carried reputable medical ads, as well as those for books, cloth, empty bottles, corks, and other useful goods and services.”).

Without these ads, the vibrant colonial press so important to the Revolutionary cause would not have existed. During the Eighteenth Century, like today, “[a]dvertising represented the chief profit margin in the newspaper business.” Mott, *supra*, at 56. As both a source of information to the population at large and a source of income to the colonial printers who played such an integral role in the struggle for freedom, advertising was both influential and plentiful during the latter part of the colonial era.

B. The Framers Themselves Advertised.

The ubiquitous role of advertising in early American society was reflected in the lives of our Founding Fathers. An early biographer of Ben Franklin credits him with having “originated the modern system of advertising.” James Parton, *Life and Times of Benjamin Franklin* (1864), *reprinted in* Wood, *supra*, at 48. Franklin not only sold advertising to support his publishing efforts, he advertised in his own newspapers to promote the goods he sold in his Philadelphia shop. Wood, *supra*, at 48-49. As this Court has noted, Franklin’s famous “Apology for Printers” came in response to an attack on a classic example of commercial speech. *See, supra*, p. 5.

George Washington, too, understood the effectiveness of advertising as both seller and buyer. To attract settlers to his land holdings in Ohio, Washington advertised in the July 15, 1773, Maryland Advocate and Commercial Advertiser and in a September issue of the Pennsylvania Gazette. Wood, *supra*, at 67. He also dispatched Major General Henry Knox of New York to obtain “superfine

American Broad Cloths” to outfit himself and his wife, of which he learned “from an Advertisement in the New York Daily Advertiser.” Letter from George Washington to Henry Knox (January 29, 1789), *reprinted id.* at 69.

As these examples indicate, advertising permeated colonial life. Central figures in the struggle for independence actively advertised. Their experience reflects the common understanding that advertising was inseparable from the “press” of the day, and not a poor relative of “non-commercial” speech.

II. ALTHOUGH STATES REGULATED TRADE, THE SOLE ADVERTISING RESTRICTIONS WERE ON UNLAWFUL PRODUCTS AND SERVICES.

A review of state statutes in effect at the time surrounding the ratification of the Bill of Rights indicates that states did not exercise power over truthful commercial messages about lawful products or services.⁴ Rather, consistent with the constitutions of the ten states that explicitly protected the freedom of the press,⁵ the only re-

⁴ This conclusion rests upon a review of the compilations of ratification-era statutes for each state closest in date to 1791. The Public Law of the State of South-Carolina (John Grimke 1790); The Laws of the State of New Hampshire (John Melcher 1797); The Laws of the State of Vermont (1797); The Public Laws of the State of Rhode-Island and Providence Plantations (1798); The Laws of the State of New Jersey (William Patterson 1800); The Laws of the State of New York (1802); Collection of All Such Acts of the General Assembly of Virginia (1803); The Public Acts of the General Assembly of North Carolina (James Iredell 1804); The Laws of the Commonwealth of Massachusetts from November 23, 1780 to February 23, 1807 (J.T. Buckingham June 1807); The Public Statute Laws of the State of Connecticut (1808); Laws of Maryland (Virgil Maxcy 1811); Digest of the Acts of the General Assembly of Pennsylvania (Mordecai M’Kinney 1841). All compilations are available at The Edward Bennett Williams Law Library, Georgetown University Law Center. Contemporaneous compilations for Delaware and Georgia were unavailable.

⁵ Decl. of Rights, para. XII (Va. 1776); Decl. of Rights, para. XII (Pa. 1776); Decl. of Rights, para. XXIII (Del. 1776); Decl. of Rights, para. XXXVIII (Md. 1776); Decl. of Rights, para. XV

strictions on advertising were on the promotion of unlawful products, services, or activities.

A. State Legislatures Regulated Trades Widely, But Did Not Restrict the Advertising of Lawful Products and Services.

Conspicuously absent from trade regulation at the time are restrictions on the advertising of lawful activities. Early statutes show efforts to regulate merchants and shopkeepers,⁶ liquor and taverns,⁷ potash,⁸ malt,⁹ a variety

(N.C. 1776); Ga. Const. art. LXI (1777); Decl. of Rights, para. IV (Vt. 1777); S.C. Const. art. XLIII (1778); Decl. of Rights, para. XVI (Mass. 1780); Bill of Rights, para. XXII (N.H. 1783). Two of those states—Pennsylvania and Vermont—connected that provision to protection for freedom of speech. See generally David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 441 n.55 (1983). Of the remaining four states in existence when the Bill of Rights was ratified, two—Rhode Island and Connecticut—had not drafted state constitutions; two others—New York and New Jersey—did not provide specific state constitutional guarantees of freedom of press and speech. See Leonard A. Levy, *Emergence of a Free Press* 189 (1985).

⁶ See, e.g., An Act for Punishing and Preventing Oppression, 1635, printed in *The Public Statute Laws of Connecticut* 544 (1808), as amended (1730).

⁷ See, e.g., An Act Regulating Licensed Houses, June 14, 1791, printed in *The Laws of the State of New Hampshire* 373-76 (1797); An Act to Lay A Duty on Strong Liquors, and For Regulating Inns and Taverns, April 7, 1801, printed in *Laws of the State of New York* 484-90 (1802); An Act for Regulating Ordinaries, Houses of Entertainment and Retailers of Spirituous Liquors, 1798, printed in *The Public Acts of the General Assembly of North Carolina* 122-23 (1804).

⁸ See, e.g., An Act to Regulate the Exportation of Potash and Pearl-Ash, Nov. 1792, printed in *The Laws of Maryland* 191-92 (1811); An Act to Regulate Flax-Feed, Pot-ash and Pearl-Ash for Exportation, June 23, 1785, printed in *The Laws of the State of New Hampshire* 377-79 (1797).

⁹ See, e.g., An Act for the Better Making and Measuring of Malt, 1700, printed in *The Laws of the Commonwealth of Massachusetts* 987-88 (1807).

of commodities,¹⁰ attorneys,¹¹ and doctors.¹² Among other things, these statutes required licenses, prevented charging of "unreasonable prices," and set standards for inspection and weighing of commodities.

The statutes surveyed, however, reveal no restrictions on the right of these regulated industries to advertise lawful products and services. Sellers were left to their own creativity in seeking to attract attention to their wares. And buyers were protected against potentially false or misleading claims by the common law, as tempered by the doctrine of *caveat emptor*. See, e.g., *Borrekins v. Bevan*, 3 Rule 23 (Pa. 1831) ("a sample, or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty that the goods are what they described"); see also *supra* note 3; see generally Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L. Rev. 1133 (1931).

B. The Only Restrictions on Advertising Prohibited the Promotion of Certain Unlawful Activities.

Legislative provisions in effect in the various states at the time the Bill of Rights was ratified indicate that the states did not restrict truthful advertising about lawful products or services. Nor did they compel advertising as a means of regulating trade. Rather, the sole restrictions

¹⁰ See, e.g., An Act for Regulating the Exportation of Tobacco and Butter, and the Weight of Onions in Bunches, and the Size of Lime-Casks, Nov. 8, 1785, printed in *The Laws of the Commonwealth of Massachusetts* 253-257 (1807); An Act to Prevent Frauds and Deceits in Selling Rice, Pitch, Tar, Rosin, Turpentine, Beef, Pork, Shingles, Stoves and Firewood, and to Regulate the Weighing of the Merchandise in this Province, June 17, 1746, printed in *The Public Law of the State of South Carolina* 208 (1790).

¹¹ See, e.g., An Act Regulating the Admission of Attornies, Nov. 4, 1785, printed in *The Laws of the Commonwealth of Massachusetts* 251-52 (1807).

¹² See, e.g., An Act to Regulate the Practice of Physic and Surgery, Nov. 26, 1783, printed in *Laws of the State of New Jersey* 51 (1800).

on advertising were on the promotion of certain prohibited activities.

For example, during the period surrounding ratification of the Bill of Rights, at least ten states prohibited or restricted lotteries. Seven of the statutes barring lotteries specifically prohibited their advertising and promotion. New Jersey, for one, enacted a statute in 1797 declaring that "all lotteries for money, goods, wares, . . . or other matters or things whatsoever, shall be, and hereby are adjudged to be common and public nuisances." Act of Feb. 13, 1797, *printed in The Laws of the State of New Jersey* 227-28 (1800).¹³ The New Jersey act imposed separate penalties on those who "make or draw" such lotteries, and those who print, write or publish any account of where tickets were available or who "expose to public view, any . . . advertisement or advertisements of or concerning such lottery."

¹³ The statute exempted lotteries established under the authority of the United States or the New Jersey legislature. *Id.*, sec. V. Only Pennsylvania completely outlawed lotteries (and their advertisement). Act of Feb. 17, 1762, *printed in A Digest of the Acts of the General Assembly of Pennsylvania* 584-85 (1841) (setting 20 pound fine for, *inter alia*, advertising or causing to be advertised any lottery). Others followed New Jersey's lead and provided for government approval of a lottery. *See, e.g.*, Act of Nov. 8, 1785, *printed in The Laws of the Commonwealth of Massachusetts* 252-53 (1807) (providing separate fines for setting up lottery and "aiding and assisting in any such lottery, by printing, writing, or in any other manner publishing an account thereof, or where the tickets may be had"), *amended by* Act of Feb. 28, 1801, *id.* at 8-9 (excepting lotteries, "authorized by a law of this Commonwealth, or of the Congress of the United States" and to specify a fine to be levied upon anyone who "shall aid and assist in any lottery established, or erected in any other of the United States, by advertising any Tickets of such lottery for sale, or by publishing the scheme for any such lottery"); Act of May 1723, *printed in The Public Statute Laws of Connecticut* 476-77 (1808), *as amended* (May 1791); Act of Nov. 1792, *printed in The Laws of Maryland* 189-90 (1811); Act of Feb. 14, 1791, *printed in The Laws of the State of New Hampshire* 299-300 (1797); Act of Feb. 14, 1783, *printed in Laws of the State of New York* 35-38 (1802); Act of Sept. 13, 1762, *printed in The Public Law of the State of South-Carolina* 256-67 (1790).

A handful of states prevented the advertisement of other illegal activities. For example, Connecticut and Pennsylvania prohibited the staging—and advertising—of horse racing. Act of Oct. 1803, *printed in The Public Statute Laws of the State of Connecticut* 381-82 (1808); Act of Feb. 17, 1820, *printed in A Digest of the Acts of the General Assembly of Pennsylvania* 450-51 (1841). *Amici* found only one statute that restricted advertising within a regulated industry—and then for the purpose of ensuring that licensing laws were not flouted: Rhode Island prohibited the erection of a sign "for the keeping of a public house" without obtaining an inn-keeper's license. An Act Enabling the Town-Councils of Each Town In This State to Grant Licenses, 1721, *printed in The Public Laws of the State of Rhode-Island and Providence Plantations* 390-94 (1798).

Such restrictions on commercial speech comport with the common law, which considered it a criminal offense to "procure, counsel, or command another to commit a crime." William Blackstone, 4 *Commentaries on the Laws of England* 36 (1769) (defining an accessory before the fact); *Rex v. Higgins*, 2 East 5, 102 Eng. Rep. 269 (1801) ("A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by . . . several cases."); *see generally Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). Thus, the only restrictions on advertising apparently extant during the colonial era are consistent with the notion that truthful advertising of lawful products and services was beyond the power of government.¹⁴

¹⁴ On occasion, state legislatures required advertising as a means of disseminating information necessary to protect the property or legal rights of others. *See, e.g.*, Act for Amending, and Reducing into System, the Laws and Regulations Concerning Last Wills and Testaments, Nov. 1798, *printed in Laws of Maryland* 457-50 (1811) (executors of estates were not liable for claims made after one year, if they inserted an advertisement announcing the estate in newspapers designated by the Orphans' Court); Act Relating to

C. The Absence of Advertising Restrictions Is Consistent With the Colonial Conception of a "Free Press" That Included Advertising.

Given the prevalence of advertising in colonial America, it is not surprising that the very idea of a free press evolved in close connection with the development of advertising. In fact, one of the major precipitating events of the American Revolution involved a defense of advertisements. The Stamp Act, which the Crown began enforcing in the colonies in 1765, taxed each newspaper—and imposed an additional two-shilling tax on each advertisement. "This was a heavy tax in proportion to the value of the item being taxed," and galvanized the colonial press against the British government. John Lofton, *The Press as Guardian of the First Amendment* 2 (1980). The opposition of newspapers to the Stamp Act was in large part based on their concern that it encroached on the freedom of expression. Arthur M. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 70-82 (1957). The repeal of the Stamp Act, one year after it had been applied to the colonies, "was a powerful victory for an independent press and for advertising." Presbrey, *supra*, at 151.

Only five years after adopting a state constitution explicitly guaranteeing freedom of the press, Mass. Decl. of Rights para. XVI (1780), Massachusetts enacted a similar stamp tax on all newspapers and almanacs. This was followed by a tax on newspaper advertisements. Eric Nessler, *Charging for Free Speech: User Fees and Insurance In the Marketplace of Ideas*, 74 Geo. L.J. 257, 264 (1985) (citing Clyde A. Duniway, *The Development of Freedom of the Press in Massachusetts* 132-36 (1966)).

Deserters, 1741, printed in Public Acts of the General Assembly of North Carolina 64 (1804) (requiring the jailer of a runaway slave to advertise, at the cost of the rightful owner, in the Virginia or South Carolina Gazette). Statutes that ensure the widespread dissemination of legal notice, consistent with ancient traditions, are a far cry from government-compelled advertising to manipulate the market or as a means to regulate trade.

These taxes were widely denounced both within and without the state as an "unconstitutional restraint on the Liberty of the Press." Carol S. Humphries, "That Great Bulwark of Our Liberties": Massachusetts Printers and the Issue of a Free Press, 1783-1788, 14 Journalism Hist. 34, 37 (1987) (quoting Isaiah Thomas, Essex Journal, Apr. 19, 1786 and Massachusetts Gazette, Apr. 24, 1786). Repeal of the advertising tax in 1786 was cited as a great victory for "Freedom of the Press." *Id.* See also *Grosjean v. American Press Co.*, 297 U.S. 233, 248 (1936) (noting that "[t]he framers were likewise familiar with the then recent Massachusetts episode; and . . . that occurrence did much to bring about the adoption of the [First Amendment]").

Advertising was thus not only a daily influence on early American life, it was also immutably tied to the rights sought to be protected by the First Amendment. As one commentator of the day noted,

Stamp duties also, imposed on every *commercial* instrument of writing—on *literary productions*, and, particularly, on *newspapers*, which of course, will be a great discouragement to *trade*; an obstruction to *useful knowledge in arts, sciences, agriculture, and manufacturers*, and a prevention of *political information* throughout the states.

Objections by A Son of Liberty, New York Journal, Nov. 8, 1787, reprinted in 6 *The Complete Anti-Federalist* 34, 36 (Herbert J. Storing ed. 1981) (emphasis in original).

D. The Absence of Restrictions on Advertising Is Consistent With the Framers' Political Philosophy, Which Equated Liberty and Property.

The inextricable link between commercial and other speech reflects the Framers' political philosophy, which generally equated liberty and property rights. As one newspaper commentator put it, "*Liberty and Property* are not only join'd in common discourse, but are in their own natures so nearly ally'd that we cannot be said to possess

the one without the enjoyment of the other." Boston Gazette, Feb. 22, 1768, *quoted in* Clinton L. Rossiter, *Seedtime of the Republic* 379 (1953) (emphasis in original).¹⁵

The generation of the Framers firmly believed in the tie between liberty and property. For example, George Mason's Virginia Declaration of Rights stated that among the natural rights of man was "the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing Happiness and Safety." Va. Declaration of Rights § 1, *reprinted in* Helen H. Miller, *George Mason: Gentleman Revolutionary* 340 (1975).

Applying this view to the freedom of expression, Cato explained the importance of free speech and its inextricable link with property rights as follows:

This sacred Privilege is so essential to free Government that the Security of Property, and the Freedom of Speech, always go together; and in those wretched Countries where a Man cannot call his Tongue his own, he can scarce call any Thing else his own.

1 *Cato's Letters* 95-103 (Essay No. 15, Of Freedom of Speech: That the Same is Inseparable From Publick Liberty, Feb. 4, 1720).¹⁶

Distinguishing between the value of commercial and non-commercial speech thus would never have occurred

¹⁵ This philosophy was based on that of John Locke, who defined the "state of perfect freedom" as the ability of people "to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of nature, without asking leave, or depending upon the will of any other man." John Locke, *Second Treatise on Government* ch. 2, § 4 (1790); *see also* John Trenchard & Thomas Gordon, 2 *Cato's Letters* 244-45 (1733).

¹⁶ Cato's articulation of the tie between property rights and free speech was enormously influential in colonial America. Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (1988). In fact, Cato's *Essay on Free Speech*, first printed in America by Benjamin Franklin in 1722, contained the seed of the First Amendment's press clause. *See generally* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 444 (1983).

to the Framers, who essentially regarded all rights, including the right to free speech, as a form of property right shielded from government interference. For example, echoing Locke and Cato, James Madison wrote:

In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have right; and which leaves to every one else the like advantage.

In the former sense, a man's land, or merchandize, or money is called his property.

In the latter sense, *man has a property in his opinions and the free communication of them*

James Madison, "Property", *The National Gazette* (March 27, 1792), *reprinted in* James Madison, 14 *Papers of James Madison* 266-68 (Robert A. Rutland & Thomas A. Mason, eds. 1983) (emphasis in original). *See also id.* ("as a man is said to have a right to his property, he may be equally said to have a property in his rights . . .").

Given this equation of liberty and free speech as forms of property, eighteenth-century printers who published advertising-laden newspapers believed that they were exercising the natural right to control their property. Much of the previously noted opposition to the taxes imposed on the press—including taxes on advertising—by the various Stamp Acts was based on their perceived offense to property rights. *See, e.g.,* Middleton, *supra*, at 280-81.

In keeping with this recognition that advertising was a critical part of the press whose freedom the Framers sought to guarantee, the text of the First Amendment draws no distinction between the commercial and non-commercial aspects of the press. The purpose of the Press Clause, as Madison said when the First Amendment was reported out of the House select committee, was to expressly declare "the liberty of the press . . . to be beyond the reach of government." 1 *Annals of Congress* 738 (1789), *reprinted in* 5 *The Founders' Constitution* 129 (Philip B. Kurland & Ralph Lerner, eds., 1987). There

is simply no evidence that the First Amendment places "beyond the reach of government" just that part of the press which contained political or other non-commercial speech.

III. STATE LEGISLATIVE PRACTICE AT THE TIME OF PASSAGE OF THE FOURTEENTH AMENDMENT IS CONSISTENT WITH THE VIEW THAT TRUTHFUL COMMERCIAL MESSAGES REGARDING LAWFUL PRODUCTS AND SERVICES ARE ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

The conclusion that truthful messages about lawful products or services are entitled to full constitutional protection is also confirmed by an examination of state legislative practices at and around the time the Fourteenth Amendment was ratified. This period marked a robust increase in the prominence and utility of advertising. States, while adopting some restriction on advertising that reflected the general movement from the common law tradition to increased reliance on statutes, *see, e.g.*, Morton Keller, *Affairs of State* 347 (1977), continued to focus their regulatory efforts on limiting advertising for illegal products and services.¹⁷

A. Commercial Speech Was an Integral Part of American Life During Reconstruction.

Advertising was "vigorous and thriving by the mid-nineteenth-century mark." Wood, *supra*, at 158. As one publisher in 1847 observed, "advertising is news. People wanted to read it just as much as they wanted to read the reports of the day's happenings." *Id.* at 159-60. To illustrate, a typical issue of the New York Herald in 1860

¹⁷ This conclusion rests upon an examination of all state codes published closest to 1868. For states with less frequently published codes, the last code published before 1868 and the first one published after 1868 were examined to determine the state of the law around the time of incorporation. *Amici* also examined the Territorial Codes of Utah, Washington, Wyoming, and New Mexico. We were unable to examine the State Code of Wisconsin, but did examine the other thirty-seven states admitted to the union by 1880.

carried thousands of small-space advertisements. Like many of its colonial counterparts, its front page bore no editorial matter. *Id.* at 166-167; Mott, *supra*, at 298, 397-98, 593-94. Only the intense interest in the Civil War supplanted advertising as the front-page material in most papers. Mott, *supra*, at 397; Presbrey, *supra*, at 259.

Although the Civil War may have pushed advertising from the front page, the demonstrated ability of advertising to sell Union war bonds led to a vast expansion in advertising's use. Presbrey, *supra*, at 253. A year after the close of the Civil War:

[e]very rock with surface broad enough, and facing in a direction from which it could be seen, and every cliff which some adventurous painter had been able to climb was daubed over with signs. Every fence, every unoccupied building, the boardings around every large construction site, even the New York curbstones, shouted advertising messages. Fences along the highways and railroad rights of way wore advertising in letters from six inches to two feet high. Bridges, especially covered bridges, bore huge advertising signs.

Wood, *supra*, at 182; *see also* Presbrey, *supra*, at 255.

B. State Legislative Practice During Reconstruction Is Consistent With Full First Amendment Protections for Truthful Commercial Speech Promoting Lawful Products and Services.

Even as advertising emerged as an increasingly powerful societal force, state governments allowed it to grow unchecked, primarily restricting the promotion of illegal products or services only.¹⁸ The restrictions on advertis-

¹⁸ For example, as before, a number of states restricted lottery advertising. *See, e.g.*, Cal. Penal Code, ch. 9, § 323 (1872); Conn. Gen. Stat., tit. 12, ch. 8, § 150 (1868); Del. Rev. Stat., chap. 98, v. 12, § 6 (1874); Digest of Stat. Laws of Fla., ch. 50, § 5 (1872); Iowa Code, tit. 24, ch. 11, § 4043 (1873); Compiled Laws of Kan., ch. 31, art. 14, § 342 (1885); Ky. Rev. Stat., ch. 28, art. 21, § 4 (1860 and 1866 Supp.); Me. Rev. Stat., ch. 128, tit. 11, § 3 (1871);

ing that did exist were aimed at the illegality of the advertised conduct, rather than advertising itself. For example, Delaware proclaimed advertising by *unlicensed* lottery retailers only to be barred. Del. Rev. Stat., ch. 98, v. 12, § 6 (1874). Similarly, Vermont barred the advertising of lotteries “not authorized by the law of this state or of the United States.” Vt. Stat., ch. 119, tit. 34, § 7 (1870).¹⁹

Also during this time, in response to an aggressive anti-abortion campaign beginning in the 1840s, many states adopted extensive abortion restrictions. James C. Mohr, *Abortion in America* 147-170 (1978). Some of these restrictions imposed penalties on “[e]very person, who shall, by publication, lecture . . . or by advertisement, or the sale or circulation of any publication, encourage or prompt the commission of [a miscarriage]” Conn. Gen. Stat., tit. 12, ch. 2, § 25 (1866).²⁰ Other then-

Md. Code, art. 30, § 114 (1860 and 1868 supp.); Miss. Gen. Stat., ch. 206, § 28 (1866); Compiled Laws of Nev., ch. 60, § 2498 (1873); N.Y. Rev. Stat., ch. 20, tit. 8, art. 4, § 53 (1875); Organic Laws of Or., Crim. Code, ch. 8, tit. 2, § 661 (1874); Compiled Laws of Terr. of Utah, ch. 9, § 2002 (1876); Vt. Gen. Stat., ch. 119, tit. 34, § 7 (1870).

¹⁹ Significantly, the products, services, or activities that could not be advertised in the colonial and Reconstruction eras were prohibited in their entirety (e.g., unlicensed inn-keeping, illegal horse-racing and lotteries). Such activities, when lawful, could be advertised. There is, accordingly, no basis for relying on such statutes as a justification for upholding advertising restrictions on products that may lawfully be marketed to the overwhelming majority of the population. See *Dunagin v. City of Oxford*, 718 F.2d 738, 743 (5th Cir. 1983) (en banc) (protection of commercial speech “would disappear if its protection ceased whenever the advertised product might be used illegally”).

²⁰ See also Cal. Penal Code, ch. 8, § 311(4) (1872); Digest of Stat. Laws of Fla., ch. 48, § 10 (1822); Compiled Laws of Kan., ch. 31, art. 14, § 342 (1885); Md. Code, art. 30, § 1 (1868 supp.); Mass. Gen. Stat., ch. 165, § 10 (1860 and 1877 supp.); N.J. Rev. Stat., Crimes, I., c., § 44 (1874); N.Y. Rev. Stat., Pt. IV, ch. 1, tit. 6, § 78 (1875); Ohio Rev. Stat., ch. 27, § 32 (1868 supp.); R.I. and Providence Plantations Gen. Stat., ch. 232, tit. 30, § 23 (1872);

illegal products or activities that could not be advertised included prize fights, Compiled Laws of Kan., ch. 31, art. 14, § 338 (1885), and obscene books, Cal. Penal Code, ch. 8, § 311(4) (1872); Compiled Laws of the Terr. of Utah, ch. 8, § 162 (1876). Similarly, West Virginia, New York, and Kansas, like their modern counterparts, barred obscene advertising. See W. Va. Code, ch. 149, § 11 (1870); N.Y. Rev. Stat., Pt. IV, ch. 1, tit. 6, § 77 (1875); Compiled Laws of Kan., ch. 31, art. 14, § 338 (1885).

The prevalence of advertising led to state protection of the property interests of advertisers, through statutes prohibiting the unauthorized removal of advertising.²¹ States also sought to prevent advertisers from trespassing on the property rights of other citizens, by penalizing the placement of advertising in unauthorized locations.²²

Although there was a noticeable absence of legislation during this period to bar false and misleading advertising of lawful products and services—and no record of advertising regulations serving other purposes—as advertising increased, so too did the recognition that, if false, it could cause harm. Thus, beginning around 1864, certain more successful newspapers refused to accept ads for questionable patent medicines and quacks. Wood, *supra*,

Compiled Laws of Terr. of Utah, ch. 8, § 162 (1876). Notably, these restrictions on abortion advertising applied with equal force to all speech regarding abortion, commercial or noncommercial.

²¹ See, e.g., Ky. Rev. Stat., ch. 28, art. 26, § 1 (1860 and 1866 supp.); Mo. Gen. Stat., ch. 206, § 47 (1866); Neb. Rev. Stat., Pt. III, ch. 12, § 144 (1866); N.H. Gen. Stat., ch. 263, tit. 29, § 10 (1867).

²² See Me. Rev. Stat., ch. 127, tit. 11, § 8 (1871); Mass. Gen. Stat., ch. 349 (1860 and 1877 supp.); R.I. and Providence Plantations Gen. Stat., ch. 230, tit. 30, § 31 (1872). The most prevalent state legislative interaction with advertising during the Reconstruction era was in the mandatory use of advertising to give legal notice. For example, state codes required notice via advertising for executors' sales, partitions of land, limited partnerships, liens, or even impounded beasts. Eighteen of thirty-seven states examined in this period required some type of advertising as a form of legal notice.

at 180. Indeed, many papers warned their readers against these disreputable advertisers. And in 1872, the national government enacted regulations aimed at restricting the dissemination of fraudulent ads through the mail. See Post Office Department Fraud Order of 1872, Act of June 8, 1872, ch. 335, § 300, 17 Stat. 322-23 (currently codified at 39 U.S.C. § 3005) (authorizing the Postmaster General, after a hearing, to issue a Fraud Order directing the local postmaster to cease delivering mail or paying postal money orders addressed to a merchant determined to have fraudulently obtained money or property via mail).

To the extent that this Court addressed issues relating to advertising during and immediately after Reconstruction, its decisions were consistent with the view that advertising should be accorded the same protection as other forms of speech. To illustrate, in *Ex parte Jackson*, 96 U.S. 727 (1877), the Court held that Congress's 1868 ban on the advertising of lotteries by mail did not violate the First Amendment. The opinion primarily dealt with Congress's power over the postal system, stating that "[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded." 96 U.S. at 732. But this Court treated lottery advertisements in the same way that it treated material that today would be fully protected by the Constitution. Thus, the Court "considered advertising (or at least printed circulars advertising lotteries) to be speech entitled to the same degree of First Amendment protection as any other." Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 Tex. L. Rev. 747, 765 (1993); see also *In re Rapier*, 143 U.S. 110 (1892).

IV. LOWER PROTECTION FOR COMMERCIAL SPEECH IS A TWENTIETH-CENTURY PHENOMENON THAT HAS ITS ORIGINS IN A DIS- ENCHANTMENT WITH ECONOMIC LIBERTIES AND CONFUSION WITH ECONOMIC SUBSTANTIVE DUE PROCESS.

A. Advertising Experienced Unprecedented Growth and Prestige Until the Depression.

As the economy boomed in the late 1800s, so did advertising. By 1898, a survey by the Press and Printer of Boston counted 2,583 companies that advertised in regular periodicals of general circulation. Presbrey, *supra*, at 362. The 1904 St. Louis World's Fair recognized the growth of the industry and staged "Ad-Men's Day" with a meeting grandly named "The International Advertising Association." George French, *20th Century Advertising* 119 (1926).

In the first few decades of the Twentieth Century, advertisers reached new heights in public prestige and prevalence. Advertisements during World War I helped to sell \$24 billion in war bonds to 22 million Americans and raise \$400 million for the Red Cross. Presbrey, *supra*, at 565. One observer remarked:

Advertising did not win the war, but it did its bit so effectively that when the war was over advertising . . . had the recognition of all governments as a prime essential in any large undertaking in which the active support of all the people must be obtained for success.

Id. at 566. As was the case after the Civil War, this widespread recognition of the power of advertising in war was not lost on manufacturers and retailers when peace returned.

Advertising's ascendancy continued into the 1920s. As President Coolidge remarked at the 1926 International Advertising Association's Washington convention:

The preeminence of America in industry . . . has come very largely through mass production. Mass

production is only possible where there is mass demand. Mass demand has been created almost entirely through the development of advertising."

Presbrey, *supra*, at 598.

Business appeared to believe President Coolidge's assessment of advertising's value. Total investment in advertising soared from \$1.5 billion in 1918 to almost \$3 billion in 1920 and continued to grow throughout the decade. Wood, *supra*, at 364-365.²³

The Depression hit advertising hard not only in terms of income, but perhaps more importantly in public esteem. Following the stock market crash, advertising revenues tumbled from \$3.4 billion in 1929 to \$1.3 billion in 1933. Wood, *supra*, at 417. Just as advertising was perhaps irrationally credited for the boom years, so too was it a target for blame as the Depression took hold. It was not just an attack on advertising, however, because "the entire economic system of which advertising was seen as a vociferous, raucous and treacherous part, was under attack." *Id.* at 418.

B. The Increase in the Assertion of State Power Over Advertising Went Hand-In-Hand With a Growing Disenchantment With Economic Liberties.

As the Gilded Age gave way to the Progressive Era, disenchantment with unfettered capitalism grew. See, e.g., Matthew Josephson, *The Robber Barons* 445-53 (1934). The notion that civil liberties were different from property rights and economic liberties began to take hold. See generally Richard Hofstadter, *The Age of Reform* (1974). This division, which was shared neither by the generation that ratified the First nor the Fourteenth Amendment, paved the way for the development and growth of the modern regulatory state.

²³ Part of this growth stemmed from the use of radio as a new advertising medium. Although the first radio ad did not air until 1923, by 1929 the industry received an estimated \$15 million in advertising revenues for its roughly 500 broadcast stations. Presbrey, *supra*, at 578.

Advertising was not immune from the perception that a larger governmental role was needed to check the unrestrained exercise of property rights. Magazines that once had accepted the patent medicine advertisers—such as the *Ladies Home Journal* and *Colliers*—led the charge to expose their fraudulent claims in 1904 and 1905. Wood, *supra*, at 327-330. Some papers, including the Scripps-McRae League of Newspapers, appointed censors to scrutinize all advertising copy for questionable claims. *Id.* at 334.²⁴

These and other concerns caused the advertising industry in 1911 to push for a model statute barring "untrue, deceptive, or misleading" advertising. See Hurnard J. Kenner, *The Fight for Truth in Advertising* 27 (1936). At that time, only New York and Massachusetts had statutory provisions barring fraudulent advertising, which had been adopted in 1904 and 1902, respectively. N.Y. Penal Code, art. 40, § 421 (1904); Mass. Rev. Laws, ch. 208, § 1 (1902). By 1920, 37 states had adopted the Advertising Federation of America's model anti-fraud statute. Wood, *supra*, at 336. Although politically significant and popular, these state legislative efforts largely represented a codification of longstanding common-law restrictions on false or misleading commercial messages. See n.3, *supra*.

The Depression spurred calls for increased restrictions on advertising. Advertising was attacked as wasteful; its critics charged that it did nothing more than add to the consumers' cost. As one observer described the national search for the cause of the Depression:

[t]here had to be a villain. Advertising as the public voice of industry and business was obvious and accessible to attack. Advertising had been used to urge people to expenditures they could not afford, to lure with false promises, to lull into false security. Adver-

²⁴ The public outcry against adulterated and dangerous foods and drugs ultimately led to passage of the federal Food and Drug Act of 1906, which forced manufacturers to justify their claims and list a product's ingredients. *Id.* at 333.

tising was to blame, and shrill cries arose for its annihilation.

Wood, *supra*, at 418. Public skepticism about the role of advertising in the American economy rose significantly.²⁵

The federal government aggressively responded to the perceived excesses of advertising.²⁶ Indeed, Professor Bruce Ackerman has argued that these and other changes brought about by the New Deal amounted to a decisive watershed in constitutional law. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 510-514 (1989). See also David Yassky, *Eras of the Fifth Amendment*, 91 Colum. L. Rev. 1699 (1991) (defining the New Deal as one of three "First Amendment Eras").

C. The Origins of the Distinction Between Commercial and Non-Commercial Speech Indicate Its Misguided Heritage.

As is well known, even as disenchantment among the body politic with economic liberties led to increased state regulation of the economy, this Court acted as a brake on that sentiment, employing the doctrine of substantive

²⁵ The consumers' movement also formed during this era, producing best-selling exposés of advertising practices with such lurid titles as *100,000,000 Guinea Pigs*, *Eat, Drink and Be Wary*, and *Partners in Plunder*. *Id.* at 419-420.

²⁶ For example, Rexford Guy Tugwell, a Columbia University economist who was appointed an Assistant Secretary of Agriculture by President Roosevelt, had written extensively regarding "the waste and extravagance of advertising which merely attempted to turn sales from one company to that of another making a product identical in value." Wood, *supra*, at 426. Tugwell championed sweeping federal legislation to centralize grade labeling, define false advertising, and centralize enforcement in the Secretary of Agriculture. *Id.* Tugwell's Agriculture Department spurred the Agricultural Marketing Agreement Act of 1937, which "illustrated the New Deal's commitment to collective capitalism." Harold F. Breimyer, *The New Deal and Its Legacy: Agricultural Philosophies and Policies in the New Deal*, 68 Minn. L. Rev. 333, 344 (1983) (citation omitted). An amendment to that Act authorized the forced advertising program at issue here.

due process to strike down many state laws. Mistakenly, advertising came to be analyzed under this category, instead of under the First Amendment, where it belonged. This confusion of categories—although it temporarily resulted in greater protection of advertising than of political speech—caused commercial speech to be unjustifiably discredited when the doctrine of economic substantive due process was properly discarded.

Prior to 1919, the Court treated political speech as subject to the states' police power, power from which economic activities were relatively free. But,

the Court did not treat all speech as a political activity subject to government ordinance. Some speech was protected as a valuable economic activity [F]ree trade in ideas became a commercial canon long before it would become the metaphorical key to constitutional protection of political speech.

Rudolph J.R. Peritz, *Competition Policy in America, 1888-1992*, at 100 (1996).

Thus, most judicial challenges during this period to restrictions on advertising did not advance First Amendment claims. Rather, they relied on a substantive due process claim that the restrictions interfered with the pursuit of lawful business.²⁷ For example, in *Halter v. Nebraska*, 205 U.S. 34 (1907), the court upheld a state law barring use of the American Flag on beer bottles. The parties failed to raise a First Amendment challenge, instead relying on a due process claim.²⁸ State courts

²⁷ At least two factors may account for this development: the Court had shown a willingness to accept economic substantive due process claims, and it was not until 1931 that it was clear the First Amendment even applied to the states. See *Stromberg v. California*, 283 U.S. 359, 368 (1931).

²⁸ In a number of later advertising cases, the Court also rejected substantive due process challenges to state and local restrictions on billboard advertising. See *Fifth Avenue Coach Co. v. City of New York*, 221 U.S. 467 (1911); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917); *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269 (1919); *Packer Corp. v. Utah*, 285 U.S. 105 (1932).

during this period also analyzed, and in many cases invalidated, challenges to advertising regulations under the rubric of substantive due process.²⁹

By the time the Court decided *Valentine v. Chrestensen*, 316 U.S. 52 (1942), however, in which it first stated that advertising was outside the protection of the First Amendment, the notion of substantive due process had been rejected, and review of economic legislation reduced to "rational basis" scrutiny.³⁰ *Valentine's* dismissive treatment of commercial speech seems most closely linked to the Court's rejection of economic substantive due process, rather than any evaluation of the First Amendment guarantees envisioned by the Founders. Thus, what has been said about the Contracts Clause may be said about the protection of commercial speech: "misinterpreted as a form of economic substantive due process, [protection of commercial speech] was wrongly discredited when that doctrine [of substantive due process] was rightly discarded." Doug A. Kmiec & John O. McGinnis, *The*

²⁹ See, e.g., *Seattle v. Proctor*, 48 P.2d 238, 239 (Wash. 1935) (striking down a city statute compelling businesses to disclose "the number of such . . . [articles] and the lowest price at which each of said articles were offered for sale to the public prior to said advertisement."); *Ware v. Ammon*, 278 S.W. 593, 595 (Ky. Ct. App. 1925) (holding unconstitutional a bar on advertising by dry cleaners without the fire marshal's permission to engage in business); see also *State ex rel. Booth v. Beck Jewelry Enterprises, Inc.*, 41 N.E.2d 622 (Ind. 1942) ("Truthful price advertising is a legitimate incident to a lawful merchandising business. Deprivation of the right so to advertise has been held to violate the due process clause of the Fourteenth Amendment.") (citing cases).

³⁰ See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) ("regulatory legislation affecting ordinary commercial transactions" was not "to be pronounced unconstitutional unless . . . it [does not rest] upon some rational basis"); see also Yassky, *supra*, at 1729-1730 (describing the *West Coast Hotel* line of cases as legitimizing the activist state and repudiating the prior era's *Lochner*-style constitutionalization of rights to property and contract). But see *Needham v. Proffitt*, 41 N.E.2d 606, 608 (Ind. 1942) (striking down statute prohibiting funeral directors from advertising under state free speech guarantee).

Contract Clause: A Return to the Original Understanding, 14 Hastings L. Q. 525, 526 (1987).

Thus, the differentiation between commercial and non-commercial speech is properly understood as an outgrowth of twentieth-century disenchantment with property rights and economic liberties, and the mislabeling of advertising as a substantive due process right rather than a First Amendment freedom. The distinction between commercial and non-commercial speech, however, is inconsistent with the text and history of the First and Fourteenth Amendments, as well as with the long-standing "traditions of the American people."

V. THE AGRICULTURE DEPARTMENT'S REGULATION OF COMMERCIAL SPEECH IS PROHIBITED BY THE FIRST AMENDMENT.

Assessed under the level of scrutiny accorded fully protected speech, this becomes an extremely easy case.³¹ First, this Court has long held that the government may not require a speaker to endorse or propound a particular view. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974). Second, the government plainly cannot contend that generic advertising of fruit for the purpose of "stabiliz[ing] the market," Petitioner's Brief at 20, constitutes a compelling governmental interest sufficient to warrant forcing a speaker to endorse a view with which he disagrees. See *Wileman Brothers & Elliott v. Espy*, 58 F.3d 1367, 1377-79 (9th Cir. 1995). Moreover, this program is not possibly sufficiently narrowly tailored to serve the government's interest: there are a myriad of less restrictive alternatives that would not trench on speech at all. Brief of Respondents, Section C; see *Wileman Brothers*, 58 F.3d at 1379-1380.

³¹ As the Respondents' brief conclusively demonstrates, however, whether assessed under the *Central Hudson* analysis or *Abood*, the Secretary's program is unconstitutional.

CONCLUSION

For the reasons set forth herein, the Court should affirm the Ninth Circuit's decision. In the process, the Court should make clear that commercial speech is to be accorded the same level of constitutional protection as non-commercial speech.

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Supreme Court, U.S.

FILED

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No. 95-1184

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,

Petitioner,

v.

WILEMAN BROTHERS & ELLIOTT, INC., et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF AMICUS CURIAE
NATIONAL RIGHT TO WORK LEGAL
DEFENSE FOUNDATION, INC.
IN SUPPORT OF RESPONDENTS**

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On Writ of Certiorari
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BRIEF OF AMICUS CURIAE
NATIONAL RIGHT TO WORK LEGAL
DEFENSE FOUNDATION, INC.
IN SUPPORT OF RESPONDENTS

INTRODUCTION

Pursuant to Rule 37.3 of the Rules of this Court, the National Right to Work Legal Defense Foundation, Inc. ("Foundation") files this brief *amicus curiae* in support of respondents. All parties have consented to the filing of this brief; and their letters of consent have been filed with the Court.

INTEREST OF THE AMICUS CURIAE

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their rights to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several states.

The Foundation has supported the most recent of this Court's major cases involving the rights of employees to refrain from joining or supporting labor organizations as a condition of employment. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Minnesota State Bd. v. Knight*, 465 U.S. 271 (1984); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). In hundreds of other cases throughout the country, the Foundation is now aiding employees who seek to limit their forced association with unions and their financial payments to those unions.

Amicus National Right to Work Legal Defense Foundation believes that the decision of the U.S. Court of Appeals for the Ninth Circuit was correct. However, *amicus* will not analyze this case in terms of commercial speech, as did the Court of Appeals, but rather in terms of compelled speech and association. The Foundation believes that its role in supporting many of the most significant cases that have come before this Court dealing with compelled speech and association will provide a unique perspective on some of the issues raised by this case and will aid the Court in analyzing this case. Finally, the AFL-CIO filed an *amicus* brief in support of the Secretary of Agriculture. In that brief, the AFL-CIO misstated the law with respect to compelled speech and association. *Amicus*

National Right to Work Legal Defense Foundation will focus on some of the misstatements made by that organization.

STATEMENT OF THE CASE

The Secretary of Agriculture, pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, established marketing orders regulating nectarines, peaches, pears, and plums grown in California. A provision of the marketing orders imposed mandatory assessments on the handlers of this California produce to finance generic advertising of those agricultural products.

California nectarine, plum, and peach handlers challenged several aspects of the Secretary's marketing orders, including the mandatory assessments for generic advertising, by filing petitions with the Department of Agriculture. An Administrative Law Judge ("ALJ") granted the petitions but the Department of Agriculture Judicial Officer reversed the ALJ decision. The handlers sought judicial review. In an unpublished decision, the U.S. District Court for the Eastern District of California upheld the mandatory assessment program. An appeal was filed.

The U.S. Court of Appeals for the Ninth Circuit analyzed the case in terms of commercial free speech and applied the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The court ruled that the forced assessments violated the handlers' First-Amendment rights, *Wileman Brothers & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995).

The Secretary of Agriculture petitioned this Court for a *writ of certiorari* and that petition was granted. The Secretary of Agriculture seeks reversal of the Ninth Circuit, arguing that the case should be analyzed in terms of compelled speech and association rather than commercial speech.

SUMMARY OF THE ARGUMENT

The handlers' speech is protected by the First Amendment of the United States Constitution. The First Amendment rights of the handlers can be analyzed in terms of commercial speech or compelled speech. *Amicus* will focus on the compelled speech analysis rather than the application of the commercial speech doctrine.

The First Amendment protects the right to refrain from speech and association, as well as the right to speak and associate. Corporations as well as individuals are protected by the First Amendment. That includes the right to refrain from speech. The protection afforded by the First Amendment to the right to refrain from compelled speech and association is not limited to political and ideological speech. It applies to *any* type of speech. Any compelled speech impinges upon First Amendment rights. The requirement that handlers finance generic advertising campaigns interferes with their ability to market their own label products.

Laws and regulations which interfere with First Amendment rights are subject to exacting scrutiny. That is true of cases involving compelled speech as well as those limiting speech. Since this case involves an interference with First Amendment rights, the marketing orders which compel speech are subject to a high level of scrutiny.

The government bears the burden of showing that it has a compelling governmental interest that justifies the burden on the First Amendment rights of the handlers. The interest in this case is the sale of agricultural products. Private advertising may achieve that goal but generic advertising is not required to achieve that goal.

The government must use the least restrictive means to implement the program so as to minimize the impact upon First Amendment rights. In this case, the Secretary has not chosen the least restrictive means to implement an advertising

campaign to sell peaches, nectarines, pears, and plums. The least restrictive method is to permit the handlers to engage in their own advertising campaigns to promote their own products or utilize a voluntary generic advertising campaign.

ARGUMENT

THE COMPELLED SUPPORT FOR GENERIC ADVERTISING IS AN UNCONSTITUTIONAL INFRINGEMENT OF THE HANDLERS' FIRST AMENDMENT RIGHTS

I. Whether This Case Is Analyzed In Terms Of Commercial Speech Or Compelled Speech, The Result Is The Same.

Handlers of California grown nectarines, peaches, pears, and plums challenged the marketing orders which the Secretary of Agriculture promulgated pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, which required them to finance generic advertising campaigns for those products. The handlers argued that the compelled financing of the advertising campaigns infringed upon their First Amendment rights. The U.S. Court of Appeals for the Ninth Circuit applied the commercial speech standards to this case and found that the compelled speech aspect of the marketing program could not withstand constitutional scrutiny.

The Secretary of Agriculture now argues that this Court should analyze this case in terms of compelled speech and association and that the compelled speech analysis will produce a different outcome. *Amicus* National Right to Work Legal Defense Foundation disagrees with the Secretary that a compelled speech analysis will produce a different result from that reached by the Ninth Circuit. If the case is analyzed in terms of compelled speech, the same result reached by the Court of Appeals will be obtained.

Commercial speech is entitled to First Amendment protection, *44 Liquormart, Inc. v. Rhode Island*, ___ U.S. ___, 116 S. Ct. 1495 (1996); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). However, while this Court has held that commercial speech is entitled to protection, it is subject to a less exacting standard of scrutiny than non-commercial speech, *Zauder v. Office Disciplinary Counsel*, 471 U.S. 626, 637 (1985).

Since the Ninth Circuit found the Secretary's regulations cannot withstand constitutional scrutiny under the less stringent commercial speech standard, it follows that the compelled advertising campaign must fail under the more restrictive standard required under compelled speech and association cases. *Amicus National Right to Work Legal Defense Foundation* will not address the commercial free speech activity analysis but will limit its discussion to the compelled speech aspect of this case.

II. Marketing Orders That Compel Speech Implicate The First Amendment Right Of Corporations To Refrain From Speech and Association.

There can be no question but that a marketing order which forces agricultural product handlers to contribute to a generic advertising campaign compels speech. It is that compulsion that implicates First Amendment rights.

In its brief, *amicus* AFL-CIO attempts to diminish the handlers First Amendment protections by referring to "a supposed 'right' not to communicate." (AFL-CIO Br. at 19). The right to refrain from compelled speech is not "supposed," but fundamental. The First Amendment protects the right to refrain from speech and association, as well as the right to speak and associate. The principle underlying this Court's decisions in compelled speech cases is that just as the First Amendment to the Constitution protects the right of freedom of speech and association, so also it protects the right to refrain from compelled speech and association. *Keller v. State*

Bar, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *Wooley v. Mayard*, 430 U.S. 705, 713-15 (1977); and *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The fact that the handlers are often corporations does not extinguish their right to refrain from speech. Corporations as well as individuals are protected by the First Amendment. *First National Bank v. Bellotti*, 435 U.S. 765 (1978). Similarly, corporations as well as individuals have the right to refrain from compelled speech and association. *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986).

Furthermore, the nature of the speech—advertising—does not extinguish the protection afforded by the First Amendment. The constitutional right to refrain from compelled speech and association is not limited to political and ideological speech. It applies to *any* type of speech. For example, in the context of compulsory agency fees or union dues, this Court has held that requiring non-union employees to pay *any* union dues or any agency fee is "a significant impingement upon First Amendment rights." *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984). This Court has found that that is true whether the fees are used for political activities or solely for collective bargaining, since "the agency shop itself impinges on the nonunion employees' First Amendment interests." *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292, 309 (1986).

Amicus AFL-CIO argues in its brief that the range of compelled speech that is limited by the First Amendment is narrow and limited to core First Amendment values such as political and ideological expenditures. It falsely argues that this Court has taken a "generous view in considering whether the challenged group expenditures are within the legislature's contemplation, and in considering whether those expenditures are rationally related to the legislature's regulatory purpose." (AFL-CIO Br. at 17). The AFL-CIO has misstated the law.

This Court has made it clear that:

our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters to take a nonexhaustive list of labels is not entitled to full First Amendment protection. Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs. [****] Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can be properly attached to those beliefs the critical constitutional inquiry.

Abood, 431 U.S. at 231-32.

Since *Abood*, this Court has not limited the protections afforded by the First Amendment to the right to refrain from political and ideological speech. This Court has not, as the AFL-CIO argues, taken a "generous" view in considering whether the compelled group's speech justifies infringing upon First Amendment rights. Instead, it has narrowly limited the types of compelled speech that can withstand constitutional scrutiny. The First Amendment does not just protect the right to refrain from compelled political and ideological expenditures, as the AFL-CIO argues. Rather, this Court has held that employees cannot be compelled to pay for a host of other activities including: organizing, *Ellis*, 466 U.S. at 451-53; extra-unit litigation, *id.* at 453 and *Lehnert*, 500 U.S. at 528; death benefits, *Ellis*, 466 U.S. at 455 n.15; charitable contributions, *Lehnert*, 500 U.S. at 524; and public relations, *id.* at 528-29 (Blackmun, J.) and *accord id.* at 559 (Scalia, J., concurring).¹

¹*Amicus* AFL-CIO argues that once a governmental interest is found to justify the infringement on First Amendment rights, "that for the objector to make out a negative First Amendment claim he must also demonstrate that the complained-of compulsion is something over and

III. The Handlers Object To Financing A Generic Advertising Campaign.

The compelled speech interferes with the handlers' ability to market their own label products. *Wileman Brothers*, 58 F.3d at 1379. Compelling handlers to finance generic campaigns when they wish to emphasize the superiority of their own label products in essence forces them to support advertising campaigns that are counter to their own interests. Forcing handlers to finance the advertising campaigns of competitors is similar to the situation in *Ellis*, where this Court held that "it would be perverse to read it [the Railway Labor Act] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members." *Ellis*, 466 U.S. at 452 n.13. Furthermore, the money the handlers are forced to pay for the generic campaigns diminishes the amount of money that they have to finance their own campaigns. *Wileman Brothers*, 58 F.3d at 1379.

It is clear that the First Amendment protects the right of corporations to speak and to refrain from speaking. Furthermore, the range of speech that is protected by the First Amendment from compelled speech is wide and not limited to political and ideological speech.

above—something quantitatively different than—the compulsion inherent in the government's decision to require the group association in the first place." (AFL-CIO Br. at 16). That is not the case. It is the obligation of the group seeking the compelled association—not the objector to the compulsion—to prove that the compulsion is germane to the compulsion, justified by the governmental interest, and includes no additional significant infringement upon First Amendment rights. Beyond making an objection known, the objector has no burden. The burden falls upon the group seeking to collect the money. *Hudson*, 475 U.S. at 306 & n.16.

IV. Compelled Payments For This Generic Advertising Campaign Cannot Withstand Constitutional Scrutiny.

- A. The compelled payments for the generic advertising campaign must be subjected to a high level of constitutional scrutiny.

What is the proper level of constitutional scrutiny this Court should use in examining the compelled speech imposed by the marketing orders? *Amicus* AFL-CIO, in its brief in support of the Secretary of Agriculture, misstates the standard. The AFL-CIO claims that the rights of individuals who exercise their right of non-association and object to compelled speech merely have "attenuated First Amendment claims." (AFL-CIO Br. at 6). Nothing is further from the truth. Laws and regulations which compel speech and association are subject to a high standard of scrutiny.

It is well settled that "a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). There is no distinction between the impairment of First Amendment rights created by compelled speech and the impairment created by limitations on the right to speak. *Abood*, 431 U.S. at 234. In compelled speech cases, this Court has subjected laws that impact upon the First Amendment to a high level of scrutiny. *Hudson*, 475 U.S. at 303 & n.11.

So also, in this case the infringement upon the First Amendment rights of the handlers by the compelled advertising campaign should be subjected to a high level of scrutiny. As shown above, the First Amendment protects not only political and ideological speech but all speech. It is only if the government has demonstrated a compelling interest that justifies the infringement upon those rights that compelled speech can withstand constitutional scrutiny.

- B. The generic advertising campaign is unconstitutional since it is not the least restrictive manner for the government to accomplish any compelling interest that justifies the compelled speech.

Since the handlers are protected by the First Amendment right to refrain from speech and association, a classic First Amendment analysis must apply. The first prong of First Amendment analysis is to determine whether there is a compelling state interest which justifies the infringement on the First Amendment right of non-association. *Abood v. Detroit Bd. of Educ.*, 431 U.S. at 220-24; *Buckley v. Valeo*, 424 U.S. 1, 65 (1976); *NAACP v. Alabama*, 375 U.S. 449, 460-61 (1958). Compelled speech can only be justified if the state has a compelling interest that justifies infringement on the First Amendment. *Abood*, 431 U.S. at 220-24. Despite the burden placed on non-union employees by agency fees, the Court in *Abood* held that such fees could withstand constitutional scrutiny since the Court found that the state had an important interest in labor peace.

The government has the burden of showing that it has a compelling governmental interest that justifies the burden on the First Amendment rights of the handlers. Is there a state interest that justifies the imposition of compulsory payments for generic advertising campaigns? An infringement upon First Amendment rights can only be justified when there is evidence in the record of governmental interest. *DeGregory v. Attorney General*, 371 U.S. 415, 444 (1963). The government asserts that its interest is promoting the sales of agricultural products. *Amicus* suggest that sales promotion is not a compelling interest that justifies an infringement upon the handlers' First Amendment rights.

However, even if the state has a compelling interest that justifies the infringement upon First Amendment rights, the government must use the least restrictive means to implement the program so as to minimize the impact upon First Amendment rights. *Hudson*, 475 U.S. at 303; *Kusper v.*

Pontikes, 414 U.S. 51, 59 (1973); and *Elrod v. Burns*, 427 U.S. at 362-63. In this case, the Secretary has not chosen the least restrictive means to implement an advertising campaign to sell peaches, nectarines, pears, and plums.

The least restrictive method to increase sales of those commodities is to permit the handlers to engage in their own advertising campaigns to promote those products. As the Ninth Circuit pointed out, the Secretary has not demonstrated that a generic advertising campaign is better at increasing consumption than individualized advertising. *Wileman Brothers*, 58 F.3d at 1379.

Advertising in the free market and not in state sponsored propaganda campaigns is more likely to increase sales of products. Furthermore, those handlers who wish to voluntarily join in a generic marketing campaign are free to do so. Those who choose not to join in but to engage in their own advertising will not be free riders. Instead, they will be competing with the generic products to produce their own labels. If anything, the handlers who participate in a generic campaign will likely benefit from the promotion of the product by the handlers who promote their own labels, and it would be the generic advertisers and not the individual label advertisers who would be the free riders.

V. The First Amendment Guarantees Freedom Of Speech And Not A Single-Government Mandated, Amplified Speech.

The stark difference between a system based upon free markets and free speech and a system based upon a state sponsored propaganda campaign is demonstrated by the argument made by *amicus* AFL-CIO. In its brief (Br. at 19), the AFL-CIO makes the bizarre claim that limiting compelled

speech is contrary to the values of the First Amendment.² It claims that limiting compelled speech contracts the range of communication. The First Amendment was not ratified in order to protect or foster compelled speech. The First Amendment protects freedom of speech. Compelled speech is not free. Using the AFL-CIO's rationale, a single view loudly and repeatedly broadcast is preferable to the free exchange of numerous and diverse opinions. That is not the goal of the First Amendment. Using that theory, a generic advertising campaign for individuals to buy autos is preferable to numerous auto manufacturers advertising their individual products. However, the one, loud bull-horn that the AFL-CIO seeks to award to government-designated groups is not preferable to the many voices of free people that the First Amendment protects. It is the freedom to speak, and not government compulsion to finance certain speech at a louder volume, that is the core value of the First Amendment.

²This argument is reminiscent of the argument made by the American Federation of Labor in *Lincoln Federal Labor Union v. Northwestern Iron & Metal*, 335 U.S. 525 (1949), that right-to-work laws violate labor unions' First Amendment rights. In that case, this Court characterized the union's arguments as so "startling" that the Court did not need to analyze them, *id.* at 531. The argument made by the AFL-CIO in this case is so "startling" that if accepted, it in turn would make a mockery of the First Amendment.

CONCLUSION

This Court should affirm its holdings that corporations, like individuals, are protected by the First Amendment in their right to refrain from speaking and associating. This Court should rule that the forced contributions for generic advertising campaigns mandated under the Secretary of Agriculture's marketing order cannot withstand constitutional scrutiny.

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September 1996